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THE
LAW JOURNAL REPORTS

FOR
THE YEAR 1837 :

COMPRISING
REPORTS OF CASES
IN THE COURTS OF
Equity, and Bankruptcy, King's Bench, Common Pleas,
Exchequer of Pleas, and Exchequer Chamber,

FROM
MICHAELMAS TERM 1836, TO TRINITY TERM 1837,
BOTH INCLUSIVE.

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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
Court of King's Bench.

BY
THOMAS PEAKE, JUN. Esq. and WM. GOLDEN LUMLEY, Esq.,
BARRISTERS-AT-LAW.

7 WILLIAM IV.

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CASES ARGUED AND DETERMINED

IN THE

Court of King's Bench.

MICHAELMAS TERM, 7 WILL. IV.

1836. } DOE d. PERRIN v. NEWTON
Nov. 2. } AND WIFE.

Evidence—Comparison of Hands.

Where several documents are in evidence in the cause, some of which are admitted to be the handwriting of A, and others are disputed, they may be handed to the jury for them to judge, by comparison of hands, whether the disputed documents are the handwriting of A or not.

But it is not admissible for a plaintiff or defendant to prove the handwriting of a party (whose handwriting is in dispute) to particular documents, which in themselves are not evidence in the cause, and to hand those documents to the jury for them to institute such a comparison.

This was an action of ejectment, brought by the heir-at-law of a deceased testator against the defendant, who claimed under a will.

At the trial, before Coleridge, J., at the last Assizes for the county of Northumberland, it appeared, that in February 1836 the testator died, and at first no will was found; but subsequently the will, the genuineness of which was the question at the trial, was found. It purported to be signed by the testator, and attested by

NEW SERIES, VI.—K.B.

three persons, all of whom were dead at the time of the trial. On the part of the defendant, evidence was given of belief of the signature being the handwriting of the testator, and of the signatures of the several witnesses being their handwriting; on the part of the plaintiff, evidence was given by witnesses, acquainted with the handwriting of the testator, and also of the several witnesses, stating their total disbelief of the signatures in question being in the handwriting of the respective parties whose signatures they purported to be; and various letters were handed to the witnesses, which were sworn to be in the handwriting of the testator.

It was proposed, on the part of the plaintiff, to put these letters in evidence, with a view that the jury might have an opportunity of comparing them with the signature to the will. This evidence, however, was rejected; the learned Judge being of opinion, that as they were not letters in the cause, they could not be given in evidence for the purpose of the jury comparing them with the signature.

Alexander now moved for a new trial, on the ground of the improper rejection of evidence. There could be no doubt that if these letters had been in evidence

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in the cause, it would have been competent for the plaintiff's counsel to insist that they should be handed to the jury, that they might see how far the questioned signature accorded or disagreed with the handwriting of the letters. Then, what difference can it make, where it has been proved that the letters offered are the genuine handwriting of the testator, whether they were otherwise in evidence in the cause or not? The same principle would seem to apply to each of the cases; and if the jury are to be allowed to come to a conclusion on the comparison of hands in the one, there does not seem any sufficient reason for precluding them from making a comparison, and drawing their own conclusions from that comparison, in the other. There is no doubt that a witness cannot give his testimony as to the handwriting of a party by comparison of hands. If that were to be permitted, it might open a door to the selection of specimens, which were similar or dissimilar to the handwriting in question, according to the purpose which it was intended to effect, and the judgment of one man might be misled by such a course; but it has frequently been the practice for Judges to lay such evidence before a jury, who, as they consist of twelve men, would employ the discrimination of twelve minds instead of one, and would be likely to discover and detect any dissimilarity from, or accordance with the writing in question. In *Griffith v. Williams* (1), it was held, that the rule that comparison of handwriting is not evidence did not extend so far as to prevent the Court or jury from instituting a comparison between two documents, of which *prima facie* evidence had been given. In that case, no doubt the letters were already in evidence in the cause; but it is not necessary that they should be in evidence. In *Allesbrook v. Roach* (2), Lord Kenyon allowed bills, the acceptances to which were admitted to be of the handwriting of the defendant, to be put in, that the jury might judge from comparison of those with the bill in question, whether that was the defendant's handwriting or not; although in *Stranger v. Searle* (3), it was held clearly, that evidence of

handwriting, by comparison of hands by a witness, was not admissible; there are, however, some cases which form an exception to this general rule, as where, from distance of time, it is impossible to obtain better evidence of the fact of handwriting than is to be had by instituting such a comparison. In *Solita v. Yarrom* (4), the jury were directed to judge of a disputed handwriting, by comparing it with another document, admitted to be the handwriting of the defendant; though in that case, certainly, the letter was in evidence in the cause; and in *The King v. Morgan* (5), Mr. Baron Bolland confirmed the right of the jury to compare two documents in evidence in the cause.

LORD DENMAN, C.J.—It appears to me, with regard to the question, whether papers may be put in, written by the party whose handwriting is in dispute, for the jury to make a comparison between them, is one upon which we ought not to raise any doubt. It has long been considered an undisputed and undoubted proposition of law, that such evidence by comparison is not admissible. The case which has been cited, of *Griffith v. Williams*, was thought at the time to go further than the general rule of law warranted; but the real ground on which that case stood was this, that where documents have been put in, in the course of the cause, such a comparison by the jury is unavoidable. The admitted documents, and the disputed documents, are both in evidence before the jury, and they cannot properly estimate the evidence before them, without instituting such a comparison. But it seems to me, that that particular case stands on that ground, and on that ground alone: I own I do not find it possible to reconcile that view of the case with what passed before Lord Kenyon in *Allesbrook v. Roach*; and, I think, were the same case to occur before any of the Judges at the present day, it would not receive the same decision. It appears to me better to abide by the general and broad principle, that comparison of hands is not admissible, except where it cannot be avoided, in consequence

(1) 1 Cro. & Jer. 47.

(2) 1 Esp. 351; s. c. *Peake's Add. Cases*, 27.

(3) 1 Esp. 14.

(4) 1 Mood. & Rob. 133.

(5) *Ibid.* 134, n.

of both documents being in evidence in the cause.

PATTESON, J.—I am entirely of the same opinion. I have always understood the rule to be, that comparison of handwritings is not admissible in evidence. The case of *Griffith v. Williams* was argued and decided upon the ground, that the admitted and disputed letters were in evidence in the cause, and that decision was limited to a comparison of such documents as were already in evidence; and although it is not said, in that case, that it is necessary that the documents compared should be in evidence, yet that is the principle upon which the decision proceeded. This question came before me at Gloucester in a criminal case; and the strong impression upon my mind was, that the rule was so limited. I was not aware, at the time, of the case before Lord Kenyon, but I think that decision went beyond the law; and had it been acted upon, it would have introduced a practice which would be highly inconvenient, and, in many cases, lead to great injustice.

WILLIAMS, J.—Are we to take it as certain that the facts, as reported in the case of *Allesbrook v. Roach*, are correct? I own I have a considerable doubt, whether, as to the generality of the decision, it can be taken as a correct report. It is extraordinary, if it be correct, that we should not find it acted upon in any subsequent case. It will, as appears to me, be infinitely safer to curtail this rule, as to the comparison of hands by a jury, as much as we can, for it appears to me to be a very dangerous species of evidence. The case of *Griffith v. Williams* depends on the reason given by my Lord and my Brother Patteson; and, I think, the rule ought to be so limited.

COLERIDGE, J.—I am of the same opinion. As to the instance which has been referred to by Mr. Alexander, of the proof of handwriting to ancient documents, there is no doubt that no objection can be made to the proof of handwriting, by comparison of hands, in such cases; but that is an exception to the general rule, founded on necessity, and it is less open to the objection, that the selection of the particular documents, by comparison with which the handwriting was to be proved, would be

an unfair one. But, besides the objection to which in general such a comparison of hands would be open, that there might be an unfair selection, there is another ground of objection to allowing such a comparison, except where the documents are already in evidence. How many irrelevant issues should we have to try? All the documents relative to the cause are already in evidence, and the party comes prepared to meet the case disclosed by them; but where the documents are not in the cause, and have no relation to it, the party does not come prepared to fight the several issues, which would necessarily be raised by the introduction of such evidence.

Rule refused.

1836. }
Nov. 8. } GILBART AND OTHERS v. DALE.

Negligence—Booking Office.

Where goods are delivered to the possession of a booking-office keeper for the purpose of being forwarded by him to the place where such goods are directed, proof that the goods never arrived at the place to which they were directed, is not prima facie evidence that they were lost by the negligence and carelessness of the booking-office keeper.

Assumpsit. The declaration stated, that defendant was possessed of a booking-office, for the booking, receiving, and taking care of boxes and parcels, in order that the same might be forwarded to the several persons to whom the same might respectively be directed; that the plaintiffs delivered a certain box of the plaintiffs, containing divers goods and chattels, &c. to be by the defendant taken care of, in order that the same might be forwarded to a certain person to whom the same was then directed, to wit, to one Thomas Jeffries, Esq., Cott Moor, near Pembridge, South Wales, and in consideration thereof, and of a certain reward to the defendant in that behalf paid, the defendant undertook to take care of the box, &c. in order that the same might be forwarded to the person to whom it was directed; and, although the defendant, as such possessor of the booking-office, received the box, &c., yet, not regarding his duty, &c. he so negligently

behaved and conducted himself, that by and through the mere carelessness, negligence, and misconduct of defendant, the box, &c. became wholly lost.

Pleas—1st, the general issue; 2nd, that the defendant did take care of the box and the goods therein contained, and that it was not by the carelessness, negligence, and improper conduct of the defendant, that they were lost to the plaintiff.

At the trial, before Lord Denman, C.J., at the sittings at Westminster, after last Trinity term, it appeared, that the plaintiffs were tailors, from whom Mr. Jeffries had ordered some clothes, which were to be sent directed in the way described in the declaration. The clothes in question were made pursuant to the order, were packed and directed accordingly, and sent to the booking-office of the defendant, to be forwarded according to the direction. It was also proved, that the goods never arrived at their place of destination. Upon this, it was objected by the counsel for the defendant, that the plaintiffs ought to be non-suited, first, on the ground, that there was no proof of these being the goods of the plaintiffs, as the clothes were made for Mr. Jeffries, and, by delivering at the booking-office, directed to him, the property in them passed to him; and, secondly, that there was no proof of negligence. His Lordship, thinking the objections valid, non-suited the plaintiffs.

Platt now moved for a new trial.—With regard to the objection, that the property of the goods was not in the plaintiffs, the pleadings, as they stood, did not raise the question. *Non assumpsit* merely denies the contract, without at all putting in issue property in the subject-matter of the contract—*Reg. Gen.* Hilary term, 4 Will. 4.

[COLBRIDGE, J.—In the declaration it is alleged to be the property of the plaintiffs. Is not that one of the facts from which the contract to deliver would arise?]

[PATTESON, J.—The ground of objection here was, that this was not a contract with the plaintiffs, but with the consignee. That being so, it is quite clear that that is an issue on the plea of *non assumpsit*.]

Here the contract stated is, that the defendant should safely keep the goods till they should be sent to their place of destination; and the question, whether they were

the property of the plaintiffs, does not arise upon the simple denial of that contract having been entered into.

[LORD DENMAN, C.J.—I cannot say, that I think there is much doubt upon that point. That the defendant did not undertake *modo et forma*, appears to me to put in issue the fact of the contract being made with the plaintiffs.]

There was then sufficient evidence of the property being in the plaintiffs. If a tailor make clothes out of materials supplied by himself, and not by his employer, the property in those clothes is not out of him till delivery to the employer. Now, when does the delivery to the consignee in a case like the present begin? Clearly not until the goods have left the booking-office to be sent to the place to which they were directed. Whilst they remained at the booking-office, they were as much in the hands of the agent of the tailor, as they were when they were in the possession of the servant, who took them there; and the tailor at any time before the goods were sent, might have gone to the booking-office, and have prevented the goods from being sent—*Hanson v. Armitage* (1). Then, as to the second question, whether there was any evidence of negligence on the part of the bailee. There was some evidence of that description, and what was the force and effect of that evidence, was a question for the jury—*Griffiths v. Neale* (2). The plaintiffs could know nothing of what became of the goods after they were delivered at the defendant's booking-office; and, on proof by him, that there was no delivery of the goods at the place where they were directed to be sent, it is *prima facie* evidence of negligence of the party who undertook to send them. It may be said, that they may have been lost by the negligence of the carrier, by whom they were sent from the booking-office. What carrier? It is only known to the defendant by what carrier they were sent, if sent by any. In the first place, then, the property was not in question upon these pleadings; secondly, if it was, no property had passed out of the plaintiffs; and, thirdly, there was sufficient evidence from which a jury might presume negligence by the defendant.

(1) 5 B. & Ald. 557.

(2) 1 Car. & Pay. 110.

PATTERSON, J.—It is not necessary to give any opinion upon the question of property, as, on the ground that there was no proof of negligence on the part of the defendant, the nonsuit was correct. Look at what the contract in this case is. It is not with a carrier to deliver, but with the keeper of a booking-office to keep safe until he should send the goods by a carrier to the place to which they were directed. It was necessary then for the plaintiffs to shew a negligence by the defendant, either by express evidence of the box having been lost from the booking-office, or that the defendant did not deliver it to any carrier. All that was here proved was the non-arrival of the box in South Wales. The contract of a carrier is to deliver to the consignee; and the case of *Griffiths v. Neale* is good law, which determines in such a case, that the proof of the non-arrival of the article is *prima facie* evidence of negligence.

WILLIAMS, J.—I am of the same opinion. The present is not like the ordinary case of delivering goods to a carrier to be taken to a particular place. For, what is the contract here? It is that the defendant should safely keep the goods until they could be sent by some carrier to the place of their ultimate destination. On the evidence it is quite uncertain whether the loss took place from the defendant's booking-office, or whether it was occasioned by the negligence of the carrier to whom the box might have been delivered for the purpose of forwarding it to South Wales.

COLERIDGE, J.—I am of the same opinion; and in so deciding, we are not laying down any new principle, but are acting in accordance with, and applying, the principle which is already recognized with respect to carriers. In the first place, it is a presumption of law, that every man performs a duty, which is thrown upon him, either by contract or otherwise. In order to raise a contrary presumption there must be some evidence of the non-performance by him of his contract; and the contract of a carrier being to deliver goods at the place to which they are directed, by proof of non-delivery to that place *prima facie* evidence is given of negligence on the part of the carrier. Now, apply that rule to the present case. The contract here is

safely to keep the goods, and to deliver them to some carrier to be forwarded to South Wales. The plaintiffs, to raise the presumption of negligence, must shew a non-performance by the defendant of his contract. That is not shewn here; but it is only shewn, that the goods were never delivered to Mr. Jeffries in South Wales. Suppose the case of three different carriers between York and London, and goods are delivered to the carrier, who starts from London, to be delivered by him to the second carrier, to be forwarded his portion of the road, and so by him to the third carrier. Now, could it be said that proof of the non-arrival of the goods at York would be any evidence of negligence on the part of the carrier to whom they were delivered in London?

LORD DENMAN, C.J.—I wish to say that I felt very slow to nonsuit on the first point. On the other point it was said at the trial, that you might as well charge a porter, employed to take a parcel to the East India House to be sent to India, with negligence, because the parcel, with which he was so sent, had not arrived at Calcutta; and really this seems to me to involve precisely the same point.

Rule refused.

1836. }
Nov. 8. } LILLEY v. HAYS.

Assumpsit—Money had and received—Consideration moving from the Plaintiff.

Where money was paid to the defendant by a third person to the use of the plaintiff, and the defendant admitted that he had received a certain sum to the plaintiff's use, held, that the party paying the money might be considered as the agent of the plaintiff; so that the consideration would be indirectly moving from the plaintiff, so as to support an action of assumpsit for money had and received.

This was an action for money had and received.

At the trial, before Lord Denman, C. J. at the Sittings at Guildhall after last term, it appeared that the plaintiff was acquainted with a person of the name of Wood, to whom he had lent 100*l*. The defendant

had also become acquainted with Wood, who had likewise had some transactions with him. Wood two or three years ago went into Scotland, from whence he remitted to the defendant the sum of 100*l.* by letter, which said that the 100*l.* so sent was for the purpose of paying to the plaintiff the sum borrowed from him. The defendant was proved to have said, that he would take care that the plaintiff had that sum; and when it was proposed to him to keep the money in liquidation of his own advances to Wood, he replied, that nothing at that time was as yet due to him. What the defendant said upon the occasion of receiving the letter was afterwards communicated to the plaintiff, and Wood shortly afterwards became insane. His Lordship left the question to the jury, whether the defendant authorized the statement made to the plaintiff, that the defendant had received the 100*l.* from Wood to be paid over to the plaintiff; and the jury thinking that the defendant had authorized that statement, a verdict was found for the plaintiff for 100*l.*

Kelly now moved for a rule to shew cause why that verdict should not be set aside and a new trial had. He contended, that, on the facts proved at the trial, the plaintiff was not entitled to recover. There was no consideration for the promise, moving from the plaintiff. *Williams v. Everett* (1), and a series of subsequent cases, will leave this case untouched, for the upshot of all the cases is, that where money is paid by a third person for the use of the plaintiff, unless there is some act done which will render the defendant a debtor to the plaintiff, the sum paid by that third person cannot be recovered in an action for money had and received. It must be admitted that, in those cases, no such evidence existed as exists here, of the authorized statement of the defendant to the plaintiff that he had received the money to his use; on the other hand, there is no case where such a declaration had been made, in which it has been held to be a sufficient ground of assumpsit. It would have been competent, at any time before the money was paid over, for the party who remitted it to have revoked the order for its payment; and

therefore, until actual payment, the defendant held the money to the use of the party remitting it. The cases are collected in *Selwyn's Nisi Prius*, p. 23, as to the necessity of the consideration moving from the plaintiff; and several cases are mentioned where, the consideration moving, as in this case, from a third party, it has been held insufficient to entitle the plaintiff to maintain assumpsit—*Bourne v. Mason* (2), *Crow v. Rogers* (3), *Price v. Easton* (4). In all those cases, in which it was held, that the plaintiff could not recover, the consideration moved from a third party; and so here, the payment of the money to the defendant was by a third person.

PATTERSON, J.—It appears to me that there was abundance of evidence to go to the jury, of the fact that the defendant had made a statement that he had received this money in a remittance from Wood to the use of the plaintiff; and once, when he was asked whether he would not apply it to the liquidation of his own debt, he replied, that at that time nothing was due to him. The only question therefore is, whether the consideration in this case can be said to have moved from the plaintiff. That is a rule of law which has been acted up to; and it has always been considered necessary, as the foundation of the action of assumpsit, that the consideration should have moved from the plaintiff. But it appears to me, that, in cases of money had and received, you never have that, except through an agreement. For instance, money is sent to a banker, for the payment of certain specified debts; does not the consideration indirectly move from the creditor whose particular debt is to be paid, by the debtor's sending the money for the particular purpose, and an admission by the banker that he has received the money for that purpose? The debtor may be considered as an agent for the creditor, and the money paid to the bankers as paid indirectly by the latter. So, here, the debtor Wood may be considered as agent for the plaintiff, and the money paid by him, and admitted by the defendant to have been re-

(2) 1 Vent. 6.

(3) Stra. 592.

(4) 4 B. & Ad. 433; a. c. 2 Law J. Rep. (N.S.) K.B. 61.

(1) 14 East, 582.

ceived to the use of the plaintiff, may be considered as a consideration moving indirectly from the plaintiff himself.

WILLIAMS, J.—I am also of opinion that the latter observation of my Brother Patteson disposes of the question, and that Wood may be considered as the agent of the plaintiff paying this sum of money to the defendant.

COLERIDGE, J.—I quite agree with the principle laid down by Mr. Kelly in argument, that the consideration must move from the plaintiff. But I think the proposition of my Brother Patteson disposes of the case. It then remains only to consider whether, assuming Wood to be the agent of the plaintiff for paying this money to the defendant, the consideration does not move from the plaintiff.

LORD DENMAN, C. J.—I thought the defendant, by his admission, made himself the plaintiff's banker with respect to the 100*l*.

Rule refused.

1836. }
Nov. 15. } LILLEY v. PRICE.

Libel—Pleading—General Issue—Privileged Communication.

In an action on the case for a libel, the defendant, under the plea of not guilty, may go into evidence to shew that the alleged libel was a privileged communication.

This was an action against the defendant for publishing a libel.

Plea—not guilty.

At the trial, before Lord Denman, C. J., at the sittings at Westminster, after last Trinity term, the defendant, in his defence, alleged that the supposed libel was a communication made by him as an attorney, in a letter to his client, and was therefore a privileged communication. His Lordship told the jury it was a privileged communication, and directed them to find a verdict for the defendants, which they found accordingly.

Sir W. W. Follett now moved for a rule to shew cause why that verdict should not be set aside, and a new trial had. He contended, that if the letter was written under circumstances which made it a pri-

vileged communication, those circumstances ought to have been pleaded, and it was not open to the defendant to set up that as a defence on the general issue. He stated that he understood the case had been before the Court of Common Pleas in another shape.

Talfourd, Serj., as *amicus Curiae*, mentioned the case of *Smith v. Thomas* (1), in which it was pleaded that the libel was a privileged communication. It was there objected, that that plea amounted to the general issue; but the Court held that it did not.

[LORD DENMAN, C. J.—The rule, with regard to slander, is, that the general issue is a denial of speaking the words maliciously. If they are a privileged communication, does not that negative the malice in speaking them?]

It is only under those words that a privileged communication can, if at all, be given in evidence under the general issue. The actual publication is *prima facie* a wrongful act, and if that act is intended to be justified, it ought to be so specially. *Stancliffe v. Hardwick* (2) is in point. There the action was in trover; and the question was, whether the general issue denied the conversion: the Court thought not.

[LORD DENMAN, C. J.—That case is also reported in *Cr. M. & R.* (3), and Lord Abinger did not entirely agree with the Court in that decision.]

There is another class of cases under the new rules, which may be illustrative of the present question, and that is, as to the mode of taking advantage of the Statute of Frauds. By the general issue, non assumpsit, the defendant says, I did not contract. But he cannot, under the general issue, say, there is no contract, because the plaintiff cannot prove it in writing; but the universal practice is to plead that there is no contract in writing—*Barnett v. Glossop* (4). The party is just as likely to be taken by surprise, in a case like the present,

(1) 2 Bing. N.C. 372; a.c. 5 Law J. Rep. (N.S.) C.P. 52.

(2) 3 Dowl. P.C. 762.

(3) Vol. 2, p. 1; vide a.c. 4 Law J. Rep. (N.S.) Exch. 161.

(4) 1 Bing. N.C. 636; a.c. 4 Law J. Rep. (N.S.) C.P. 174.

as in any of the cases mentioned. Secondly, it ought to have been left to the jury, whether the letter was written *bond fide* by an attorney to his client, it having been written on the day when the defendant ceased to be the attorney for the party to whom the letter was written.

[PATTERSON, J.—Was there any request made to the Judge to put that question to the jury?]

It did not appear that there was.

Cur. adv. vult.

This case was moved on the 5th of November, and now, November 15th, the judgment of the Court was delivered by—

LORD DENMAN, C.J.—This case was tried before me, in which the defence was, that the letter which contained the alleged libel was a privileged communication. It was objected that such a defence should have been pleaded, and could not be gone into under the general issue. We are all of opinion, on conferring with the other Judges upon the subject, that this is a defence which may be given in evidence under the general issue, and that it is not required that it should be pleaded. The rule, therefore, in this case, will not be granted.

Rule refused.

1836. } BASTARD v. SMITH AND
Nov. 25. } OTHERS.

3 & 4 Will. 4. c. 42—Pleading—*Regulæ Generales*—Custom.

The Court have no discretionary power to allow several pleas, in a case where such pleas are prohibited by the new rules. The pleas of a custom unqualified, and a custom qualified, cannot be allowed.

A rule had been obtained calling on the plaintiff to shew cause why the defendants should not be allowed to plead the several pleas following—that is to say, first, justifying the trespasses under a custom for all stannars and tinnars in the stannaries to make trenches in any lands, for conveying water to any stannary worked by them for the better working of the same;—and secondly, the like plea alleging the custom

to be, making reasonable compensation for the injuries done.

Sir W. W. Follett and Montagu Smith shewed cause.—They contended, that this was one of the cases within, and contemplated by, the new rules of pleading, and that the Court had no power to grant the present application. Thus, one of the examples given, is, “pleas of right of common at all times of the year, and of such right at particular times, or in a qualified manner, are not to be allowed;” so, “pleas of right of way over the *locus in quo*, varying the termini, or the purposes, are not to be allowed.” The present case is precisely the same in principle as a plea of right of common generally, or in a qualified manner, and a plea of right of way. The custom is sought to be pleaded, first, without a qualification; and secondly, with a qualification annexed. The words of the act, 3 & 4 Will. 4. c. 42, preclude the Court from exercising any discretion in this matter. Any rule or order laid before both houses of parliament is, after a certain time, to be binding and obligatory on the said courts and all other courts of common law, and be of like force and effect as if the provisions contained had been expressly enacted by parliament. The rule then states, that several pleas shall not be allowed unless a distinct ground of answer and defence is intended to be established in respect of each. There cannot be two distinct facts, as stated upon these pleas, existing at the same time as distinct and separate defences. *Jenkins v. Treloar* (1) is in point. The Court there thought, that they had no discretion.

Erle, contra.—It is to be recollected, that this is a claim under the stannary customs. It is not to be considered as a common law custom, but as a private custom, applicable to the miners of Cornwall. There might exist different grants, granting at different times the different rights as claimed in the two pleas. The one grant from the Crown might be of the right absolutely; and the other might be qualified, by requiring a payment to be made for the injury done.

[COLERIDGE, J.—The pleas state a custom—in the one a general custom; in the

(1) 3 Cr. M. & R. 16; s. c. 5 Law J. Rep. (N.S.) Exch. 113.

other a qualified custom: you must contend, that there can be two co-existing customs at variance the one with the other.]

LORD DENMAN, C.J.—This seems to me to be a case expressly within the rules, and we have not the power, were we inclined to do so, of granting this application.

Rule refused.

1836. }
Nov. 5. } JONES v. REED.

Attorney—Pleading—Evidence.

To an action of debt on an attorney's bill, the defendant pleaded *namquam indebitatus*, except as to 28*l.* As to 15*l.* of the 28*l.*, a set-off; and payment of money into court as to 13*l.*:—Held, that it was competent for the defendant to give evidence of an agreement by the attorney to do the business for the money out of pocket.

Debt on an attorney's bill. Plea—*namquam indebitatus*, except as to 28*l.* Second plea—as to 15*l.* of the 28*l.*, a set-off; and as to the remaining 13*l.*, payment into court.

At the trial, before Vaughan, B., at the last Assizes for the county of Chester, the defendant proved his set-off, as also that the 13*l.* was the money which the attorney was out of pocket, the defendant offering to prove an agreement by the attorney to do the business charged for the amount of the money out of pocket. This evidence was objected to on the part of the plaintiff, it being contended, that, as the pleadings stood, it was not open to the defendant to go into that defence. The learned Judge, however, overruled the objection; and a verdict was found for the defendant, with leave reserved for the plaintiff to move to enter a verdict for the amount of the taxed costs, if the Court should think, that the evidence of the agreement between the plaintiff and the defendant was improperly received.

J. Jervis now moved according to the leave reserved.—He contended, that the payment of money into court admitted the character of the plaintiff and the contract declared on. It admitted, that the defendant employed the plaintiff as an attorney, to be paid according to the usual fees pay-

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able to an attorney. If the agreement was any defence, it was beyond the employment of the plaintiff as an attorney; and it ought to have been pleaded—*Reg. Gen.*, Hil. term, 4 Will. 4, Assumpsit and Debt. The general issue puts in issue the matter of fact, from which the contract is to be presumed. That fact here is the employment of the defendant as an attorney, from which the contract is implied, that he was to be paid the usual fees paid to an attorney; and, if anything contrary to that implied contract is to be set up, the matter constituting the defence must be pleaded. *Edmunds v. Harris* (1) is decidedly in favour of the proposition contended for.

[LORD DENMAN, C. J.—That case has been overruled, both in this court and elsewhere. (2)]

The payment of money into court is, at all events, an admission of the contract declared on, that the defendant employed the plaintiff as an attorney to do the business for him, on payment of the fees of right payable to him as an attorney.

LORD DENMAN, C.J.—The payment of money admits that the plaintiff was employed as an attorney. I do not see why it should be assumed, that he was employed to be paid the fees as of right payable to an attorney.

PATTESON, J.—It admits, that the business was done by the plaintiff as an attorney; but the fallacy seems to me to be in assuming, that the common *indebitatus* count implies that the plaintiff was employed to be paid according to the ordinary fees payable to an attorney.

Rule refused.

1836. }
Nov. 10. } HART v. MARSH.

Prohibition after Sentence, when it will go, when not.

Where a suit in the Ecclesiastical Court is promoted against a clergyman, and there are a variety of articles, some alleging

(1) 2 Ad. & Ell. 414.

(2) *Haselden v. Staff*, K.B. Trin. term, 1836; *Grounsell v. Lamb*, 1 Mee. & Wels. 352, s. c. 5 Law J. Rep. (N.S.) Exch. 154; *Broomfield v. Smith*, 1 Mee. & Wels. 542, s. c. 5 Law J. Rep. (N.S.) Exch. 155; *Jones v. Nainny*, 5 Law J. Rep. (N.S.) Exch. 55.

matters which are of ecclesiastical cognizance, and others of cognizance in the temporal court; and the Ecclesiastical Court, after the appearance of the defendant, proceed to sentence of suspension, reciting, that the articles "are for the most part sufficiently and in truth fully proved;" it is incumbent on the party, applying for a prohibition after sentence, to shew that the Court below proceeded on those articles which allege matters of temporal cognizance.

Quære—whether trading by a clergyman, or the occupation of a farm of more than eighty acres, is properly matter of ecclesiastical cognizance.

A suit had been promoted by one Robert Hart, in the Consistory Court of the diocese of Hereford, against the Rev. George Wathin Marsh, rector of the rectory of the parish church of Hope Bowdler, in the county of Salop, in the diocese of Hereford.

Among a variety of articles and positions alleged in the suit were these—"for carrying on and exercising the several trades and businesses of a dealer in corn, and buying and selling the same for profit, of a maltster, of a wool-dealer, and also of a flannel-manufacturer, and for farming and cultivating a farm, consisting of 200 acres and upwards, without any leave or licence for that purpose first had and obtained from the Lord Bishop of Hereford for the time being, and for attending fairs, markets, and towns, and other places, for the purpose of buying and selling live and dead stock, goods, wares, and merchandise, in the respective businesses of husbandman, maltster, and wool-dealer, and flannel-manufacturer, thereby forsaking and neglecting the sacred duties of a priest or minister, and using yourself in the course of your life as a layman."

The articles in the whole were twenty-five, and all the rest alleged matters which, without doubt, were of ecclesiastical jurisdiction.

The Court, reciting that forasmuch as the heads, positions, articles, charges, and interrogatories, &c., "they had found, and it did evidently appear unto them, are for the most part sufficiently, and, in truth, fully proved and founded," pronounced sentence of suspension for three years.

It appeared that Marsh, upon several occasions, attended the Consistory Court of the diocese of Hereford, pending the suit; and that, from 1833 to the present period, he well knew the whole contents of the articles.

A rule had been obtained, calling on the plaintiff to shew cause why a writ of prohibition should not issue to the Consistory Court of Hereford, and to the Arches Court of Canterbury, to prohibit the said Courts from further proceeding in the suit between the parties; against this rule cause was now shewn by—

Maule and Cleasby.—Unless there are some very special grounds suggested why the writ should go after sentence in the Ecclesiastical Court, this Court will not interfere. It is difficult to suggest on what ground the rule in this case has been obtained, for it cannot be said that the Ecclesiastical Court have no jurisdiction; almost all the charges are not only stated as against the office of a minister of the church, but they are such as in themselves the Ecclesiastical Court has cognizance of. It is not necessary that the Ecclesiastical Court should have the exclusive jurisdiction over the subject-matter; if they have a concurrent jurisdiction it will be sufficient. It may be said, that some of the articles allege an offence for which the defendant might have been indicted at common law. It may be said, that the carrying on the trade of a maltster, of a wool-dealer, and flannel-manufacturer, was an offence against the statute of 21 Hen. 8. c. 13, prohibiting the holding of farms, and against buying and selling, and was an offence cognizable in a court of common law. That statute is repealed, and the 57 Geo. 3. c. 99. imposes a penalty for every acre of land, occupied by an ecclesiastical person, beyond eighty; and also creates a forfeiture of any goods and merchandise sold by such persons. But this was not intended to relieve an ecclesiastical person from any obligation of the ecclesiastical law, or from the jurisdiction of the ecclesiastical courts. It was to superadd a penalty or punishment upon that to which he was before subject. In *Gibson's Codex*, c. 7, tit. 1, will be found the several canons, and each article concludes with the words of the canon which is infringed.

The Ecclesiastical Court is the only court to give interpretation to the canons, and to determine whether they have been infringed or not. There is an express authority to shew, that where the suit proceeds on the canons, prohibition will not lie. *Slader v. Smallbrook* (1), cited in *Townsend v. Thorpe* (2), are authorities shewing that although an offence be punishable in the temporal courts, yet there may be a proceeding thereon in the spiritual court to deprive the clerk of a parish, though they could not proceed to punish him for it. But supposing the Ecclesiastical Court to be deprived of its jurisdiction by reason of the two offences being punishable by statute, yet, as some of the articles are clearly within the cognizance of the Ecclesiastical Court, no prohibition will go after sentence, there being clearly no want of jurisdiction over those matters. In *Carslake v. Mapledoram* (3), Buller, J. says, "After sentence, it is incumbent on the party making this application, to shew clearly that the spiritual court had no jurisdiction." If there is anything informal in the sentence, that is matter of appeal; this Court has no power to correct the error. *Free v. Burgoyne* (4) supports the principle, that a beneficed clergyman may be proceeded against where the object of the suit is deprivation.

R. V. Richards, *contra*.—The form of the sentence, compared with the charges made against the defendant, some of which will turn out to be of common law cognizance, leaves it as a matter of uncertainty what was proved. Consistently with the terms of that sentence, it may be only those matters which are cognizable by the temporal courts that were proved, and the Ecclesiastical Court would have no jurisdiction; and if they have no jurisdiction, or have exceeded their jurisdiction, prohibition will go after sentence—*Offley v. Whitehall* (5), *Leman v. Goulty* (6). The question for the Court to determine therefore is, whether all the charges are within

the jurisdiction of the Ecclesiastical Court. It is impossible to accede to the doctrine, that a case may be brought within the jurisdiction of the Ecclesiastical Court by the object for which the suit is instituted. The charges which have been referred to in argument, on the other side, are clearly within the cognizance of the temporal courts; and, supposing that the others are not, the sentence is uncertain.

LORD DENMAN, C.J.—Supposing that the two articles in question, namely, the carrying on of trade and occupying a farm, are quite insufficient to give the Ecclesiastical Court jurisdiction, still there are several other articles, most of which allege matters which are entirely of ecclesiastical cognizance. Now, in order to get rid of the sentence of the Court, it is necessary for the applicant to shew, that the Court, pronouncing that sentence, had no jurisdiction whatever over the subject-matter. It is quite clear, here, that the Court had jurisdiction as to part. The party consented to the articles propounded; and the Court have proceeded to sentence. They may have acquitted the defendant of those two particular charges: at all events, we are not to assume that they proceeded on those upon which they may have had no jurisdiction, when they may have proceeded upon those, over which it is clear they had cognizance.

PATTESON, J.—It is laid down in several cases, nor has it been denied in argument on this occasion, that prohibition shall not go after sentence, unless the party making the application shews, that there was no jurisdiction in the Court over the subject-matter. Here are several articles alleged, over some of which it is admitted that the Court had jurisdiction; but it is contended, that they have no jurisdiction upon the other matters. Mr. Richards should make this certain, that the Court did proceed upon the articles, of which it is contended they had no cognizance.

COLERIDGE, J. concurred.

Rule discharged.

WILLIAMS, J. was absent.

(1) 1 Sid. 217; s. c. 1 Lev. 138.

(2) 2 Lord Raym. 1509.

(3) 2 Term Rep. 475.

(4) 5 B. & C. 400; s. c. 4 Law J. Rep. K.B. 266.

(5) Bunb. Rep. 17.

(6) 3 Term Rep. 3.

1836. }
Nov. 11. } THE KING v. MATTHEW CHITTY.

Corporation—5 & 6 Will. 4. c. 76. ss, 28,
52—Councillor—Bankrupt.

An uncertificated bankrupt is not disqualified from being elected a councillor of the borough, if bankrupt at the time when he is elected; although, by the 52nd section, if he become bankrupt whilst in office, the office becomes ipso facto void, and he can only be re-elected on obtaining his certificate.

A rule had been obtained, calling on Matthew Chitty to shew cause why an information in the nature of a *quo warranto*, should not be filed against him, to shew by what authority he held the office of councillor in the borough of Shaftesbury.

On shewing cause against the rule, it appeared that, at the time of the election of Mr. Chitty to the office of town councillor, for the borough of Shaftesbury, he was qualified in every respect as required by the 28th section of 5 & 6 Will. 4. c. 76, but that, at the time of the election, he was a bankrupt, not having obtained his certificate; and the ground of the motion was, that, being an uncertificated bankrupt at the time when he was elected, his election was void by the 52nd section of the act.

Erle and Bingham, in shewing cause, contended, that there was nothing in the act of parliament to prevent the first election of an uncertificated bankrupt, although by the 52nd section, his bankruptcy after having been elected, would, *ipso facto*, avoid the office. The 28th section, as one of the qualifications, requires "that a person be seised or possessed of real or personal estate, or both, to the following amount, that is to say, in all boroughs directed by the act to be divided into four or more wards, to the amount of 1,000*l.*, or be rated to the relief of the poor of such borough upon the annual value of not less than 30*l.*" The borough of Shaftesbury is one of those boroughs which is directed to be divided into four wards, and Mr. Chitty was rated to the relief of the poor upon the annual value of not less than 30*l.* In respect of that section, therefore, there is no ground for saying that he was not qualified at the time of the election.

The 52nd section contemplates a person holding office, and becoming bankrupt whilst he is an officer, but leaves untouched the case of a party who had become bankrupt before the election of him as an officer took place. The words of the clause bear that construction only, and there is every reason for supposing that the intention was only to make the disqualification to a party becoming bankrupt whilst he was an officer. The section goes on to declare, "that every person so becoming disqualified, and ceasing to hold such office on account of his being declared a bankrupt, or of his applying to take the benefit of any act for the relief of insolvent debtors, or having compounded with his creditors, shall, on obtaining his certificate, or on payment of his debts in full, be capable, if otherwise qualified, of being re-elected to such office;" evidently throughout contemplating the case of a bankruptcy or insolvency of a person in office; but there are no words which would extend to make the election void *ab initio*, on account of the party being at the time of the election an uncertificated bankrupt or insolvent. There is good reason also in support of this provision. Taking this view of the subject, a party is elected to an office of trust; at the time of his election, he is solvent and in good circumstances, and a person who is capable in every respect of executing an office of trust. He is elected on such a supposition. He subsequently becomes insolvent, and if not incompetent to perform an office of trust, yet in all probability he never would have been elected, had it been known that he would be insolvent; the act, therefore, declares the office vacant. But in the case of a party who was bankrupt or insolvent at the time of his election, he never could have been elected by the burgesses, on the supposition of his solvency. It must have been on some other qualities that his election was based, and there is no possible reason for declaring his election to be void. The apparent hardship of the construction contended for on the other side, will prevent the Court from putting that construction on the act, unless that can be made to appear, from the words used, to have been the intention of the legislature.

Mr. Attorney General (Campbell), contra.—Unless it be quite clear that the just construction of the statute allows that an insolvent, a person who has compounded with his creditors, or a bankrupt, should be the mayor of a borough, the Court will make this rule absolute, in order to have the question tried, so as to give an opportunity of taking the opinion of a court of error. The reason on which it has been attempted to support the construction contended for on the other side fails, because, if that were the reason, there is no cause why a person who is in office having become a bankrupt, and having ceased to be an officer on that account, should not be immediately eligible to the same office; and yet, by the express words of the act, such person is only eligible on obtaining his certificate, or on payment of his debts in full. Then what is the meaning fairly to be put on the words of the act? From the 28th section, which requires that a person should be seised or possessed of real or personal estate to a certain amount, or rated to the relief of the poor to a certain amount, it is clear that the meaning was, that a party should be rated for a house belonging to him, of which he was possessed in his own right, not by mere sufferance of another party. This was considered as equivalent to the seisin and possession of real or personal property. Then can it be said that an uncertificated bankrupt is rated within the meaning of the act? Immediately upon his bankruptcy, all his property, his house and everything, vests in the assignees, and the bankrupt has no property whatever. The 52nd section supposes that no uncertificated bankrupt can be elected, because not having any property, and, therefore, not being a party rated, under the former section (the 28th) he has no qualification. It therefore only provides for the case of a party becoming bankrupt subsequent to his election.

LORD DENMAN, C.J.—I agree with Mr. Attorney General, that if there were any reasonable doubt upon the question before us, the rule ought to be made absolute, that the subject might be solemnly considered and decided; but I do not think that there is any doubt, and we should not be justified in raising a doubt in favour of the disquali-

fication of a party, where the act of parliament has not in clear terms made bankruptcy a disqualification. It is urged, that the term "rated" in the 28th section, must be taken to mean rated for a house belonging to the party. It is enough for us to abide by the words used in the act, and to say that the party in this case was rated to the relief of the poor on a sufficient value. He is qualified as a councillor for the borough.

PATTESON, J.—I am entirely of the same opinion. The Attorney General relies in his argument upon the construction of the 28th section, contending that a party cannot be rated within the meaning of that section, unless he is rated in respect of property that belongs to him. If such a construction were to prevail, it would follow that an insolvent or a bankrupt could not be a burgess. Every person who is the occupier of a house is entitled to be put on the rate, whether he is occupying his own house or that of another person; and with respect to the argument that the term or other interest in the house would vest in the assignees, suppose the assignees make election to have nothing to do with the lease, and the lessor choose not to take the lease off the bankrupt's hands, in that case the bankrupt would still remain the tenant. But without minutely entering into that question, it is clear that the bankrupt is rated, within the meaning of the act. The 52nd section then is confined to those who become bankrupt subsequently to their election.

WILLIAMS, J. concurred.

COLERIDGE, J.—The clause which states the disqualification by reason of bankruptcy, omits to state that as a disqualification from being elected in the first instance: we cannot, therefore, extend the disqualification to that state of circumstances.

Rule discharged.

1836. } GRIFFITHS AND OTHERS v.
Nov. 11. } ANTHONY AND WIFE.

Prohibition—Executor—Legatee.

Prohibition lies to the Consistory Court if it proceed to hear exceptions to the inventory exhibited by an executor, whether the citation

in that court be at the instance of a creditor or of a legatee.

A rule had been obtained for a prohibition to the Consistory Court of Carmarthen, in the diocese of St. David's, on behalf of Walter and Margaret Anthony, the latter of whom was the executrix of Thomas Griffiths, deceased, against whom a suit had been instituted, at the instance of legatees under the will, in the name of the deputy registrar of that court, and who had exhibited an inventory of all the goods of the deceased. The defendants appeared to the citation, and put in the inventory, to which exceptions were made by the legatees. The defendants put in their answer to those exceptions, and, subsequently, applied to amend the inventory.

The ground on which the rule was obtained was, that the ecclesiastical court, having heard exceptions to the inventory, were proceeding to sentence.

Chilton, on shewing cause against the rule, admitted, that if *Henderson v. French* (1) were to remain unimpeached, he could not successfully shew any cause against the present rule. There is one distinction, however, between the two cases: there, the suit was instituted by creditors; here, it is by legatees; and it would appear, that the Spiritual Court can question the correctness of the inventory, at the suit of the legatees, although they cannot at the suit of creditors—*Hinton v. Parker* (2), *Catchside v. Ovington* (3), and *Williams on Executors*, p. 645. If there is any irregularity in this case, in proceeding to hear the exception, it has been waived by the application to amend the inventory.

E. V. Williams, contra, was stopped by the Court.

LORD DENMAN, C.J.—The case of *Henderson v. French* is quite in point, and the authority of that case has not been got over. What took place on this occasion was no waiver.

Rule absolute.

(1) 5 *Mau. & Selw.* 406.

(2) 8 *Mod.* 168.

(3) 3 *Burr.* 1922.

1836. } THE KING v. THE INHABITANTS
Nov. 16. } OF KELVEDON.

Poor Law Amendment Act, 4 & 5 *Will.* 4. c. 76—*Examination—Evidence.*

The act of 4 & 5 *Will.* 4. c. 76. requires that the respondent should send a copy of the examination of the pauper, on which the order of removal was obtained, and provides, that the respondent shall not be allowed to go into evidence of any other ground of removal than that which appears on the examination:—*Held*, that where, upon the examination, the pauper stated that his father belonged to the appellant parish, and that he continued to belong there till his death, and that he had heard him say he was a certificated man from the appellant parish, it was competent to the respondents to go into evidence, that the pauper's father gained a settlement in the appellant parish by apprenticeship, and that he was a certificated man from that parish; and the Sessions having refused to hear such evidence, the case was sent back to be heard.

[For the report of the above case, see 6 *Law J. Rep.* (n.s.) *M.C.* p. 3.]

1836. }
Nov. 25. } PEACOCK v. HARRIS.

Costs on New Trial—Regulæ Generales, *Hil.* 2 *Will.* 4. 64.

Where (a verdict having been found for the plaintiff) a new trial was granted, on the ground of the improper admission of evidence, and nothing said as to the costs of the former trial, and the defendant suffered judgment by default, instead of taking the cause down to a new trial:—*Held*, that the plaintiff was not entitled, upon taxation, to the costs of the former trial.

The plaintiff brought an action, as assignee of the effects of J. Jones, an insolvent debtor, against the defendant to recover a sum of money for work and labour done and materials supplied by the insolvent to the defendant.

At the Spring Assizes, 1835, for the county of Denbigh, a verdict was found for the plaintiff.

A rule had been obtained, and was afterwards made absolute for a new trial, on

the ground that evidence had been improperly admitted.

A fresh notice of trial was given by the plaintiff's agent, for the trial of the cause at the then ensuing Assizes; but before that time the defendant withdrew his pleas, and suffered interlocutory judgment by default, upon which a writ of inquiry of damages was sued out and executed.

On the taxation of the plaintiff's costs, the Master allowed the expenses of the first trial, on the authority of *Jackson v. Hallam* (1).

A rule had been obtained, calling on the plaintiff to shew cause why it should not be referred back to the Master to review his taxation; against which, cause was shewn by—

J. Jervis, who relied upon the cases of *Booth v. Atherton* (2) and *Jackson v. Hallam*. He also cited *Gray v. Cox* (3) and *Sweeting v. Potts* (4). If the defendant had gone to trial, and the plaintiff had obtained a verdict on that trial, he would, no doubt, have been entitled only to the costs of the second trial; but the defendant, by having suffered judgment by default, has acknowledged that he had no ground of defence to the action, and that the first verdict was right upon the merits.

R. V. Richards, in support of the rule. By the rule 64, Reg. Gen., Hilary term, 2 Will. 4, if a new trial be granted, without any mention of costs in the rule, the costs of the first trial shall not be allowed to the successful party, though he succeed on the second. In *Newberry v. Colvin* (5), Mr. Justice Littledale said, "When a new trial is granted, and nothing is said about the costs of the first trial, they fall to the ground as a matter of course." So, here, nothing having been said as to the costs, the costs have fallen to the ground. *Porter v. Cooper* (6) is also an authority to the same effect.

LORD DENMAN, C.J.—It is quite clear, that the Court has no power to grant these costs.

Rule absolute.

(1) 2 B. & Ald. 317.

(2) 6 Term Rep. 144.

(3) 5 B. & C. 458.

(4) 2 Ad. & El. 414.

(5) 2 Dowl. P.C. 415.

(6) 2 Cr. M. & R. 232; s.c. 4 Law J. Rep. (N.S.) Exch. 192.

1836. }
Nov. 25. } **OHRLY V. DUNBAR.**

Policy of Insurance—Payment of Money into Court—New Trial.

*Where sixty actions on a policy of insurance were depending, in which there had been a consolidation rule, binding both the plaintiff and the defendant by the result of the trial in one cause, and the whole amount was for 27,200*l.*; and the plaintiff having obtained a verdict in that cause, a rule nisi had been obtained for setting it aside, as against evidence; the Court refused to order the sums to be paid into court, or invested in Exchequer bills, to await the result of the discussion of the rule for a new trial.*

This was an action upon a policy of insurance of the ship *Pylades*, valued at 27,200*l.*, and the policy was subscribed by the defendant as one of the underwriters thereof, for 300*l.* The amount of the policy of insurance, including the subscription of the defendant and the other underwriters, was 10,000*l.* Five other policies were effected at the same time, one of which was for 1,200*l.*, subscribed by several underwriters at Lloyd's Coffee-house; another for 7,000*l.*, underwritten at the office of the Indemnity Mutual Assurance Company; another for 5,000*l.*, underwritten at the office of the Royal Exchange Assurance Company; another for 2,000*l.*, underwritten at the office of the Corporation of London Assurance; and another for 2,000*l.* at the office of the Alliance Company.

Sixty actions were brought against the several underwriters and assurance companies upon these respective policies. A consolidation rule was entered into, upon the submission of the plaintiff and the several defendants to be bound and concluded by the verdict to be given in this action, provided the same should be to the satisfaction of the Judge before whom tried.

Two of the underwriters had died before the actions were brought.

The action was tried before Lord Denman, C. J., when a verdict was found for the plaintiff, the jury finding, on the two issues raised upon the record, that the ship was seaworthy, and that she was a new ship.

A rule nisi had been obtained on a prior

day in this term for setting that verdict aside, and for a new trial, on the ground that the verdict was against evidence.

Sir W. W. Follett also, in this term, obtained a rule calling on the defendant to shew cause why he should not pay into court the loss on the ship *Pylades*, or invest the same according to the direction of the Court; or why the rule for a new trial should not be discharged. The grounds suggested on obtaining the rule were, the probability of the death, bankruptcy, or insolvency of many out of such a number of underwriters, before the rule for a new trial could be discussed; and the hardship thrown upon the plaintiff, should he again succeed, by the loss of interest on the principal sum for so long a period of time. Cause was now shewn by—

Mr. Attorney General (Campbell), Maule, and Wightman.—This is a perfectly novel and unprecedented motion. The only case in which the Court have imposed terms on the rule for a new trial, is that of *Rickman v. Carstairs* (1). But, there, the action was brought to recover an average loss, and the liability to pay for average loss was admitted, and the amount only was to be ascertained. There is nothing in the circumstances of the present case to take this out of the general rule, and to induce the Court to comply with this application. The proper application for the other side to have made was, to be released from the consolidation rule, so that they might have proceeded with another cause.

Sir W. W. Follett and *Alexander*, in support of the rule, urged, that the case stood upon its own peculiar circumstances: the vast amount of the insurance—that there were sixty actions depending upon this against different underwriters—two of the underwriters were already dead, and it was impossible to say how many more might become insolvent, bankrupt, or die before the rule for a new trial could be discussed. As far as the insurance at *Lloyd's*, and those of the different assurance offices, they were willing that the rule should be discharged as to them.

LORD DENMAN, C.J.—The remarkable circumstances of this case induced us to

(1) 5 B. & Ad. 651; s. c. 3 Law J. Rep. (N.S.) K.B. 28.

grant the rule. We have now heard the matter discussed, and we think that it would be leading to a much greater delay were we to accede to this application, that can possibly arise from the circumstances as they stand.

PATTESON, J., WILLIAMS, J., and COLERIDGE, J. concurring—

Rule discharged, but without costs.

1836. } THE KING v. THE INHABITANTS
Nov. 16. } OF HOLBEACH.

Poor Law Amendment Act, 4 & 5 Will. 4. c. 76—Appeal, Statement of Grounds.

Where the ground of appeal was stated to be, that the pauper, at the time when he hired himself (as stated in the examination) and before the completion of the bargain, stipulated with his master, that out of his year's service he should be allowed to have two days holidays at Spalding club-feast, in the month of July, and that the pauper was allowed and did take and absent himself from his master's service during the said two days accordingly:—Held, that it was not competent for the appellants, under that notice, to prove a bargain for one day's holiday to go to Holbeach fair, and that the pauper had such holiday in pursuance of the bargain.

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 5.]

1836. } THE KING v. MARSH.
Nov. 21. }

Grand Jury, Finding by—Indictment, Quashing.

In point of law, no more than twenty-three persons can be sworn on the grand jury; and an indictment found by a grand jury, on which were sworn twenty-five, was held bad.

But the Court will not, after the indictment has been removed by the defendant by certiorari, and he has pleaded and been convicted, quash the indictment, but leave the party to move in arrest of judgment, bring his writ of error in law or in fact, according to whether the error appears upon the record or not.

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 7.]

1836. }
Nov. 9. } THE KING v. RICHARD HIGGINS.

Certiorari—Costs—Court below.

Where an indictment is removed by certiorari, this Court has no jurisdiction over the costs incurred in the court below previous to the delivery of the writ of certiorari.

Thus, where the defendant had sued out a writ of certiorari in March, and, after three Sessions had passed, gave notice of trial, and the prosecutor was ready with all his witnesses, but, at the conclusion of the Sessions, the defendant delivered in to the Justices the writ of certiorari,—The Court, on quashing the writ and awarding a procedendo, would not make the defendant pay the costs incurred at the last sessions.

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 9.]

1836. }
Nov. 23. } THE KING v. THE COMMISSIONERS OF THE THAMES AND
ISIS NAVIGATION.

Mandamus—Compensation—Private Act—Construction.

The Commissioners of the Thames and Isis Navigation were empowered to make a new cut, &c., and by one section of the act it was provided, "that if any person should think himself aggrieved, damaged, or injured by any wall made by the commissioners, or by the operation and effect of such work, and should make complaint thereof, in writing, to the commissioners, under his hand, the commissioners should hear and report on such complaint, and should make such order, determination, and judgment thereon, as they should think just, and give such compensation to the party complaining, as they should think reasonable; and if the said party should be dissatisfied with such order, determination, and judgment, it might be lawful to appeal to the next General Quarter Sessions: and the said Court of Quarter Sessions should and might entertain and take cognizance of the appeal, and make such order and adjudication thereon as to the Justices should seem just, and award such costs to either party as they should think reasonable, which order and determination should be final and conclusive to all intents

NEW SERIES, VI.—K.B.

and purposes whatsoever." B, who had a towing-path by the side of the ancient channel of the river Thames, made complaint to the commissioners of an injury accruing to him, by reason of a new cut made by the commissioners, the consequence of which was, that the navigation of the old cut was almost entirely disused, and his towing-path rendered useless and unprofitable. The commissioners in answer said, that they could not accede to the application, upon which B appealed to the Quarter Sessions, who awarded 1,000*l.* by way of compensation, and 200*l.* for costs:

Held, first, that the answer of the commissioners, that they could not accede to the application, was an order, determination, or judgment on which to found an appeal to the Sessions:

Secondly, that by the provisions of the act upon such appeal, the Sessions had full cognizance of the matter, and were enjoined to make such order and determination thereon as to the Justices should seem just and reasonable; and it was impossible to say that the Sessions had done wrong in deciding that the damage accrued by the operation and effect of the work done by the commissioners.

This Court, therefore, granted a peremptory mandamus to enforce the order of Sessions.

A writ of mandamus had issued to the Commissioners of the Thames and Isis Navigation, commanding them to pay, or cause to be paid, to George Lord Boston, or John Boodle, the younger, his solicitor, the several sums of 1,000*l.* and 200*l.*, pursuant to an order and adjudication of the Court of General Quarter Sessions. The mandamus recited an act of parliament of 52 Geo. 3, authorizing the commissioners to make a navigable canal, in which act were recited several antecedent acts of parliament made in the 11th, 15th, 28th, and 35th years of the reign of Geo. 3; and it was enacted, "that all and every the powers, authorities, provisoes, restrictions, clauses, penalties, forfeitures, matters, and things contained in those acts, should continue in full force and effect for executing and performing the several works by the former acts, &c. authorized and directed to be done, except such parts

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thereof as should be altered, varied, or repealed by that act," &c.

It then recited, that by 35 Geo. 3. c. 108, it was amongst other things enacted, "That if any person or persons should think himself, &c., *aggrieved, damaged, or injured*, by any work made by the commissioners appointed and constituted by that act, or by the operation or effect of any such work, and should make complaint thereof, in writing, to the said commissioners, at any district meeting, or at any general meeting, under his hand, the said commissioners should hear and report on such complaint to the next or some other subsequent general meeting, and at such next or subsequent general meeting the said commissioners should make such order, determination, and judgment thereon, as to them should seem just, and give such satisfaction to the party complaining as they should think reasonable; and if the said party should be dissatisfied with such order, judgment, or determination, it should and might be lawful to appeal to the next General Quarter Sessions of the Peace for the county in which the cause of complaint should arise, giving at least ten days' notice to the general clerk of the said commissioners of the intention of making such appeal. And the said Court of Quarter Sessions should and might entertain and take cognizance of such appeal, and make such order and adjudication thereon, as to the Justices then present should seem just, and award such costs to either party as they should think reasonable, which order and determination should be final and conclusive to all intents and purposes whatsoever." The writ then stated, that "Lord Boston has been, for divers years, seised and possessed of, and entitled to the fee simple and inheritance of an ancient towing-path, situate in the several parishes of Taplow, Hedson, Wooburn, &c., for the towage of barges, boats, and vessels, and of goods contained in the said barges, boats, and vessels, up and down the river Thames, &c.; and that Lord Boston, for divers years, has been and now is seised, possessed of, and entitled to the sole and exclusive right and privilege of towing barges, boats, and vessels, and for taking for the towing of such barges, &c. by horses kept by or by the authority of Lord Bos-

ton for that purpose, certain reasonable tolls or payments; that the commissioners have made, or caused to be made, under the authority of the above recited acts, a new cut or canal, from &c. to &c., by the making of which new cut or canal, all persons navigating barges, boats, &c. up and down the river Thames, are enabled to avoid that part of the river along which the towing-path of Lord Boston is situate, and to dispense with the use of the horses kept by or by the authority of Lord Boston, &c. and to withhold from him the reasonable tolls or payments, to which he would otherwise have been entitled for the use of such horses; that the commissioners have also made a pound lock, at which tolls and payments are, under the authority of the recited acts, demanded and taken for the use of the new cut by barges, &c., whether such barges shall or shall not have passed through the new cut."

It also alleged, that the commissioners, by the making of the new cut or canal, had also materially injured the old channel of the river Thames, and made the navigation of that part thereof, along which the said towing-path of Lord Boston was situate, less easy and convenient than it had theretofore been; and that so by the making of the said new cut or canal as aforesaid, and by the demanding and taking of the tolls as aforesaid, and by the injuring of the said channel, they had diverted the navigation of the river Thames from the towing-path of Lord Boston, and rendered his towing-path, and his said sole and exclusive right of towing, &c., wholly useless and unprofitable; and so Lord Boston had been aggrieved, damaged, and injured by the work of the commissioners, and by the operation and effect thereof.

The writ then stated, that Lord Boston being so aggrieved, damaged, and injured, &c., in pursuance of the provisions of the act made complaint in writing to the commissioners, and demanded compensation adequate to the injury he had sustained; that the commissioners, at a subsequent general meeting, &c., made an order, determination, and judgment on such complaint, which order, determination, and judgment was to the purport and effect following: that the commissioners could not accede to his Lordship's application,

That Lord Boston appealed to the next practicable Quarter Sessions for Buckinghamshire, which said Court of Quarter Sessions, in pursuance of the provisions of the act, made an order and adjudication thereon, that the commissioners should pay to Lord Boston 1,000*l.* in full compensation for the injury sustained by Lord Boston, and 200*l.* for costs.

The return to the mandamus stated, that the commissioners, believing that his Lordship had no claim for compensation, did not think it necessary to hear evidence on the subject of his complaint, or the amount of his alleged loss: that, having notified to his Lordship through their general clerk, that the commissioners refused to accede to his application, Lord Boston, treating that refusal as if it were an order, determination, and judgment of the commissioners upon his claim, made it the ground of appeal to the Sessions: that before the case was heard, an objection was taken on behalf of the commissioners, that that refusal was not an order, &c., against which an appeal lay: that, by making the cut or canal, the commissioners have not done, nor caused any injury to be done to the channel of the river: that Lord Boston was no otherwise entitled to the towing-path than as owner of the land through which the same passes, adjacent to the river, and to such part thereof only as passes through his land: that they have not, by opening the cut or by any other work, given any obstruction to Lord Boston in the use and enjoyment of the towing-path, or his wharfs, or other private property, on the banks of the river, &c.: that, by the effect and operation of the cut, traders and others, if they prefer it, are not prevented from navigating their barges in the old channel of the river, or from proceeding to or from Lord Boston's wharf or wharfs, and that, in fact, some of the barges do navigate the old channel: that the commissioners are not empowered to make compensation to any person for the disuse or abandonment of a towing-path, or on account of traders or others upon the river being enabled, by means of new cuts or other improvements in the navigation, to dispense with the horses of any person claiming a supposed exclusive right of towing barges, &c.

Mr. Attorney General (Campbell), in support of the mandamus.—The Court of Quarter Sessions was a court of competent jurisdiction to assess the amount of compensation to be paid to Lord Boston; and this Court are called upon to compel the commissioners to pay the sum awarded. If this Court were called on to say whether Lord Boston was entitled to compensation under the provisions of the act, there would be no difficulty in convincing the Court that he was so entitled; but that question has already been determined by the Court of Quarter Sessions; and the only question is, whether the order of the Quarter Sessions is a void order. It must be made out on the other side that the order is void. The objection that will be made will be, that there was no order, determination, or judgment of the commissioners, by which they refused to give Lord Boston compensation, so as to be the foundation of an appeal to the Quarter Sessions, and that, therefore, that Court had no jurisdiction to order compensation to be paid to Lord Boston. It is not denied, by the return, that the commissioners did refuse to make any compensation; on the contrary, they say, they did not consider that Lord Boston had any claim, and they heard no evidence upon the matter. Their refusal to hear evidence, and give any compensation, was, within the act of parliament, an order, determination, or judgment, from which Lord Boston had a right to appeal. With respect to the right of Lord Boston to receive compensation for the injury he has sustained, there are much larger words for awarding compensation in the 22nd section of 35 Geo. 3. than are contained generally in acts of parliament of this description. The words are, "That if any person shall think himself aggrieved, damaged, or injured by any work made by the commissioners, or by the operation and effect of any such work," the commissioners are to give compensation. Lord Boston, it is not denied, was seised of an ancient towing-path, and he was entitled to the sole right and privilege of towing barges, boats, and vessels along that portion of the river Thames by which the towing-path ran. By the act of the commissioners, in making the new cut, the advantages which Lord Boston enjoyed from the exclusive right to the towing-path

were considerably diminished, and the loss which Lord Boston has sustained in consequence, is not denied by the return. The present is a very different case from *The King v. the London Dock Company* (1), as the words of the act are much wider and more extensive.

Sir W. W. Follett, contra, in support of the return.—It is impossible for any one reading the act of parliament to suppose that Lord Boston is a party contemplated by the act of parliament as a person aggrieved, damaged, or injured by any work made by the commissioners, within the meaning of the 22nd section. Lord Boston is the owner of land adjoining the river Thames, and a power is given to the commissioner to make cuts on giving compensation, &c. The commissioners under that power have made a new cut, and barges go by the new cut in preference to going by the old channel, adjoining which is Lord Boston's towing-path. The return states, that no injury is done to the old channel.

[*PATTESON, J.*—The mandamus alleges, that the new cut has rendered the navigation of the old channel less easy and convenient: the commissioners, in their return, have abstained from denying that it is made less easy and convenient.]

It may be less convenient, but boats and barges may go round the old cut still, and there is no obstruction arising from the new cut. Whether Lord Boston comes within the act or not, can only be determined by reference to what is stated in the mandamus and return. What is the description of the injury alleged in the mandamus? It is, that the commissioners have made a new cut, by which traders and others may dispense with the old channel of the river, adjoining which is Lord Boston's land. The rule would appear to be this, that, in making compensation under these acts of parliament, it is not intended to give compensation for that which, if the act had not passed, would not have been a ground for an action.

[*PATTESON, J.*—It must depend upon the words used in the particular act of parliament. The words in this act are very singular.]

Suppose the same words had been used

in the act for making Regent Street, could the owners of Bond Street have sought compensation for an injury, damage, or loss accruing by reason of building Regent Street, by which the custom was transferred from the shops in Bond Street to those in Regent Street? Again, suppose an act for making a new line of road, giving compensation, had contained the same words as are in the present act, could the innkeepers on the old road have sought compensation for the loss which they had sustained by the diversion of the travellers from their line of road?

[*PATTESON, J.*—Looking at the language of the denial on the return, I should doubt whether it was a denial that the water of the old channel was abstracted by the new cut.]

If the Court are of that opinion, application would be made that the return might be amended in that particular, for of the fact there cannot be a doubt; and the parties have come to try whether the making of the new cut, which does not affect the navigation of the old cut by reason of anything except taking the user from it, can be the subject-matter of compensation.

[*Per Curiam.*—The Court will assume that no water is abstracted from the old cut.]

If the commissioners, by the new cut, had diverted the water, this, except for the act, would entitle the party injured to an action, and, consequently, to compensation under the act. So, if the effect of the new cut had been to obstruct and prevent boats from going along the old cut; but it is a new thing, because a public benefit has accrued, and a new cut is made which is more convenient than the old cut, so that the public are induced to use the new in preference to the old, that every person who has property near the old cut is to receive compensation under the provisions of the 22nd section. Suppose the case of owners of a canal, and a new railroad act were passed, giving compensation in the words of this act, would the canal owners be entitled to compensation?

[*LORD DENMAN, C. J.*—I think that you assume the words of the act to be, that a party being aggrieved, damaged, or injured, shall receive compensation. But the words of the act are—"If a party shall think himself aggrieved, &c. he may apply to the

(1) 5 Law J. Rep. (N.S.) K.B. 195.

commissioners for compensation;" and if they decide against him, an appeal is given to the Quarter Sessions, whose order is to be final and conclusive.]

But the Sessions have no right to give compensation, where the party applying is not, within the act of parliament, a party aggrieved. Had the Court of Quarter Sessions power to give compensation in the present case? *The King v. the Commissioners of the Nene Outfall* (2) is in point. What have the Court decided in *The King v. the London Dock Company*?—that the company having made their cut, which they were authorized by the act to make, a party who was damnified, in consequence by the loss of neighbourhood and custom, was not entitled to compensation. *The King v. the Bristol Dock Company* (3) is also applicable. Suppose Lord Boston had merely shewn to this Court the order of the Court of Quarter Sessions, that would not have entitled him to ask the Court for a mandamus. The commissioners thought that Lord Boston was not a party entitled to compensation within the act of parliament, and they refused to hear any evidence upon the subject. Lord Boston might have come to this Court for a mandamus to the commissioners, to hear and determine; but as it is, they came to no determination. But the appeal to the Sessions is given from the order and determination of the commissioners: and have the Sessions any authority or jurisdiction under the circumstances? The commissioners have made no report at the next general meeting, nor have that general meeting made any compensation.

[PATTERSON, J.—It hardly lies in your mouth to say, that the commissioners made no report.]

It cannot be denied, that the commissioners gave such answer as is alleged in the mandamus; but they say, that they did not think there was any ground for the claim, and refused to hear evidence.

[LITLEDALE, J.—You cannot seriously mean to contend, that it was necessary that the commissioners should have made a report.]

Lord Boston should have made the complaint to the commissioners, and they should have reported to the next general meeting,

(2) 9 B. & C. 375; s. c. 8 Law J. Rep. K.B. 1.

(3) 12 East, 449.

which should have proceeded to determine on the claim, and have made an order, either granting compensation, or stating that they heard the complaint, and thought that there was no ground for compensation; but all that is stated is, that intimation was given by their general clerk to Lord Boston, that they considered him not to be a person within the act, and refused to hear any evidence with respect to his claim. If the commissioners decide, there is an appeal given to the Quarter Sessions; but if they refuse to decide, as they did in this case, then the party must apply to this Court for a mandamus, to compel them to hear and determine—*The King v. the Justices of Middlesex* (4).

[LORD DENMAN, C.J.—It is quite consistent with the return, that all that was required by the act of parliament may have been complied with. They do not say, that the case is not within the act of parliament, but they refuse compensation.]

Mr. Attorney General (Campbell), in reply.—Whatever the determination of the commissioners may be on the application to them, the claimant may appeal to the Quarter Sessions; and whether the commissioners give a small amount by way of compensation, or say, that the party is entitled to no compensation, in either case there is a determination by the commissioners. In the mandamus, there is a direct allegation, that there was a determination by the commissioners, and there is no direct traverse of that fact in the return. The commissioners do not merely say, that they did not hear evidence; but further, that they did not think it necessary to hear evidence. Among the cases which have been cited on the other side, there is not a single instance in which words were contained in the act of the description of those used in this act of parliament. The act of parliament, in *The King v. the Bristol Dock Company*, contained no such words; and the words here are essentially different from those to be found in the Hungerford Market Act (5) or the London Dock Act; but the case principally relied on on the other side, is *The King v. the Nene Outfall*. That case was

(4) 16 East, 310.

(5) See *The King v. the Hungerford Market Company*, 1 Ad. & Ell. 668; s. c. 3 Law J. Rep. (n. s.) K.B. 50.

very different: it was there held, that tithes were not an hereditament, within that act of parliament.

Cur. adv. vult.

This case was argued in Trinity term, May 28; June 1, 1835; and now, the 23rd of November 1836, the judgment of the Court was delivered by—

LORD DENMAN, C.J.—There is a case of *The King v. the Commissioners of the Thames and Isis Navigation*. It was a case of mandamus that was issued to the commissioners, commanding them to pay to Lord Boston the sum of 1,000*l.*, as compensation for damage arising from the act of the commissioners, and 200*l.* costs. It has been long pending, and has been brought under the notice of the Court more than once. On shewing cause against the rule, in Trinity term, 1834, it underwent much discussion, which, however, ended in the writ issuing. To that writ, the commissioners made a return, the sufficiency or insufficiency of which was argued in the course of last year, before my Brothers Littledale, Patteson, Williams, and myself; and, after a great deal of deliberation and doubt, we have at length agreed on the judgment we ought to give.

One of the acts done by the commissioners, and complained of, was to cut off the bends of the river, and to make a new channel straight across from one extremity of the bend to the other; in consequence of which, a towing-path belonging to Lord Boston, which went by the side of the ancient bend of the river, was rendered useless, and the channel of the river was supposed to be made less convenient for the purposes of the navigation. For the injury thus sustained, his Lordship applied to the Commissioners of the Thames and Isis Navigation, for compensation, who refused to accede to that application, and thought it unnecessary to hear evidence on the subject. Lord Boston then appealed to the Quarter Sessions of the county of Bucks, who, after a full hearing, set aside the determination of the commissioners, and awarded 1,000*l.* for the said injury, and 200*l.* for costs. The mandamus was moved for to compel the payment of those two sums.

The cause shewn by the commissioners

by their return, was, that the damage described was not, within the language of the act of parliament, "a grievance," and that Lord Boston could not be considered as a party aggrieved. Their argument was, that a mere diversion of the custom to the owner of the towing-path, who lets out his horses to be used, could no more be considered an injury from the act of the commissioners, than the loss of custom brought on the owner of a public house, by making a new road, and cutting off a bend near which that house was situated, and by which it was benefited; and we were referred to authorities, where a claim somewhat similar, was held inadmissible. But we think the answer to those authorities is to be found in the very peculiar language of this act of parliament, which differs altogether from numerous acts of the same nature, which were sent to us after the argument. We should have had little difficulty in deciding, that damages could not be given to the sufferer in such a case, unless, according to legal language, he was the party aggrieved; and though the remedy is provided for a party who thinks himself aggrieved, and that question is sent to the Quarter Sessions, yet those words would probably not be held extensive enough to shew that such damage was a grievance. But the clause empowers every one thinking himself aggrieved, damaged, or injured, by any work made by the commissioners, or by any operation or effect of any such work, to apply for compensation to the commissioners, who are to make such order, determination, and judgment thereon, as to them shall seem just, and give such compensation to the complaining party as to them shall seem reasonable; and on a refusal by the commissioners, the party is to appeal to the Sessions, who are required to entertain and take cognizance of such appeal, and make such order and adjudication as to the Justices present shall seem just, and award such costs as they think just and reasonable, which order and determination is to be final and conclusive to all intents and purposes.

Lord Boston, thinking himself damaged and aggrieved by the operation and effect of a work made by the commissioners, asks them for compensation, and is refused. On his appeal to the Sessions, that Court is in-

vested with the cognizance of the case, and is enjoined to make such order and determination thereon as to the Justices present shall seem just and reasonable—a much wider power than merely to assess damages for some recognized injury. Can we say, they have done wrong in deciding, that the damage has accrued by the operation and effect of the work done by the commissioners? On the contrary, to assert that it had not, would have been a direct untruth, in the ordinary sense of the words; and no other sense is to be attached to them, by any clear legal authority.

Then, another objection to the mandamus was, that the order of Sessions included two objects, for one of which, the prosecutor, Lord Boston, was clearly entitled to no compensation. Though it was not much pressed at the bar, it has occupied the attention of the Court; because, if the 1,000*l.* was awarded partly for the loss of profits derivable from the towing-path, and partly for obstructing the old channel, and the latter had not been made out within the meaning of the act, we were disposed to think the judgment, comprehending both, could not have been sustained; but this objection also is cured by the extensive language of the act of parliament.

The mandamus alleges the obstruction as one cause of complaint, and the loss of profits from the towing-path as another, and recites, that the Sessions gave their compensation for the said injury: that would be twofold. The return denies that the channel had been at all obstructed, and states, that all who prefer taking that course can pursue it; but the Sessions must be taken to have found the fact when they gave compensation for it; and their order to do what to them seems just and reasonable, is made final and conclusive.

If the Sessions had not inquired as to that point, the return might so have averred, and the question of fact might have been raised. The fact that the commissioners assert the channel *not* to be thus obstructed, is quite consistent with the Sessions having adjudged that it *was*.

Another objection, which was more relied on, was, that the jurisdiction of the Sessions did not attach, because the commissioners had come to no order, determination, and judgment, on which an appeal might lie.

Upon the facts above stated, which appear in the writ, and which are not denied in the return, we have not the least hesitation in saying, that the refusal to accede to Lord Boston's application, and hear evidence, was a plain determination that he was not entitled to what he claimed, and, consequently, a proper subject of appeal.

I may observe, that this is one of a class of cases which has become exceedingly numerous, in which the Court has found itself bound to give the words of private acts of parliament an effect which probably never was contemplated by those who obtained the act, when it was passed by the legislature. But our duty is to look to the language employed, and to construe it in its natural and obvious sense. The liabilities imposed on themselves by bodies of men, and the conditions on which the public empower them to perform their works, are expected to be beneficial to both the contracting parties. We are not at liberty to inquire whether the bargain is reasonable; but we are to see it executed. Therefore, our judgment will be to quash the return.

Return quashed; a peremptory mandamus to issue.

1836. }
Nov. 11. } THE KING V. ANDREW WHITE.

Corporation—Quo Warranto.

An information in the nature of a quo warranto cannot be filed against a whole corporate body, except by and in the name of the Attorney General.

The Court, however, will grant an application to file such an information, at the instance of a private relator, although the ground of objection to the party's right to hold the office, affects every individual belonging to the corporation.

A rule had been obtained to shew cause why a criminal information in the nature of a *quo warranto* should not be filed, at the instance of J. Beecroft, Esq., against Andrew White, to shew by what authority he exercised the office of mayor of the borough of Sunderland. The first ground stated was, that George Stephenson, who made out the lists, was not town clerk of the borough,

nor any person performing duties similar to the office of town clerk;—2nd, that the election of councillors of the said borough was held before Richard Spoor, who was not mayor or chief officer of the said borough.

Mr. Attorney General (Campbell) and Wightman, in shewing cause against the rule, said, that the Court would not grant the application, because the relator made it appear on the affidavits, that the first ground on which the motion was founded was, that there was not any valid existing corporation at the present time. The motion was, in effect, against the whole corporation; and, therefore, could not be entertained, except in the name of the Attorney General—*The King v. the Corporation of Carmarthen* (1), and *The King v. Ogden* (2).

Sir W. W. Follett, (with whom was *W. H. Watson*,) in support of the rule.—As to the objection, that the relator says, there is no corporation,—if the ground of objection to an individual be such as applies to the whole corporation, that is no available objection to a criminal information being filed against that individual; and *The King v. the Corporation of Carmarthen* is rather strong against that position, for although the Court refused to grant the rule for a *quo warranto* against the corporation as a body, they proceeded to grant rules against the several individuals composing the corporation. The case of *The King v. Ogden* is not at all applicable to the present case. The application in that case was for an information in the nature of a *quo warranto* against private individuals, for claiming to act as a corporation; and the Court held, that such an information must be filed by and in the name of the Attorney General.

LORD DENMAN, C.J.—It appears to me, that *The King v. Ogden* is satisfactorily distinguished from the present case. The question there was, whether the Court would suffer a private person to file an information in the nature of a *quo warranto* against individuals who were claiming to act as a corporate body; but in *The King v. the Corporation of Carmarthen* it does appear, that the Court did permit informations to be filed against individuals of a

corporation for a defect, which was made the ground of application for an information against the corporate body; and as, upon the affidavits, a sufficient doubt is raised as to the title of the defendant, to exercise the office of mayor, the rule in this case will be made absolute.

PATERSON, J.—*The King v. Ogden* is not at all applicable to this case. The defendants there did not claim to exercise any government office or corporate franchise, but only to act as a corporate body. Then it comes to the question, whether the circumstance of every one of the corporation being in a similar predicament to that in which the defendant stands, is an answer to the application to file an information at the instance of a private person; and I am of opinion, that that circumstance is no answer, when the application is made against the individuals.

WILLIAMS, J. and COLERIDGE, J. were of the same opinion.

Rule absolute.

There were several applications against the different acting members of the corporation on the same grounds, in which the rules were also made absolute.

1836. } THE KING v. THE INHABITANTS
Nov. 16. } OF BOBBING.

Poor — Settlement — Parish Clerk and Sexton.

In the year 1811, the offices of parish clerk and sexton of B. becoming vacant, the rector sent for the pauper on a Sunday, and requested him to perform the duty of clerk for that day; the pauper did so; and the rector, on coming out of the desk, told the pauper, "I shall appoint you my regular clerk and sexton, and to follow me in the marriages and funerals." The pauper, upon that, without anything further being said or done, entered upon the execution of the duties of the offices, and continued to perform them until 1833:—Held, a sufficient and valid appointment to the office, and that by such service, the pauper gained a settlement in B.

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 13.]

(1) 2 Burr. 869; s. c. 1 Black. 887.

(2) 10 B. & C. 230.

1836. }
Nov. 3, 15. } SYMS v. CHAPLIN AND OTHERS.

Carriers—11 Geo. 4. & 1 Will. 4. c. 68.
—Receiving-house—Pleading.

An innkeeper at M, on the western road, was in the habit of receiving parcels to be sent to the different places to which they were directed, by the several coaches which were accustomed to stop at his inn, and every parcel was entered in a general booking-book kept for the purpose. The defendants were the proprietors of the mail coach, which had been accustomed for two years and a half to stop at this inn, and the guard of the mail had, during that time, been constantly in the habit of receiving parcels to be forwarded to the different places to which they were directed. The plaintiff booked a parcel with the postmaster at B, about six miles from M, which was sent by the mail-cart to M, and delivered by the innkeeper there to the mail guard, to be forwarded to London:—Held, first, that the defendants, by having been in the habit of stopping with their mail at M, and of receiving parcels from the innkeeper there to be forwarded on the road, had adopted his inn as a receiving-house.

Held, secondly, that the fact of there being several agents, by whose means the parcel of the plaintiff was ultimately delivered to the defendants to be conveyed to London, did not prevent the contract by the defendants from being with the plaintiff.

Held, thirdly, that, whether the act make it a condition precedent to the plaintiff's right to recover against a carrier for the loss of goods above the value of 10*l.*, that he should have given notice of the value, or not; yet, that, since the new rules, that defence could not be gone into under the general issue, but must be pleaded.

Quære—Whether the act 11 Geo. 4. & 1 Will. 4. c. 68. does make it a condition precedent to the right of the plaintiff to recover in such a case, that he shall have given notice of value and paid the additional rate of charge?

This was an action of assumpsit against the defendants, as common carriers, for not safely and securely keeping and delivering a parcel containing a certificate of bankruptcy of the plaintiff.

NEW SERIES, VI.—K.B.

Pleas—First, the general issue. Second, that the plaintiff did not cause the certificate of bankruptcy to be delivered to the defendants for the purpose in the declaration mentioned. The third plea alleged, that the certificate in the declaration mentioned was delivered by the plaintiff for the purpose of being carried and conveyed, after the passing of 11 Geo. 4. & 1 Will. 4. c. 68; that the certificate is a certain writing within the meaning of the act, and that the value thereof exceeded 10*l.*; that the certificate was not delivered at any office, warehouse, or receiving-house of them the defendants as such common carriers, but that the same was delivered to and received by a certain then servant of the defendants in that behalf: that the plaintiff did not, nor did any person on his behalf, at the time when the certificate was so delivered to and received by the said servant of the defendants, declare the value and nature thereof; nor did the plaintiff then, or at any other time, pay to the defendants, nor to their servant, who so received the certificate as aforesaid, nor to any other person or persons on behalf of the defendants, any increased rate of charge over and above the ordinary rate of carriage, as a compensation for the greater risk and care to be taken for the safe conveyance of such certificate, or any other increased charge whatsoever; nor did the defendants or their servant, or any other person, accept any engagement to pay the same; concluding with a verification.

Replication thereto, *de injuriâ*.

At the trial, before Williams, J., at the last Assizes for the county of Wilts, it appeared, that the parcel containing the certificate was sealed up and taken to the post-office at Bradford, where all parcels are booked for the mail, and the usual charge of booking (2*d.*) paid; that the parcel was delivered by the postmaster of Bradford to the driver of the mail-cart who conveys the letters from Bradford to Melksham, a distance of about six miles, to meet the mail-coach for London, and was entered at the coach-office at Melksham, in the general booking-book, and subsequently delivered to the guard of the mail, and inserted in the way-bill of the day, but the parcel never reached its place of destination. It

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appeared, that the innkeeper at Melksham was in the habit of receiving parcels to be sent by the various coaches which stopped at his inn, amongst which was the mail, which had been accustomed to stop there for two years and a half, and that all the parcels so left were entered in a general booking-book kept for the purpose. The parcel in question was not directed to be sent by the mail, but was entered generally in the general booking-book. A verdict was found for the plaintiff for 25*l.*, with leave reserved to the defendants to move to enter a non-suit.

Bompas, Serj. now moved accordingly. He contended, that, upon this evidence, the third plea was distinctly proved, that there was no delivery at a receiving-house of the defendants, but a delivery to a servant only, without any information being given to him as to the contents and value of the parcel, or any additional rate of carriage paid. The innkeeper at Melksham sends parcels left at his inn by various coaches, and there being no limitation or direction to send this parcel by one coach or the other, the innkeeper had his option to send it by whatever coach he pleased. The innkeeper was not the agent of the defendants, nor did they receive the parcel until it was delivered by the innkeeper to the guard of the mail, and it was not until then that any one had any authority to make the extra charge.

[COLERIDGE, J.—Suppose several coach proprietors of different coaches running on the western road direct the coachman to stop at a particular house on the road, which receives parcels for the purpose of being conveyed, and a parcel is left at that particular house, directed generally, without any particular direction by what coach it is to be sent, could that be otherwise than a receiving-house for each of the several coach proprietors?]

Secondly, there was no contract between Syms and the defendants. The parcel was delivered by Syms to the postmaster at Bradford, who received his 2*d.* for booking it, and sent it on by the mail-cart to Melksham, for which portion of the journey he is paid by the defendants. The contract, therefore, was with him, if with any one.

[COLERIDGE, J.—You must contend, that,

although the postmaster might have taken the parcel to Melksham, yet that you might maintain an action against him for not delivering it in London.]

There is also another objection to this action being maintained. The first section of the act provides, that the proprietors of coaches, &c. shall not be liable for the loss of certain goods exceeding the value of 10*l.*, unless at the time of the delivery thereof the value and nature of the property be declared, and an increased charge or engagement to pay the same be accepted by the person receiving it. That is a condition precedent.

[LORD DENMAN, C. J.—Is there any pleading to raise that point?]

That portion of the plea, that it was received by a servant, may be rejected, and it may be taken as if the allegation were, that it was received at a receiving-house. The 3rd section contains a proviso, that, "when the value shall have been so declared, and the increased rate of charge paid, or an engagement to accept the same shall have been accepted, the person receiving the same shall, if required, give a receipt;" and *Owen v. Burnett* (1) shews, that the giving of the notice of value is a condition precedent to the plaintiff's right to recover.

[COLERIDGE, J.—The words of the section are very strong: "and if such receipt shall not be given as aforesaid, or such notice as aforesaid shall not have been affixed, the mail contractor, &c. shall not have or be entitled to any benefit and advantage under this act, but shall be liable and responsible as at the common law, and shall be liable to refund the increased rate of charge." No notice of the increased rates of charges appears to have been stuck up at the inn at Melksham.]

[PATTESON, J.—"If such notice as aforesaid shall not have been affixed" refers to the second paragraph of the 2nd section; and, in that case it is declared, that the carrier shall not be entitled to the benefit of the act.]

But the prior section enacts, that, in no case—

[COLERIDGE, J.—The 8th section pro-

(1) 2 Cr. & M. 353; a. c. 3 Law J. Rep. (N. S.) Exch. 76.

vides—"That nothing in the act shall be deemed to protect any carrier from damage accruing by the felonious act of his servants." Would you contend, that, if no notice of value were given, and such damage accrued above the value of 10*l.*, the owner could not recover?]

LORD DENMAN, C. J.—Upon the first point, upon which this was moved, whether the inn at Melksham was the office, warehouse, or receiving-house of the defendants, I cannot entertain any doubt. It was a house for the reception of all parcels, which might be left there to be conveyed to their respective places of destination by the different coaches, which were accustomed to stop there. One of the coaches, which were accustomed to stop, was the mail, of which the defendants were proprietors, and the house at Melksham had been so used by them for a long space of time. That was an adoption by them of the inn, as a receiving-house, within the third class, described in the act; and the jury were perfectly warranted in coming to the conclusion, that it was a receiving-house of the defendants. As to the second point, there is no doubt that the contract of the defendants was with the plaintiff; and the fact of there being several agents, by whose means the parcel of the plaintiff came to the defendants' hands, will not prevent it from being a contract with the plaintiff. With regard to the last point, it is one of great importance, and we will look at the pleadings, and consider it.

PATTERSON, J.—With regard to the first point, it rests upon the argument, that the innkeeper at Melksham was not the servant of the defendants, and that the receipt, therefore, by him of the parcel was not for them. Now, it appeared in evidence, that the innkeeper kept a general booking-book for the purpose of booking parcels, to be conveyed to the different places on the road to which they were directed. That book was kept for booking parcels for the mail as well as for other coaches. The mail had constantly stopped there for two years and a half; and why did it stop? Not for the purpose of changing horses; for, if that had been the case, there would have been a strong argument in favour of the defen-

dants:—it stopped for the express purpose of receiving parcels left at the innkeeper's to be sent by the mail. Then, with respect to the contract not being entered into by the defendants with the plaintiff, the evidence shews, that no undertaking was entered into by the mail-cart proprietor, at Bradford, to convey to London; his responsibility ceased when he delivered the parcel to the innkeeper at Melksham. He was the agent of the plaintiff. With respect to the third point, there is great difficulty in construing the different sections, so as to make them consistent the one with the other.

COLERIDGE, J.—I am of the same opinion. If the facts are stated in the order in which they occurred, the case is clear. The plaintiff wishes to send a parcel to London. He takes it to the post-office at Bradford, that it may be left, by the mail-cart, at Melksham, where the mail stops. That was not a contract between Syms and the man at Bradford, to take the parcel to London, but to Melksham. As soon as the mail-cart got to Melksham, the proprietor had performed his contract, and earned his reward. What takes place at Melksham? The parcel is delivered by the innkeeper to the guard of the mail to be forwarded to London. The mail had stopped at the inn for upwards of two years;—for what? clearly for the purpose of receiving parcels. Would not that then make it a receiving-house of the defendants? It is said not, because the same person (the innkeeper) receives parcels for different proprietors of coaches stopping at his house; and that it was at his option to send it by what conveyance he pleased. As soon, however, as he, who was the agent of the person sending the parcel, has determined by what coach the parcel shall be sent, he becomes the agent, and receives that parcel for the proprietors of the coach so determined upon, and by which the parcel is sent. As to the last point, it is right that we should consider it.

WILLIAMS, J.—The great contest at the trial was, whether this was a receiving-house or not. It struck me, as it did the jury, that it was a case of no difficulty whatever in that respect. The same facts dispose of the two first points. For two years and a half this man (the innkeeper

at Melksham) had been accustomed to take parcels for the mail, and was in the habit of receiving payment from the mail-coachman for his portion of the carriage. Can it then be said that this is not a receiving-house, conducted for the benefit of the defendants?

Rule refused on first and second grounds.

Cur. adv. vult on the third.

The motion was made on the 3rd of November; and now, November 15th,—

LORD DENMAN, C.J. said—We disposed of all the points which were raised upon the motion, with the exception of one, which was, whether the plaintiff, having sent an article to the defendants beyond the value of 10*l.* mentioned in the act, could recover, not having at the time of its delivery given any notice of its value, or paid any higher rate of carriage. The pleas were—first, the general issue; secondly, that the plaintiff did not cause the certificate to be delivered to the defendants for the purposes in the declaration mentioned; and, thirdly, that it was not delivered at a receiving-house, but to a servant of the defendants. Under the second plea, we think that there can be no doubt the plaintiff is entitled to recover. The jury have found, that the parcel was delivered at a receiving-house of the defendants, and *non constat* but that, when it was so delivered, notice was given of the value. The case cited and relied upon was a case of *Owen v. Burnett*, which was decided before the new rules; and we are of opinion, that that defence cannot, since the new rules, be given in evidence under the general issue.

Rule refused.

1836. { THE KING v. THE CHURCHWARD-
Nov. 10. { DENS OF ST. MICHAEL, PEM-
BROKE.

Church Building Act—Church Rate—Churchwardens.

Where a sum of money was borrowed on the credit of the church rates, and it was stipulated that the principal should not be called in for twenty years from the time at which it was lent:—Held, that the proper

construction of the act, 59 Geo. 3. c. 134. s. 40. was, that the churchwardens should raise annually a sum sufficient to pay the interest, as also a sum equal to the amount of the interest, to constitute a fund for the ultimate payment of the principal at the end of twenty years; but that the lender was not entitled to have that sum paid over to him in redemption of the principal.

A rule had been obtained, calling on the churchwardens of St. Michael, Pembroke, to shew cause why a mandamus should not issue directed to them, commanding them to pay to Ann Morgan the instalments which had become due of the sum of 1,000*l.* borrowed by the churchwardens upon the credit of the church rates, under the provisions of the statute 59 Geo. 3. and also the arrears of interest due thereon, or to raise by rate, pursuant to the statute, a sufficient sum of money to pay as well the said instalments due of the principal sum as also the arrears of interest.

By the indenture, bearing date the 26th of September 1830, on which the sum of 1,000*l.* was advanced, and by which it was charged upon the church rates, it was agreed that the sum advanced should not be called in and paid off before the expiration of twenty years from the day of the date of those presents, unless the said churchwardens should be desirous of paying off the same at any time before or as soon as a sufficient sum should be raised by means of the said rates or otherwise.

The 40th section of the 59 Geo. 3. c. 134. enables the churchwardens, when any parish is desirous of taking down the existing church, to take it down and to rebuild it, and to borrow money for those purposes on the credit of the church rates, and to make rates for the payment of the interest thereof, and for forming a fund, of not less than the amount of the interest, for repaying the principal, as agreed upon by the lenders (1).

(1) Sec. 40—"And be it further enacted, that when any parish shall be desirous of extending and increasing the accommodation in the parish church, and it shall be found necessary or expedient to that end to take down the existing church and to rebuild the same on the same site or on a more convenient site, it shall and may be lawful for the churchwardens of any such parish, with the consent of the vestry, or persons possessing the powers of vestry, and with the

Maule shewed cause against the rule which had been obtained.—It is impossible to say that any instalment is due in the present case. The agreement between the parties is one to which the section of the act under which this motion is made is not applicable, that is, the 14th section, which applies to money borrowed for building new churches, but this was money borrowed under the 40th, which applies to money borrowed for rebuilding; and as, by the terms of the agreement, the money is not to be paid for twenty years, there is nothing in the act to enable the churchwardens to raise a fund for the payment of it at the present time.

Sir W. W. Follett, in support of the rule.—The act requires a rate for the payment of interest annually, and also to raise such a proportion of the principal as is equal to the interest, in order to raise a fund out of which to pay the principal ultimately. If it were allowed to stand over to the end of the twenty years, the parishioners in 1850 would be charged with the whole sum, which ought to have been charged proportionably on the inhabitants of each year. If they are not to raise the fund and pay it over, the fund, at all events, is to be raised to the amount of the year's interest.

[*PATTESON, J.*—Does the act of parliament point out what is to be done with the fund?]

It does not; but it is apprehended it is to be paid to the party.

[*COLERIDGE, J.*—What sense do you give to the terms in the agreement, "not to be called in before the expiration of twenty years"?]

consent also of the ordinary, patron, incumbent, and lay impropriator, if any such there be, to take down such existing church and to rebuild the same upon the same or upon a new site; and the said churchwardens are hereby authorized and empowered to borrow and raise, upon the credit of the church rates or any rates made under the said recited act, or this act, of any such parish, such sum or sums of money as shall be necessary for defraying the expense, or any part of the expense, of the taking down and rebuilding such church, and to make rates for the payment of the interest of such sum or sums of money so to be borrowed and raised, and of providing a fund of not less than the amount of the interest of the sum advanced for the repayment of the principal, or for repaying such principal in such manner and at such times and in such proportions as shall be agreed upon with the persons advancing any such money," &c.

LORD DENMAN, C. J.—No doubt the writ must go to raise enough to pay the interest due, and I also think it must go commanding the churchwardens to raise a sum equal to the interest, to constitute a fund out of which ultimately to pay the principal. Though the word "annual" is not in the act of parliament, it can only be understood by supposing that the rate is to be made annually, to constitute a fund equal to the interest. The churchwardens are not to pay the principal over, as, by the terms, that is not to be called in till the end of twenty years.

PATTESON, J.—The mandamus must be modified. It should be to the churchwardens, commanding them to make a rate to raise the interest, and pay it over, and also to raise a fund equal to the interest for the six years which have elapsed.

Rule for a mandamus so modified.

1836. { THE KING v. THE MINISTER
AND CHURCHWARDENS OF
STOKE DAMEREL.

Churchwardens—Mandamus to convene a Vestry.

If it be made to appear, that a considerable number of the parishioners are desirous of having a vestry called, and they are unable to call a vestry, from the refusal of the minister and churchwardens to aid them in doing so, the Court will grant a mandamus to the minister and churchwardens to convene a vestry.

But where the application was to convene a vestry to elect a sexton, the office being full by the appointment of the rector, the Court required that there should be very strong evidence of the existence of a custom for the parishioners to elect to that office, before they would grant a mandamus to try the right; there being another remedy,—by action for money had and received, brought by a party wishing to dispute the title of the sexton against him, the fees having been paid under a protest; or by refusal to pay the fees, when the sexton would have his action against the party so refusing.

[For the report of the above case, see 6 Law J. Rep. (n.s.) M.C. p. 14.]

1836. } THE KING v. BARDELL AND
Nov. 11. } OTHERS.

Indictment—Arbitrator—Submission to Award—Revocation—3 & 4 Will. 4. c. 42. s. 39.

The Court have no power to restrain an arbitrator from proceeding with a reference after revocation.

The statute 3 & 4 Will. 4. c. 42. s. 39, which restrains a party from revoking the power of an arbitrator appointed by an order of Nisi Prius, &c., or "by or in pursuance of any submission to reference, containing an agreement that such submission shall be made a rule of court," applies only to submissions by orders of Nisi Prius in civil actions, and not to an order of Nisi Prius referring an indictment which contained an agreement that it should be made a rule of court.

A bill of indictment had been found at the Clerkenwell Sessions in September 1834 against the defendants for a conspiracy to obstruct George Shillibeer and William Morton in carrying on the business as owners of omnibuses. The record of the indictment was removed by *certiorari*; and, on the indictment being called on before Lord Denman, C. J., on the 15th of May 1834, at the Westminster sittings, on the suggestion of his Lordship, it was ordered by the Court, and with the consent of parties, their counsel and attorneys, that the jurors should be discharged from giving a verdict, subject to the award, order, and arbitrament, final end, and determination of W. Channell, Esq., barrister-at-law, to whom all matters in difference between the prosecutor and the defendants, &c., were thereby referred. And it was ordered, that the Court of King's Bench might be prayed that the order be made a rule of court.

Between the order and appointment, which was for the 16th day of December 1835, and postponed to the 15th of January, an arrangement and settlement of the matters in difference between the prosecutors and defendants took place by the decision and arbitration of George Cloud; and on attending before the arbitrator on the 15th of January, the submission of the prosecutors and the defendants, with the award of George Cloud and George Little, were

shewn to the arbitrator, and a notice of revocation to the following effect:—

"Rex v. Bardell and others.

"We, the undersigned defendants, and their attorneys, revoke the authority given you as arbitrator herein by a certain order of reference dated 15th of May 1834.

"To Mr. Channell.

"Thomas John Bolton,

"H. D. Rushbury, Attorney for all the defendants except the Bardells.

"J. S. Dale, Attorney for the defendants Bardells."

Mr. Channell intimated that he had very great doubts as to his right to proceed with the reference, and recommended an application to be made to this Court by the defendants.

A rule had been obtained, calling on the prosecutors and the arbitrator to shew cause why the arbitrator should not be restrained from further proceeding in the reference, on the ground, that his authority had been revoked, or why the defendants should not now be at liberty to revoke his authority: against this rule—

Bompas, Serj. and Platt, shewed cause.

—The question is, whether the submission to reference in the present case could be revoked since the passing of 3 & 4 Will. 4. c. 42. s. 39, without leave of the Court; this order of Nisi Prius being made by the consent of parties, and it being agreed, that it should be made a rule of court. The power of the arbitrator is "by or in pursuance of a submission to reference, containing an agreement that such submission shall be made a rule of court:" and is therefore, within the statute, irrevocable by any of the parties to the submission without the leave of the Court.

Mr. Attorney General (Campbell), with whom was Clarkson, contra, was contending, that such a reference as this was not in the contemplation of the statute,—when he was interrupted.

[LORD DENMAN, C. J.—We are very much of that opinion.]

[PATTESON, J.—Is there any instance of the Court's interfering to prevent an arbitrator from going on and making his award, notwithstanding the revocation? This case was moved before me in the other court, with the express understanding, that the

point was to be raised as to the effect of the statute. But, supposing we should be of opinion, that it is not a case within the statute, can we make the present rule absolute ?]

That was certainly the understanding of the parties: and the object will be attained if the Court intimate that opinion, although the rule, as drawn up, should be discharged.

LORD DENMAN, C. J.—We are quite clearly of opinion, that this is not a case within the act. The act appears to me to apply to two specific kinds of submission of civil disputes, the one by order of Nisi Prius, and the other by agreement, and not to a submission of an indictment. This, therefore, was not an agreement intended by the act.

PATTERSON, J.—I have not the slightest doubt, nor had I at the time when this was moved, that the power of revocation in the present case is not taken away by the statute. The 39th section is drawn with relation to actions depending in the courts, and not to indictments, and the word “agreement” plainly points to the statute 8 Will. 3. A reference of an indictment is at common law, and not by the statute of William.

WILLIAMS, J.—I am of the same opinion. The act was intended to apply to actions in court, and agreements to refer matters in dispute between parties, made out of court.

COLERIDGE, J.—It is quite clear that the enactment had regard to the statute of William, and that the provision of the 39th clause is tied up and confined to civil actions.

Rule discharged, for the reason before alleged.

1836. } THE KING v. THE JUSTICES OF
Nov. 13. } MIDDLESEX.

Highway—55 Geo. 3. c. 68—Order for diverting and stopping up.

An order of Justices for diverting a public highway and substituting a new one, containing in it also an order for stopping up the old highway, under 55 Geo. 3. c. 68, is bad:

to effect both purposes, two separate and distinct orders are necessary.

[For the report of the above case, see 6 Law J. Rep. (n.s.) M.C. p. 10.]

1836. }
Nov. 17. } GRINDELL v. GODMORE.

Baron and Feme—Necessaries—Action.

Where the plaintiff employed an attorney to prosecute the defendant by indictment, for cruelty and ill-treatment to his wife, and he was convicted and sentenced:—Held, that the plaintiff could not recover against the defendant the expenses he had incurred in instituting such a prosecution, as it could not be considered in any way necessary for the wife's protection.

At the trial of this cause, before Alderson, B., at the Spring Assizes, 1835, for the county of York, it appeared, that the defendant had ill treated his wife, and that she having escaped from her husband, applied to the plaintiff to institute a prosecution against her husband for cruelty and ill treatment; that the plaintiff, accordingly, employed an attorney to commence a prosecution; that the defendant was indicted and found guilty, and sentenced to pay a fine of 50*l.* and be imprisoned for twelve months; and it was to recover the expenses incurred by the plaintiff in this prosecution that the action was brought against the husband. The learned Judge directed a verdict for the plaintiff, reserving to the defendant leave to move to enter a nonsuit.

A rule had been obtained, pursuant to the leave reserved, against which, cause was now shewn by—

Cresswell.—The cruelty of the husband to the wife, made the prosecution of the husband necessary for the protection of the wife, and she was entitled to institute that prosecution at her husband's expense—*Shepherd v. Mackreth* (1), where it was held, that the exhibiting of articles of the peace against the husband was necessary for the wife's protection, and that the expenses incurred by the attorney employed by her might be recovered against the husband.

(1) 3 Campb. 326.

If there was any evidence to go to the jury from which they might infer, that the prosecution for cruelty was necessary for the wife's protection, the plaintiff is entitled to his verdict. Now, if the case cited be law, there, is no substantial distinction between that and the present. It may be said, that articles of the peace are to protect the wife from some impending evil; but here was a case of ill treatment that had actually taken place, and the wife might well apprehend a repetition of such ill treatment.

[COLERIDGE, J.—That was a case where the attorney employed by the wife was the plaintiff.]

In *Williams v. Fowler* (2), it was held, that an action would lie by an attorney against the husband, who had compelled his wife to leave him in consequence of ill-treatment, for reasonable costs, incurred by proceedings at law and in equity, to enforce an agreement for a settlement.

[COLERIDGE, J.—In that case, the Court seem to have proceeded on the ground of there being some evidence of an undertaking by the husband.]

In *Harris v. Lee* (3), it was ruled, that if money be lent to the wife, for the purpose of providing necessaries, the lender cannot recover against the husband, because the wife may have been already supplied with necessaries; but if necessaries are supplied, then may the amount be recovered against the husband. So, here, if the money had been lent by the plaintiff to the wife, for her to employ an attorney, the money could not have been recovered; but the plaintiff having actually expended the money in counsel's fees, in the expenses of various witnesses, and having incurred a liability to the attorney whom he employed to prosecute, may maintain this action. The wife had no opportunity of misapplying the money.

Alexander (with whom was *Wightman*), *contrà*, was stopped by the Court.

LORD DENMAN, C.J.—It is impossible to say, that an indictment under any circumstances of ill usage of his wife by the husband, can be considered as necessary for the wife's protection. There is another and a more effectual mode pointed out by

the law for that purpose—namely, exhibiting articles of the peace. In the case which has been cited from *M'Clelland and Younge's Reports*, there appears to have been an express undertaking by the husband to pay all reasonable expenses; and in *Harris v. Lee*, the question was, whether the trustees of lands devised by the husband for payment of his debts, could be compelled in equity by the lender to discharge a sum advanced to the wife, to pay for medicine and attendance and necessaries during an illness. The Lord Chancellor thought that a bill in equity could be maintained, always considering the point to rest upon the question, whether the articles supplied were necessaries.

PATTESON, J.—Looking at the cases it will be found, that they all proceed on the ground, that what has been supplied to the wife has been necessary. It is impossible to say, that it was necessary for her to prefer an indictment for cruelty.

With which WILLIAMS, J. and COLERIDGE, J. concurring—

Rule absolute.

1836. } THE KING v. THE INHABITANTS
Nov. 21. } OF EASTINGTON.

Indictment—Pleading—Arrest of Judgment—Judgment non obstante veredicto.

Judgment non obstante veredicto is always upon the merits, and never granted but upon a very clear case.

Where to an indictment against a parish for not repairing a road, the defendant pleaded that there was a township within the parish, that the road lay within that township, and that, by immemorial custom, that township was bound to repair all roads which, but for the custom, would be repairable by the parish; but the plea omitted to aver that the road in question was one "which, but for the custom, the parish would be liable to repair;" and the jury, finding the existence of the custom, gave a verdict for the defendants:—Held, that the Court could not give judgment non obstante;—Held, however, that the want of the above averment in the plea, rendered it bad in arrest of judgment.

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 17.]

(2) 1 M'Clell. & Y. 269.

(3) 1 P. Wms. 482.

1836. } THE KING V. THE TRUSTEES OF
November. } THE GREAT DOVER STREET
ROAD.

Poor-rate—General Turnpike Act, 3
Geo. 4. c. 126—Exemption.

The exemption in the 51st section of the General Turnpike Act, of tolls taken at any gate erected by the trustees or commissioners of a turnpike road from the poor-rate, applies to all turnpike roads, whether the trustees are interested as shareholders, or merely trustees of a turnpike road for the public benefit.

[For the report of the above case, see
6 Law J. Rep. (N.S.) M.C. p. 25.]

1836. } THE KING V. THE LORD OF THE
Nov. 9. } MANOR OF HEXHAM.

Copyhold—Admission—Mandamus.

Where it is necessary, to enable a party to try his right to an estate of copyhold, that he should be admitted, this Court will compel the lord by mandamus to admit, although the lord may have already admitted another person.

A rule had been obtained calling on the lord of the manor and his steward to shew cause why he should not admit one Richard Errington to certain copyhold tenements, within and parcel of the manor of Hexham.

The affidavits on which the rule had been granted stated, very particularly, the mode in which the estates in question were settled by the will of Elizabeth Armstrong, through whose hands they had passed, and that under the settlement they had, on the death of William Scott Ord, descended upon the right heir of Elizabeth Armstrong.

In June 1835, Richard Errington claimed to be such right heir, attended a manor court, and appeared to prove that he was the right heir. The homage on that occasion found him to be the right heir; but the steward refused to admit him. The steward, in his affidavit, admitted, that the homage had found Richard Errington to be the right heir; but stated, that the evidence offered by the prosecutor was, in his opi-

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nion, not conclusive. He also stated entries and admissions from the court roll, at variance with the statement of title in the affidavit of the applicant.

J. Bayley shewed cause against the rule which had been obtained.—It was not usual to admit two parties claiming under different rights to the same copyhold, and there is no authority for saying that this Court will compel the lord of the manor to do so by mandamus.

W. H. Watson, contra.—There is not, as it is believed, any authority upon the subject; but principle is in favour of granting this application. It is only that the party may have an opportunity of trying his right, that the admission is required.

LORD DENMAN, C.J.—I think that the rule should be made absolute. I should like to have had an authority. But on principle it appears to me, that the writ should issue, otherwise in some cases the steward might shut out one party from making his claim.

COLERIDGE, J. concurring;—

PATTESON, J. and WILLIAMS, J. having left the Court—

Rule absolute.

1836. } BOTFIELD AND ANOTHER V.
Nov. 10. } DIXON AND ANOTHER.

Arbitration—Order of Reference—Construction—Special Case.

Where, by an order of reference, a verdict was taken for the plaintiff, subject to the award of an arbitrator, to inquire and determine certain specific matters pointed out in the order of reference, and to the opinion of the Court of King's Bench upon a special case, and that the arbitrator should have further power to certify any other fact which, in his judgment, should appear necessary to be stated to the Court in a special case, in order to raise and abide the issues in the cause:—Held, that it must be taken to have been the meaning of the order of reference, that the facts found by the arbitrator should be those, on which, in a special case, the Court were to decide: that the certificate of the arbitrator was in substance the special case; and accordingly that it should be set down in the special paper as

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the special case to be argued.—Coleridge, J. dissentiente.

Debt on covenant against assignees of a mining lease.

At the trial of this cause, before Tindal, C.J., at the Summer Assizes, 1833, for the county of Stafford, a verdict was found for the plaintiff, 37,075*l.* 19*s.* 9*d.* debt, with 1*s.* damages and costs, subject to the award thereinafter mentioned, and to the opinion of the Court of King's Bench, on a special case; and that it should be referred to the order, arbitrament, final end, and determination of a barrister, to inquire and determine, by the examination of the witnesses on the part of the plaintiffs and the defendants, and from the inspection of the mines or otherwise, as he should see necessary, whether from Christmas, 1827, to Michaelmas, 1832, or during any and what part of that time 600 tons of coal per week could be gotten out of the mine demised, if worked according to the true intent and meaning of the lease; and in that inquiry to specify the quantity of each different kind of coal; and that the arbitrator should have further power to certify any other fact which, in his judgment, should appear necessary to be stated to the Court in a special case, in order to decide the issues in the cause.

The arbitrator having gone into the evidence, and examined witnesses, and inspected the mine, stated the result of his inquiries upon the particular matters specified in the order of reference, and all other matters, the result of that evidence, which appeared to him necessary to raise the question, on the several issues, in a special case, stated for the opinion of the Court. This certificate of the arbitrator was then submitted to the Lord Chief Justice, who approved of it, as raising all the several points to be raised on the issues.

The award was in favour of the plaintiffs, and the defendants, the unsuccessful parties, objecting to this finding being taken as the special case for the opinion of this Court, a rule had been obtained, calling on the defendants to shew cause why the certificate of the arbitrator should not be set down in the special paper as the special case to be argued; against this, cause was now shewn by—

Sir W. W. Follett and W. J. Alexander, who contended, that it was not the intention of the order of reference, that the certificate of the arbitrator should be taken as the special case. The parties contemplated a case being subsequently drawn up and signed by counsel on each side. The certificate does not state all the facts necessary to raise the points which the defendants wish to raise. Of course, therefore, their counsel decline signing it as a special case. There is a case of *Jackson v. Hall* (1), where a verdict was taken for the defendant, subject to the opinion of the Court, upon a reference in the Common Pleas, where the Judge and counsel had signed the case, and the plaintiff had obtained a Serjeant's hand, and handed it over to the defendant's attorney for the like purposes. The attorney refused, and the *postea* was ordered to be delivered to the plaintiff. That had been signed by counsel for both parties, but nobody has agreed to this special case; and the only alternative, where parties refuse to sign a special case, is to send the cause down for a new trial—*Medley v. Smith* (2). It would be desirable for the Court to ask the learned arbitrator, who is in court, what was his understanding of the order of reference—whether it was that he should state a special case for the opinion of the Court or not.

R. V. Richards and Whateley shewed cause.—If, in such a case as this, the finding of the arbitrator were not to be taken as the special case to be argued before the Court, the whole object of the reference would be defeated. The arbitrator had all the evidence before him; he inspected the mine, and had every opportunity of ascertaining the facts; and the facts which may be wished to be introduced in the case as facts on the other side, may be such as the arbitrator did not believe to exist—*Rawsthorn v. Arnold* (3) was cited.

The COURT, after considerable hesitation, referred to the learned arbitrator to know in what way he understood the order of reference.

Mr. Lumley, the arbitrator, said, that

(1) 8 Taunt. 421.

(2) 6 B. Mo. 53.

(3) 6 B. & C. 629; s. c. 5 Law J. Rep. K.B. 270.

certainly his impression of the meaning of the order was this: not that in form he should draw the special case for the opinion of the Court, but that he should state all facts relating to the matter, specifically mentioned in the order of reference, and all other facts that he should think material to be stated in a special case, in order to decide the issues raised.

LORD DENMAN, C.J.—There certainly may be some difficulty in saying precisely what was the intention of the parties on this order of reference, whether the finding of the arbitrator should be taken as the case for the opinion of the Court, or whether a case was subsequently to be drawn up and signed by himself, in the usual course. I think, however, that it must be taken to have been contemplated, that the facts found by the arbitrator should be those on which the Court should give an opinion. The finding of the arbitrator is, in substance, the special case, and should be set down for argument as such.

PATTESON, J. and WILLIAMS, J. were of the same opinion, that in substance the finding of the arbitrator was the special case.

COLERIDGE, J.—I certainly rather differ from the view that the rest of the Court take of this. I should have been inclined to agree with the arbitrator in the view he took of his powers under the reference, that he was to find the facts; the special case to be drawn up in the usual mode. I am not sorry that the majority of the Court are of the contrary opinion.

Rule absolute.

1836. { **DOE d. ROWLANDSON AND OTHERS**
Nov. 3. { **v. WAINWRIGHT AND ANOTHER.**

Evidence—Feoffment—Proof of Livery—Attesting Witnesses.

Where, on the sale of an estate to a party, it appeared that a feoffment was handed over to him as part of the title-deeds of the estate, and which he had been in possession of ever since, together with the estate:—Held, that such party could not be considered otherwise than as claiming under the feoffment, and

that it was competent to the adverse party, after notice given to produce the feoffment, to give secondary evidence of it by an abstract, without calling the attesting witness to the feoffment, and without proof of livery of seisin.

This was an action of ejectment brought to recover premises in Dale Street, Liverpool. The declaration contained one demise by Margaret Williams, another by Jeremiah Williams. The defendant Wainwright defended as landlord.

At the trial, before Coleridge, J. at the last Assizes for the county of Lancaster, it appeared that the property in dispute consisted of a yard upon which were some offices which had been used by the defendants. The counsel for the lessor of the plaintiff relied in his opening upon the following facts.

On the 9th of July 1807, by deed of feoffment between James Rogers, of the first part; James Oldham, of the second part; Michael Williams, of the third part; and Jeremiah Williams, of the fourth part; a piece of land, with the messuage and buildings thereon erected, which included the premises in dispute, were conveyed to Michael and Jeremiah Williams and their heirs, to the use of Michael and Jeremiah and the heirs and assigns of Michael, in trust for Michael Williams, his heirs and assigns.

Michael Williams shortly afterwards sold a portion of the land described in the feoffment, but not the premises in dispute, and he continued to occupy those until his death in 1821. He had previously made a will, by which he devised this property to his wife Margaret for life, with remainders over.

Margaret continued in possession until 1827, when she was turned out of possession by a Mr. Etches, who had a transfer of a mortgage made by Michael Williams in 1808 of a portion of the property conveyed by the feoffment, but which, it was alleged by the plaintiff, did not comprise the property in dispute.

In order to make out his case in evidence, the plaintiff called upon the defendant to produce the feoffment; and on its not being produced, and a notice to produce having been proved, he called a witness,

who stated that he was clerk to Mr. Houghton, an attorney, who was possessed of the property in dispute; that Houghton sold it to Wainwright, and upon that occasion an abstract of the feoffment was prepared, and he handed over to Wainwright the feoffment. The witness produced the abstract, which he said was a correct statement of the contents of the feoffment; and, on its being proposed to give it in evidence, the witness was asked, on cross-examination, whether there was not an attesting witness, and whether a memorandum of livery of seisin was not indorsed on the feoffment. He answered both these questions in the affirmative. It was objected, first, that the abstract was inadmissible, because the attesting witness was not called to prove the execution, and, secondly, because livery of seisin was not proved. It was answered, that it was not necessary to call the attesting witness where the party claimed under the deed, and for this *Doe v. Hemming* (1) was cited. The abstract was received in evidence, but, at the conclusion of the trial, on a verdict being found for the plaintiff, the learned Judge gave the defendant leave to move to enter a nonsuit.

Neville, pursuant to the leave given, now moved.—He contended, that the abstract of the feoffment was improperly received in evidence. The first objection which arose to the admissibility of the abstract was, that supposing secondary evidence to be admissible, the abstract was not the best secondary evidence; there was no proof that there was not a counterpart, or a copy, which would have been better evidence than the abstract.

[COLERIDGE, J.—It was not the best in degree, but it was the best in kind.]

Munn v. Godbold was cited (2).

[LORD DENMAN, C. J.—But that argument is of no avail to you, there being no proof that there was any counterpart or copy.]

The second objection to the admissibility of the abstract is, that it appearing there was a subscribing witness to the original feoffment, he ought to have been called. There is no rule of law clearer, than that when there are subscribing witnesses to a

deed, which does not prove itself, they must be called—*Gillies v. Smither* (3).

[COLERIDGE, J.—Here you claimed under the feoffment.]

That was the answer given to the objection as making it unnecessary to prove the exemption; and *Doe d. Tyndale v. Hemming* was relied on; but the defendant never did claim under the feoffment. In the case cited, the attorney of the party had recognized the lease as a valid lease; but there was nothing here to shew any recognition by the defendants of the validity of this deed of feoffment.

[COLERIDGE, J.—The feoffment formed part of the abstract of title.]

There was no proof of any abstract of deeds as of title; but that of the feoffment, which feoffment, along with other title-deeds, was delivered to Wainwright by Houghton: but, if it is to be supposed that the mere acceptance of a deed along with others is a recognition of its validity, the doctrine would be exceedingly dangerous. The fact of the sale having taken place from Houghton, is hardly to be taken into consideration by the Court. There was no evidence given of a written contract for the purchase; and all that it amounted to was to shew an equitable interest conveyed to Wainwright; but, in order to rely upon the answer that the defendant claimed under the feoffment, it should have been shewn that he claimed a legal title. Thirdly, there was no proof of livery; and without livery, the feoffment was nothing. Except for the Statute of Frauds, a parol feoffment with livery would be good—*Co. Litt.* 49, a, 6; and in *Gilbert on Evidence*, 75, it is made a question, whether the plea of a feoffment by deed could be considered as proved by shewing a feoffment by parol. It may be said that it will be presumed, from the indorsement of livery of seisin, that it was actually delivered. *Doe v. the Marquis of Cleveland* (4) is an express authority that that is not so. In *Bull. N.P.* 256, it is said, "though a deed of feoffment be proved to be duly executed, yet that is not sufficient to convey a right, unless livery of seisin be likewise proved. If the jury find a deed of feoffment, and that possession has gone along with the deed,

(1) 6 B. & C. 28.

(2) 3 Bing. 392.

(3) 2 Stark. 528; s.c. 1 Stark. Evid. 320, 2nd ed.

(4) 9 B. & C. 864; s.c. 8 Law J. Rep. K.B. 74.

yet, unless they expressly find livery, the Court cannot adjudge it a good conveyance, for they are only the Judges of what is the law, and have nothing to do with the probability of facts. Therefore, they cannot find a lawful conveyance, unless the jury find a delivery of the fee. *Fin. Abr.* 'Feoffment,' F, a, pl. 5. is to the same effect, that the presumption is to be made by the jury.

LORD DENMAN, C. J.—With regard to three points that have been argued, I confess I have no doubt. The title of Jeremiah Williams depended on the feoffment, which, not having in his possession, he made out, in proof, not by the production of the feoffment itself, but after notice to produce it given to the defendant, in whose possession the original feoffment was proved to be, he gives secondary evidence of it. This secondary evidence consisted of an abstract, which was prepared by the party who produced it, who was employed as the clerk to the vendor on the occasion of the sale from Houghton to the defendant, and who stated the contents of the feoffment. That was receivable, if it was proved, that the party claimed under the feoffment. Houghton was in possession; he sold the premises to the defendant. It would be unreasonable to say, that he did not claim under the feoffment. If it was not necessary to prove the feoffment by reason that the party claimed under it, so neither was it necessary to prove the essential part of the conveyance by feoffment, livery of seisin; because, where a party claims under an instrument, that dispenses with the necessity of proof of all the particulars that go to make out the validity of the deed.

PATTESON, J.—I am of the same opinion as to the admissibility of the abstract. The notice to produce having been proved, the first question raised is as to the abstract being the best secondary evidence. I am not prepared to say, that, if it had been proved that there was a copy of the feoffment, the lessors of the plaintiff would not have been bound to have given notice to produce that copy; but I do not mean to be concluded by any observation on that point. It is laid down in the books, that the counterpart is the next best evidence, and next to that a copy; but here there was no evidence of

any counterpart or copy ever having existed. The other question is, whether the subscribing witness to the feoffment should not have been called. That depends entirely on the question, whether the defendant claimed under the feoffment or not. If, upon notice, he had produced the deed, it is not contended that the lessor of the plaintiff would have been compelled to call the subscribing witness. It being in proof, then, that the defendant received that feoffment at a time when a conveyance was made from Houghton to himself, it is a little too much to say, that he did not take under the feoffment. If he did, there was no necessity to call the subscribing witness. The same observation applies to livery of seisin, for, as he claimed under the feoffment, it was for the jury to presume livery of seisin.

WILLIAMS, J.—I am of opinion that there should be no rule for a nonsuit. We are not called on to consider how far the abstract would have been admissible, if a copy had been proved to have existed. There was no proof of the existence of any such copy. The necessity of proof of livery of seisin and of calling the attesting witness was dispensed with, as the party really claimed under the feoffment. Can we close our eyes to the fact of this feoffment at the time of the sale from Houghton to the defendant, being handed over for the purposes of a title as part of the title?

COLERIDGE, J.—I am of the same opinion. With respect to whether the notice to produce was in time, and to the admission of secondary evidence, the Judge appears to me to stand in the place of Judge and jury. He is to determine the questions on the circumstances, in the same manner as he is to determine whether a sufficient search has been made for an original document to lay the foundation of secondary evidence. Whether this abstract, when produced, and it appearing that there was an attesting witness, made it necessary to call that witness, I thought depended upon the inquiry, whether it was within the principle, that where a party claims under a deed, and has notice to produce that deed, and does produce it, there is no necessity for the other party to prove the execution of that deed. I thought that this case did fall within that principle. A person of the

name of Houghton, who was an attorney, being in possession of the property, sold it to the defendant; the abstract given in evidence was prepared at that time, and the original feoffment was handed over to Wainwright, who is still in possession of the deed. It is not sufficient for counsel to say that his client does not claim under the deed, when it is apparent, from the circumstances, that he must do so. It is not necessary to decide, if a copy had been proved to exist, whether that must have been produced. With respect to livery of seisin, that stands upon the same principle as the calling of the attesting witness. It was no more necessary to prove livery than it was to call the attesting witness.

Rule refused.

The COURT granted a rule *nisi* for a new trial on another ground.

1836. }
Nov. 21. } WOODHAM v. EDWARDES.

Pleading—General Traverse—What put in issue.

To an action of assumpsit on several bills of exchange, the defendant pleaded, that, after the time mentioned for the payment thereof elapsed, the defendant, being then resident in Scotland, in consideration of forbearance by creditors to sue, made a deed or writing duly stamped and attested, according to the law of Scotland, by which he alienated, &c. all his goods for the benefit of his creditors in discharge of his debts; that notice was given to the creditors, of whom the plaintiff was one; and that the plaintiff, by his writing, signed by him, which writing was valid by the law of Scotland, did appoint H. R. as his attorney, &c., who adopted the deed: that all and singular the proceedings aforesaid were pursuant to and in conformity with the law of Scotland; whereby and by reason of the said several premises, and by effect of the aforesaid law, he, the defendant, hath become absolutely discharged, in respect of his person, lands, goods, and chattels, from the several causes of action in the declaration. The replication alleged, that the defendant had not become, nor was he discharged, &c. in manner and form:—

Held, that, by this replication, the law of

Scotland was traversed, and that it was incumbent on the defendant at the trial to give evidence, in support of the issue, of what was the law of Scotland in this matter, and to shew that, by that, the facts stated operated as a discharge.

And supposing that the allegation in the plea that the defendant was discharged, "according to the law of Scotland," were rejected, no sufficient defence was shewn on the plea as a discharge by the law of England.

Assumpsit on several bills of exchange.

Plea—That, after the accepting of the said several bills of exchange, in the said first, second, third, fourth, and fifth counts of the said declaration mentioned respectively, and after the time therein mentioned for the payment thereof had elapsed, to wit, on &c., he, the defendant, being at that time resident in that part of the United Kingdom called Scotland, and subject to the laws thereof, in consideration that certain persons being, or supposed to be, creditors of him, the defendant, should forbear to molest or sue the defendant in respect of any debt, monies, or claims before and at that time due or supposed to be due and owing to them, or any of them, from him the defendant, had made his certain deed or writing, by which deed or writing duly stamped and attested according to the law of Scotland, and shewn to the Court here, he, the defendant, did alienate, assign, dispose, convey, and make over, to and in favour of John Donaldson, picture-dealer in Edinburgh, and to such person or persons as might thereafter be appointed by his creditors as trustees, to and for the use of his creditors in the deed mentioned, and of other creditors whom the trustee should assume into the benefit of the said disposition, all and sundry his moveable goods, gear, household furniture, books, paintings, wines and all other liquors, coin, cattle, debts owing to him, and other effects, and, in general, the whole moveable estate presently appertaining and belonging to him, and of whatsoever nature and denomination, situate and being within the kingdom of Scotland, together with the lease of the dwelling-house at Clermitson, to and in favour of the trustee and of such other person or persons as might thereafter

be appointed by his said creditors as trustees as aforesaid, whom he did thereby surrogate and substitute in his full right and place thereof, in lieu of and in full satisfaction and discharge of all the debts, monies, and claims due from him or payable to them, the said creditors, by him, the said defendant. That notice of the execution of the said deed or instrument of disposition was given to divers persons being, or supposed to be, creditors of the defendant, as well in Scotland as also in England, and among the rest to the plaintiff; and that the plaintiff, by his writing signed by him, and which writing was, by the law of Scotland, valid and effectual in that behalf, did nominate and appoint one Henry Richards as the attorney of him, the plaintiff, in that behalf; and as such attorney, authorized and empowered him to concur in and adopt the said deed, and to receive the dividends which might and should become due in respect of the said property, by virtue of the said assignment; and that the said Henry Richards, by virtue and in pursuance of such nomination, appointment, and authority as aforesaid, did adopt the said deed and the provisions thereof, for and on behalf of the plaintiff, and did act thereon as the authorized agent of the plaintiff, and was appointed one of the committee chosen by the creditors for the management and distribution of the estate and effects of the defendant, and attended meetings of the creditors under the said deed, and voted and acted as the representative of the plaintiff in the matters thereof in that behalf. That divers other persons being creditors of the said defendant, to wit, James M'Donald, Mr. Smith, Alexander Boyack, and others, in consideration of the execution of such assignment by the defendant, and the acceptance thereof by the plaintiff as aforesaid, did agree to accept the assignment of the goods and chattels of the said defendant as aforesaid, and did accept the same in lieu of and in full satisfaction of their respective debts and claims. That since the execution of the trust deed as aforesaid by him, the defendant, and the adoption thereof by the plaintiff, certain funds, &c. have become available under the trust-deed, &c., and that the sum is sufficient to pay and discharge

all the debts: and that all and singular the proceedings aforesaid were pursuant to and in conformity with the law of Scotland. Whereby and by reason of the said several premises, and by effect of the aforesaid laws, he, the said defendant, hath become absolutely discharged, in respect of his person, lands, goods, and chattels, from the several causes of action in the said declaration mentioned: and this he is ready to verify.

Replication—That the defendant hath not become, nor is he discharged, in respect of his person, lands, goods, and chattels, from the several causes of action in the declaration mentioned, or any of them, or any part thereof, in manner and form as the defendant in his plea hath above alleged.

At the trial, before Lord Denman, C.J., a verdict was found for the defendant, under his Lordship's direction, with leave reserved to move to enter a verdict for the plaintiff. Against this rule, cause was now shewn by—

Erle and Sewell.—There being a general allegation at the end of the plea, that the defendant had become discharged, it will be said upon the other side, that the general replication puts in issue every fact which is stated in the plea; but, if the decision in the Exchequer be correct, that the replication *de injuriâ* applies to actions *ex contractu*, and is not confined to those *ex delicto*, the form of the replication in this case is not sufficient to put in issue every fact alleged in the plea. The traverse drew the attention of the defendant to what was stated in the plea to be the effect of the facts before stated, and not to the facts themselves, and it amounted to a kind of general demurrer. The defendant at the trial relied on the admission by the replication of the facts stated in the plea; and the only question he came to try was as to the effect of those admitted facts, viz. the inference to be drawn from the law of Scotland, that the defendant was thereby discharged. The plea offered a sufficient defence for any portion of the kingdom, whether the debt was contracted in England or Scotland, or elsewhere. Wherever a debtor consents to hand over all his property to trustees for the benefit of his creditors, such a transfer is a valid defence

to an action brought by any one of the creditors who assents to the deed—*Butler v. Rhodes* (1), *Brady v. Sheil* (2). The plea also discloses another ground of defence, that, after the composition deed was entered into by the defendant and by the plaintiff, other creditors came in under it—*Oughton v. Trotter* (3).

Smirke, (with whom was *Peacock*,) contra, contended, that the replication was a traverse of all the allegations in the plea. The plea states certain facts, and concludes with stating, "that, by reason of the several premises, and by effect of the aforesaid laws, the defendant hath become absolutely discharged," &c. By traversing the *virtute cujus*, which, in this case, involves a matter of fact as well as of law, the discharge by the law of Scotland is put in issue, and it was incumbent on the defendant to shew, that the circumstances were such as to be a parol discharge by operation of the law of Scotland. But it is said, that what appears upon the plea is sufficient, according to the English law, to operate as a discharge, and that, therefore, it was unnecessary to resort to the allegation of its being a discharge according to the Scotch law. This is not so, for if the allegation of his being discharged, according to the Scotch law, were struck out of the plea, there is no sufficient discharge according to the English law. It ought to have been made to appear that it was by deed, by which deed the plaintiff was furnished with a complete cause of action as a substitute for that which he lost on the original security.

[*LORD DENMAN*, C. J.—Supposing you are right, is the plaintiff entitled to a verdict? It is not a bad plea.]

The plea may be good; but, if the replication be a traverse of the law of Scotland, the defendant ought to have given evidence of that.—[He was here stopped.]

LORD DENMAN, C. J. — The replication certainly did put the law of Scotland in issue. The traverse of his discharge from the debt was a traverse of

its being a discharge according to the law of Scotland. Then it is said, that all reference to its being a discharge by the law of Scotland may be struck out, and that yet the plea states a sufficient defence to this action, according to the law of England. That does not appear to be the case: there is no deed binding on the defendant or upon the plaintiff, and there is nothing to prevent the plaintiff bringing his action on these bills.

PATTESON, J.—It is quite clear that, by the language of this replication, the Scotch law is put in issue, and the defendant was bound to prove that issue; and, on that ground, I think, the rule for entering a verdict for the defendant should be made absolute. The Scotch law being matter of evidence, the defendant was bound to shew that, by the Scotch law, the circumstances stated in the plea amounted to a discharge of the defendant. But then, it is said, you may reject the allegation, "according to the law of Scotland," and take the plea as a defence by the law of England: I doubt much whether that could be done; but, if it could, it is quite clear that the circumstances stated in the plea did not amount to a discharge by the English law.

WILLIAMS, J. and *COLERIDGE*, J. concurred.

Rule absolute.

1836. { *THE KING v. THE INHABITANTS*
Nov. 22. { *OF CUMBERWORTH AND CUMBERWORTH HALF.*

Highway—Turnpike Act—Liability of Parish to repair unfinished Road.

Where trustees are authorized, under an act of parliament, to make a line of road, consisting of a main line and several branches, it is necessary that the whole undertaking, main line and branches, should be complete before the parish can be subject to a liability to repair.

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 21.]

(1) 1 Esp. 236.
(2) 1 Campb. 147.
(3) 2 N. & M. 71; s. c. 2 Law J. Rep. (N.S.) K.B. 185.

1836. } THE KING v. THE INHABITANTS
November. } OF CROTHWAITE.

Highway — Indictment — Parish Liability.

Indictment of a parish for non-repair of a highway; plea, that the parish was divided into townships, in two of which existed a custom for the township to repair all the highways within it, which, but for the custom, would be repairable by the parish. Replication traversing the custom. Proof that the parish had no surveyor of the highways; that the townships had: that repairs had been done of the highways within the township, under the direction of the township surveyor; but on cross-examination it appeared, that the particular road had been repaired by a third district, Newlands:—Held, that it ought to have been left to the jury to say, what was the character of the repairs done by Newlands, whether for the parish or for the township.

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 18.]

1836. } DOE d. STILLWELL v.
MELLISH.

Copyhold—Steward—Surrender.

Where an officer, created by patent from the lord within a manor, (as for instance, the clerk of the Castle of Farnham, in the manor of Farnham,) stated himself to be in the habit of taking surrenders concurrently with the steward of the manor within that part of the manor:—Held, that he must be taken to be for that purpose deputy steward, and competent to take surrenders without proof of power given him in his appointment to do so.

This was an action of ejectment, to recover copyhold lands situate in the manor of Farnham.

At the trial, before Lord Abinger, C.B., at the last Assizes for the county of Surrey, the lessor of the plaintiff called a witness to prove the surrender of the copyhold in question. The witness stated, that he was the clerk of the Castle of Farnham, which was parcel of the manor of Farnham, and that his appointment to that office was by

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patent from the Bishop of Winchester, who was lord of the manor; that patent, however, gave him no power in terms to take surrenders. He also stated, that as clerk of the Castle of Farnham, he was in the habit, concurrently with the steward of the manor, of taking surrenders of copyholds lying in that portion of it. It was objected, that the steward was the proper person to prove the surrender, and that the evidence of the clerk of the castle ought not to be received. Lord Abinger having overruled the objection, a verdict was found for the lessor of the plaintiff.

Wordsworth now moved for a new trial, on the improper admission of this evidence. He contended, that no second person other than the steward, could take a surrender of copyholds, except by special custom; and those only can take surrenders who form a constituent part of the customary court of the manor. It may be a question here, whether, if the custom were satisfactorily made out, such a custom could exist; and without such evidence, the surrender could only be to the lord, his steward, or deputy steward; and there can be no concurrent right in any one else with the steward, to take surrenders.

LORD DENMAN, C.J.—I do not know what “constituent part of the customary court of a manor” means. The office of clerk of the Castle of Farnham appears in some way connected with the manor, and the officer appears to have been in the habit of taking surrenders in that part of the manor as the deputy of the steward.

PATTESON, J.—The clerk of the Castle of Farnham appears to me a kind of a deputy steward for this purpose.

Rule refused.

1836. } THE KING v. THE TRUSTEES OF
Nov. 9. } THE NORWICH AND WATTON
ROAD.

Turnpike Act — Compensation — Certiorari.

Where the value of several interests is to be assessed by the jury impanelled under the 3 Geo. 4. c. 126. s. 85 (the Turnpike Act), an inquisition finding one gross sum only, is invalid.

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An inquisition having been taken, and the jury having returned their verdict,—held, that it was not premature to remove that inquisition by certiorari before the trustees had made any order upon it.

Semle—That the notice required to be given to the parties interested previous to the summoning of the jury, should appear in the inquisition.

The certiorari to remove proceedings under the 3 Geo. 4. c. 126. is not taken away by the 4 Geo. 4. c. 95.

By the 3 Will. 4. certain trustees were enabled to make a new line of road “in, upon, over, and along any lands, &c. described in a map or plan and book of reference deposited with the clerk of the peace, &c., and to take, pull down, or remove, and take and use any dwelling-houses, &c. mentioned and set forth in the schedule, upon making satisfaction for the same to the owners of the said hereditaments and premises and other persons interested therein, or for the damage which such owners or other persons may respectively sustain thereby.”

An inquisition, purporting to be taken by virtue of a precept signed by three of the trustees appointed by or by virtue of, and acting in execution of, an act of 3 Will. 4, entitled—‘An Act for more effectually repairing the road from the city of Norwich to the Windmill in the town of Watton,’ &c.; and 3 Geo. 4, entitled—‘An Act to amend the general laws now in being for regulating turnpike roads,’ before the said three trustees, upon the oaths of, &c., twelve indifferent men of the said city and county, qualified to serve on juries, who being duly summoned and returned and sworn to inquire into and ascertain and assess the sum or sums of money to be paid by the trustees acting in execution of the first-mentioned act, to E. Strickland, of &c., T. W. Rogerson, of &c., H. E. Blyth, of &c., and T. T. Wiseman and H. Gidley, of &c., or some or one of them *respectively*, as the value, recompense, and satisfaction of and for their *respective* estates, rights, interests, and property of and in—(certain premises described); and also to inquire into and ascertain and assess the sum or sums of money to be paid by the said trustees acting in execution of the said first-

mentioned act, to any other person or persons having any estate, term, or interest in the premises, as the value, recompense, and satisfaction for her or their respective term, estate, or interest therein; and also to determine all such other matters and things relating to the premises, &c.—upon their oaths find, that the sum of 85*l.* is the value, recompense, and satisfaction to be paid to the said E. S., T. W. R., H. E. B., T. T. W., and H. G., of and for their estates, rights, interests, and property of and in the said plasterer's shop, workshed, stable, stone-mason's shop and yards, according to their respective proportions therein.”

A rule had been obtained, calling on the trustees to shew cause why a certiorari should not issue to remove into this court the above inquisition; against this rule, cause was now shewn by—

Kelly and Palmer.—It is objected, that the inquisition is defective, first, because it does not set forth that notice of the demand had been given pursuant to 3 Geo. 4. c. 126. s. 85; and secondly, because it does not sever the different proportions of the sum awarded to each of the parties. But there are several answers to this application. First, the certiorari is taken away by the 3 Geo. 4. c. 126. s. 145; and, though that statute was repealed by the 4 Geo. 4. c. 95, yet section 87 requires, that persons aggrieved by any proceedings under the 3 Geo. 4, or any local act, shall appeal to the Quarter Sessions, and enacts, that no proceeding under that act shall be removed by certiorari: that must apply to the present case. Secondly, the notice need not appear in the inquisition; the statute does not require that it shall be stated in it, and it was not a matter for the jury to inquire into; they were only to assess the value of the premises to be taken, and not to ascertain the existence of their own jurisdiction.

[LORD DENMAN, C. J.—Are you aware of the case of *The King v. Bagshaw* (1)?]

There, it rather appears, that no notice had been given in point of fact.—Thirdly, this is but an interlocutory proceeding, upon which the trustees will make their order for the payment of the money, and against that order the parties may appeal to the Quarter Sessions.

(1) 7 Term Rep. 363.

[LORD DENMAN, C. J.—The trustees must follow the inquisition in their order.]

[COLERIDGE, J.—How do you get out of the provision in the 3 Geo. 4. that the inquisition shall be final and binding?]

Still, the trustees must draw up a complete order,—this inquisition will form part of it;—but, until they have done so, the parties have no right to interfere; and this motion is consequently premature. Lastly, it was not necessary for the jury to sever their proportions of the value of these premises; it does not appear that they had any means of determining the respective interests of the parties.

Andrews and *Austin*, in support of the rule.—The certiorari is not taken away in this case. No question can arise on the 3 Geo. 4. c. 126. s. 145, because that has been repealed by the 4 Geo. 4. c. 95; and that statute only authorizes an appeal to the Quarter Sessions where there has been some final order and determination by the trustees. This could not form the subject of an appeal, and it cannot be said to be any proceeding under the 4 Geo. 4. The certiorari was only intended to be taken away in cases where there can be an appeal to the Sessions. Then this inquisition is not a mere interlocutory proceeding; it is itself a judgment, and the order of the trustees is a minute only of what they are to do. That order is not requisite as a preliminary step before the certiorari shall issue; the trustees may make a verbal order. Suppose they had made an order, they could not get rid of the defect in the inquisition, for it must have followed the finding of the jury. Then the inquisition is defective for not shewing that notice was given, and that the trustees were warranted in issuing their precept. Where proceedings take place which are to be final and conclusive in their result, the parties should shew on the face of them that they have issued with due authority—*The King v. Wilson* (2), *The King v. the Corporation of Liverpool* (3), *The King v. Shephard* (4). Now, the trustees could not issue their precept until thirty days after notice had been given to the parties interested. It

ought to have appeared that such notice had issued. *The King v. Bagshaw* is precisely in point. Lastly, the inquisition is not final; the jury have not assessed the proper shares of each party; therefore, it cannot be determined how much is to be paid to each of the parties interested.

[LORD DENMAN, C. J.—Should it not appear on your part that a separation of the compensation is required? The objection is, not that the inquisition is not final, but that it does not properly award compensation to the parties according to their distinct shares.]

They have not awarded the compensation which ought to be made for the erection of the fences, which, according to *The King v. the Llandillo Commissioners* (5), must be made by the owner of the adjoining land. Here, neither the compensation nor the costs can be divided.

LORD DENMAN, C. J.—The first objection is, that the inquisition does not contain such a notice as the act requires, to enable the trustees to summon the jury. It is not necessary to enter into the question at length, because *The King v. Bagshaw* is a clear authority to shew that the omission is fatal. Besides this, there is also a conclusive objection to the inquisition. It appears that there were several parties with separate interests, and the jury were impanelled to award compensation according to their *several* interests. They have found, however, only one sum for the whole of them. But it is questioned whether we can entertain this argument, or whether the certiorari is not taken away by the 4 Geo. 4. c. 95. s. 87, which states, that “no proceedings taken in pursuance of that act shall be removed by certiorari.” It is contended, that those words mean, in pursuance of that act or of the 3 Geo. 4. c. 126, by reference to the former part of the clause; but I do not think that is the true construction, but that the words are confined to proceedings taken in pursuance of that act. But even if it were so, and if it were correct that the certiorari is taken away where there is an appeal, on reference to the 3 Geo. 4. c. 126. s. 145, it will be seen that the appeal is there given to any person who

(2) 5 N. & M. 164; s. c. 4 Law J. Rep. (N.S.) M.C. 118.

(3) 4 Burr. 2244.

(4) 3 B. & Ald. 414.

(5) 2 Term Rep. 232.

shall think himself aggrieved, not by any act of the trustees or commissioners, but of the Justices. Now, here, there is no act of the Justices or the trustees, but of the jury. Therefore, no appeal is given, the certiorari is not taken away, and there is a fatal defect in the proceedings.

PATTESON, J.—With respect to the question whether the certiorari is taken away, it seems clear to me that the 4 Geo. 4. c. 95. s. 87. does not apply to this proceeding, which is not a proceeding, either in part or entirely, under that act. The clause says, that “no proceedings in pursuance of *this act* shall be removed;” so far the language of the legislature is plain, and shews that it is not taken away. But an argument is raised on the words in the commencement of the section, which refer to the recited act and any local act; and it is urged, that the taking away of the certiorari was co-extensive with the right of appeal. If that was intended, the legislature have not carried their intention into effect. It seems to me, that the better way is to abide by the words of the act, and to say that the certiorari is taken away in proceedings under *this act*, and the present is not a proceeding under *this act*. Then it is said, that the inquisition was not a final act, and that this application was made too soon. The 3 Geo. 4. c. 126. s. 85. provides that, after the jury shall have assessed the damages, the trustees shall order the sum so assessed to be paid; and then it proceeds to declare, that such verdict or inquisition, and judgment, order, and determination thereon, shall be final. I think the word “judgment” must be coupled with “order and determination,” and not with the inquisition. A verdict is not a judgment, and the judgment had not been mentioned before. Perhaps the best way is to treat it as having no meaning at all. Then the question is raised, whether the order of the trustees is not necessary to complete this proceeding, so that we cannot deal with the inquisition until it is completed by their order. I think not. The trustees are not to exercise any jurisdiction or discretion over the verdict. Their act is merely ministerial. It is the inquisition which is binding, and to that we may look. There are several objections to it. The one which has been mentioned by my

Lord, namely, that an aggregate sum is awarded to the several parties, appears to be clearly fatal; so that, whether the notice should appear in the inquisition or not, I need not decide. I wish to say nothing upon the point, except that I would not be understood as saying, that it is not necessary that it should appear on the proceedings.

WILLIAMS, J.—The only doubt I have had in the case was, whether the application was not premature. No case has been cited, in which a certiorari has ever been granted until the judgment has been complete. But that doubt has been removed by the consideration that the trustees could in no respect depart from or amend the previous proceeding. They are merely ministerial. Then, I think that the inquisition is defective. As to the last point, it is not necessary to give any conclusive opinion; but it appears to me, that all that is necessary to give jurisdiction should appear on the proceedings, because, unless the notice had previously been given, the jury had no right to inquire into the value of this property. As to the certiorari, I agree in the observations which have been made by my Brother Patteson. The certiorari must be clearly and distinctly taken away. It has not been so here.

COLERIDGE, J.—The most important point in this case was, whether the certiorari had been taken away. I have always understood the law to be, that express words are necessary to take it away. *The King v. Terrett* (7) was a case where an act of parliament was passed taking away the certiorari with respect to proceedings under it. Another act was subsequently passed, increasing the powers given under the former, but not taking away the certiorari; and it was held, that the Court of King's Bench could not be prevented from issuing a certiorari, because the clause in the first act was not to be incorporated in the second. How, then, does the present case stand? The proceeding is clearly under the 3 Geo. 4, which contained a clause taking away the certiorari. Is it re-enacted in the 4 Geo. 4? That takes away the certiorari for proceedings under it. A great deal of argument has been entered into as

to whether an appeal would lie on this proceeding. That only raises an inference of probability. There may be an appeal and yet a certiorari, or no appeal and no certiorari. But a probability will not suffice—it must be taken away by express words. Assuming, then, that it is not taken away, does it lie in the present stage of the proceedings? Now, whenever the defect is such a one as can never be remedied by any ulterior proceedings, the parties who are interested therein have a right to come to this Court. It is not to be taken that persons are averse to part with their land; they may be anxious to receive the compensation, and will be desirous of seeing that all has been done rightly and securely, and are justified in coming to this Court to have the proceedings corrected. The main question then is, is this such a defect as must remain to the end? It is clear that it is. All that the trustees can do is to make an order in accordance with the inquisition for payment of the money. Is this objection then valid? The jury were impanelled to assess the value of several interests; they have assessed it in one sum, and have left it to the parties to settle their respective shares. The argument in support of the inquisition would go to this, that, if there were a reversioner and persons having present interests, the jury might award a gross sum for the whole, and leave the reversioner and the parties having the present interests to settle among themselves the proper amount to be paid to each.

Rule absolute.

1836. } LORD BOLTON v. TAMLYN.

Parol Demise—Statute of Frauds.

Where there is a tenancy from year to year, created by a parol demise, valid by the 2nd section of the Statute of Frauds, any terms and stipulations may be added by parol to that demise.

But where those terms were contained in a written document, not signed by the parties, but were read over to the tenant at the time when the demise was made,—semble, that though such memorandum could not be read at the trial, it might be referred to by the witness who prepared it, and was present at

the making of the actual demise, to refresh his memory.

This was a special action of assumpsit against the executors of a deceased tenant, for the breach of the terms of a parol lease.

At the trial, before Parke, B., at the Spring Assizes 1835, for the county of York, it appeared that the defendants were executors of the lessee; that in the month of December 1819, the testator's father was tenant of the premises until the following Lady-day. The plaintiff's attorney, at a meeting in the month of December 1819, proposed to let the plaintiff's farm, and read from a printed paper the terms of letting. The testator was present, and assented to those terms, agreeing that he should succeed his father at Lady-day; but no writing was signed. He did then enter upon the land, and continued tenant until his death; since which, the defendants, his executors, had occupied and paid rent. At the top of the printed paper of terms, was contained a memorandum, not signed by either party, but by the clerk of the plaintiff's steward or agent. That memorandum contained the following terms:—"A. B., as agent to the plaintiff, agreed to let, and C. D. agreed to take, &c., (going on to state the terms, the rent, and when payable,) for one year certain, and so from year to year, until a due notice to quit, and that from the Lady-day next following."

A verdict was found for the plaintiff, with liberty to the defendant to move for a nonsuit.

A rule had accordingly been obtained, calling on the plaintiff to shew cause why a nonsuit should not be entered; against which, cause was now shewn by—

Alexander and Addison.—The objection made at the trial was, that if the instrument given in evidence amounted to a demise, it ought to have been in writing, signed by the parties, within the first section of the Statute of Frauds. That if an agreement only, then that, as it was not to be performed within the year, it was inadmissible for want of such signature, by the 4th section. The learned Judge thought that it was a mere condition annexed to a demise within the statute; and that if this was not within the 1st section, it was within the protection

of the 2nd. It was said, that the term was not to commence immediately; that, therefore, it was not a lease, but an agreement for a lease, not to take effect within the year, and was within the 4th section—*Ryly v. Hicks* (1). In *Inman v. Stamp* (2), and *Dampier v. Jones* (3), the instruments were considered as amounting to agreements only; but a lease, although to commence in future, may pass a present interest—1 *W. Saund.* 250. Then was this an agreement for a lease within the 4th section? It will be said that it was—that it was an agreement made in December, for a tenancy, to commence for a year from Lady-day ensuing, and, therefore, not to be performed within a year of the date. *Bracegirdle v. Heald* (4) was cited when this rule was moved. That was a contract of hiring and service, clearly not to be performed within a year. Here was a lease, a present demise. The memorandum was not an agreement, it was not signed by either party or any person on their behalf. The agreement to become tenant was complete when Lord Bolton's agent said, "Do you take these lands on those conditions?" and the tenant replied, "I do." The language used by Patteson, J., in *The King v. St. Martin's, Leicester* (5), applies to the present case. The instrument itself could not be enforced against any one—*The King v. the Inhabitants of Wrangle* (6). The party entered under such agreement; he occupied and paid rent; and will it be said that it was not a tenancy on those terms contained in the memorandum, but that the party became tenant independent of all those conditions, subjecting himself only to the general terms of a tenant from year to year?

Cresswell and *Wightman*, contra.—If a landlord, when he creates a tenancy from year to year, wish to avail himself of terms of tenancy, inconsistent with the terms under which a tenant from year to year holds, it is necessary that he should have an agreement with his tenant for that pur-

pose, by the provisions of the 4th section of the statute.

[PATTESON, J.—Do you mean to say that a party cannot demise by parol, with special terms annexed to that demise?]

The 2nd clause may be sufficient to give validity to the tenancy, and to all the consequences arising out of that; but, if special terms are introduced, which are inconsistent with a tenancy for two years, there must be an agreement in writing, signed by the parties, specifying what those terms are; and there is no exception in the 4th clause, in favour of a lease which is not to take effect within a year. There is the authority in *Strange* certainly, that such a demise as this is within the protection of the 2nd clause. It is no answer to the objection, that the party has for a number of years complied with the terms—*Boydell v. Drummond* (7). What is this but an agreement not to be performed within the year? for the statute contemplates a complete performance of the agreement within the year, and *Bracegirdle v. Heald* is in point.

[COLERIDGE, J.—Suppose only this annexation of a term, that the rent should be payable quarterly, could you not give evidence of that?]

Not unless, by the custom of the country, on a holding from year to year rent was payable quarterly.

[PATTESON, J.—Your argument would go to this—that there could be no reservation of rent in a parol lease from year to year, but the landlord must have reliance on the *quantum meruit*.]

Cur. adv. vult.

This case was argued on the 19th of November, and now, November 25, the judgment of the Court was delivered by—

LORD DENMAN, C. J.—[who, having shortly stated the facts of the case, proceeded]—It was contended on the behalf of the plaintiff, that the testator became tenant at all events at his entry at Lady-day 1820, if not before; and that the memorandum might properly be adverted to, for the purpose of shewing the terms of the tenancy, although not to shew any agreement to become tenant. On the other hand,

(7) 11 East, 152.

(1) 1 Stra. 651; s. c. Selw. N.P. 821.

(2) 1 Stark. N.P.C. 12.

(3) Cro. Jac. 391.

(4) 1 B. & Ald. 722.

(5) 2 Ad. & Ell. 210; s. c. 4 Law J. Rep. (N.S.) M.C. 25.

(6) 4 Nev. & Man. 375; s. c. 4 Law J. Rep. (N.S.) M.C. 43.

it was contended, that that was the agreement; that it was not to be performed within the year, and so required to be in writing by the 4th section of the Statute of Frauds; and, although a tenancy from year to year might have been created, yet, that the terms of it could be only such as result by law from the mere relation of landlord and tenant, there being no writing to satisfy the statute. Now assuming that what passed in the month of December did not amount to a demise, (for which, see *Inman v. Stamp*, and *Dampier v. Jones*.) and that whilst it remained an executory agreement, the performance of it could not be enforced, yet, it by no means follows, that when the actual demise by parol took place, which was valid under the 2nd section of the statute, and the tenancy was actually created by entry and payment of rent, that the terms of that tenancy might not be proved by parol. Leases, not exceeding three years, have always been considered as excepted by the 2nd section from the operation of the 4th; and it seems absurd to say that a parol lease shall be good, and yet that it cannot contain any special stipulation or agreement. No authority is, or can be cited, to shew that it may not; on the contrary, it has always been assumed, that the parol lease meant by the 2nd section, may be as special in its terms as a written one, and we are of opinion that the law is so. But it is contended, that in this view of the case the memorandum could only be used to refresh the memory of the witness, and, perhaps, in strictness, that may be the case; we cannot, however, find that it was used substantially in any other manner on the present occasion. Certainly, it was not treated as being in itself a binding instrument, and whether, in fact, it was read by the officer of the court, or by the witness, is immaterial, no objection on that ground having been taken at the trial. We are, therefore, of opinion, that the verdict was right, and that the rule to enter a nonsuit must be discharged.

Rule discharged.

1836. }
Nov. 8. } FARRY v. DEERE.

Stamp—Lease.

A lease in 1824, demising certain premises at a yearly rent of 20l., and also certain other

fields, from a subsequent period, at the rents then paid by the tenants who then actually occupied them, held sufficiently stamped with a 3l. ad valorem stamp, and not to require an additional stamp of 1l. 15s. in respect of those fields.

Assumpsit for use and occupation.

Plea—Non assumpsit.

At the trial, before Littledale, J., at the last Berkshire Assizes, it appeared, that the action was brought to recover a balance of rent due from the defendant to the plaintiff, for premises occupied by him under the following agreement, dated March 19, 1824, and signed by both.

"Mrs. P. agrees to let to Mr. J. R. D., Donnington Priory, with &c., from the 25th of March instant, for the term of fourteen years, at the rent of 200l. for the first ten years, and 210l. for the remainder of the term, to be paid half-yearly. Mr. D. to pay tenant's taxes—Mr. D. to have a lease for fourteen or twenty-one years, at Mrs. P.'s option. Mrs. P. also agrees to let to Mr. D. the two fields occupied now by Mr. S. and Mr. H., from Michaelmas next, being the end of their current year therein, at the same rent as she actually receives of them, for the same term as Mrs. P. agrees to let him have the house and premises before mentioned." The defendant occupied the house and premises, and also these two fields, which had been let, one at 10l., and the other at 12l., annually. The agreement bore a single 3l. *ad valorem* stamp. At the trial, it was objected, that the stamp was insufficient; but the learned Judge reserved the point, and the plaintiff recovered a verdict.

Ludlow, Serj., on a former day, moved to enter a nonsuit on this objection. This agreement ought to have had a stamp of 1l. 15s. upon it, in addition to the 3l. *ad valorem* stamp actually imposed. The 55 Geo. 3. 184. sched. provides for three description of leases. The first is, where lands are let at a yearly rent without a fine, and there a stamp is imposed according to the amount of the rent. The second is, where a fine is taken, and also a yearly rent of the amount of 20l. or upwards, and there an *ad valorem* stamp is taken. The third is, a lease of any kind not otherwise charged, and on that a stamp of 1l. 15s. is imposed. The *ad valorem* stamp is im-

posed according to the consideration and rent apparent on the instrument—*Robinson v. Macdonnell* (1); and as no rent is stated for the occupation of the two fields, no *ad valorem* duty could have been imposed; and as the agreement for the letting of those fields must have some stamp, it can only be that of a lease not otherwise charged. If the action had been brought for the rent of the two fields, on a paper referring in this manner to the terms of the tenancy, that paper must have been stamped, and could only have been stamped with a stamp of 1*l.* 1*s.* He cited *Turner v. Power* (2).

Cur. adv. vult.

Afterwards, on this day,—

LORD DENMAN, C.J. said—We have no doubt at all, that the lease is properly stamped, and that it does not fall within the class not otherwise charged in the schedule.

Rule refused (3).

1836. }
Nov. 8. } MARTIN v. STRONG.

Slander—Privileged Communication.

The communications between the members of a charitable institution, respecting the conduct of their officers, are not privileged.

Slander by the plaintiff, who was an assistant to a surgeon, at Painswick, in Gloucestershire, for words imputing indecency in the plaintiff's conduct towards the patients of a lying-in hospital in that place.

At the trial, before Littledale, J., at the last Gloucestershire Assizes, it appeared in evidence, that there was a lying-in hospital at Painswick, and the plaintiff was the assistant to the surgeon who attended it. The defendant was the vicar of Painswick, and his wife was one of the subscribers. A meeting of the subscribers had been called, on some other matter, at which the defendant presided, and, during the time that the subscribers were in the room, made some observation upon the plaintiff's

conduct. One of the ladies insisted, as a member of the society, to know what the defendant had to complain of, and the defendant without stating expressly what it was, intimated that he had been guilty of gross misconduct towards the patients. Some doubt was raised upon the evidence, whether the defendant had left the chair or not at the time he spoke the words; and the counsel for the defendant claimed a verdict, on the ground, that the communication was privileged. The learned Judge left the case to the jury, who found a verdict for the plaintiff.

On a former day,—

Sir W. W. Follett moved for a new trial, alleging, that the learned Judge had left it to the jury to say, whether the defendant had made the communication to the witness before he had left the chair, and in his capacity of chairman; because, if so, it was a privileged communication, but not so if it were made afterwards. Now, that was a misdirection. There was no evidence of express malice, and if this communication were made at a meeting of the subscribers, it was privileged, whether the chairman had left the chair or not. He was justified in communicating to another member of the society his opinion of the plaintiff's conduct—*Wright v. Woodgate* (1), *Bromage v. Prosser* (2), and *Macdougall v. Claridge* (3).

Cur. adv. vult.

LORD DENMAN, C. J.—We have ascertained from my Brother Littledale that he left it to the jury to say, supposing the communication to be privileged at all, whether it took place as part of the proceedings of the meeting; and then urged in favour of the plaintiff, to consider whether it was made after the defendant had left the chair: that is not the manner in which it was supposed to have been left. But it is also urged, that the defendant was privileged in making this communication to a person who was a member of the same institution. We cannot assent to that proposition, and can find no case that supports it.

Rule refused.

(1) 5 *Mau. & Selw.* 228.

(2) 7 *B. & C.* 625; *s. c.* as *Turner v. Ford*, 6 *Law J. Rep. K.B.* 122.

(3) See *Blount v. Pearman*, 1 *Bing. N.C.* 408, *s. c.* 4 *Law J. Rep. (N.S.) C.P.* 149; and *Coster v. Cowling*, 7 *Bing.* 456.

(1) 2 *C. M. & R.* 572.

(2) 4 *B. & C.* 247; *s. c.* 3 *Law J. Rep. K.B.* 203.

(3) 1 *Campb.* 267.

1836. } THE KING v. THE CHURCHWARD-
Nov. 5. } DENS AND OVERSEERS OF THE
 } POOR OF EDLASTON.

Poor-rate—Mandamus.

Where one set of parish officers refused to consent to a poor-rate drawn up in the usual form by the other set, unless the latter described the locality of certain property therein, so as to operate as an admission against the interest of one of the latter, the Court granted a mandamus to compel them to make a rate, and made it absolute in the first instance.

[For the report of the above case, see 6 Law J. Rep. (n.s.) M.C. p. 36.]

1836. }
Nov. 15. } CANE v. CHAPMAN.

Statute, Construction of — Annuity —
Pleading—Form of Action.

Commissioners for lighting and paving a town, five of whom constituted a quorum, were empowered by a local act to raise money and to grant annuities, in satisfaction thereof, to be charged on rates to be levied by authority of the act. Five commissioners, in consideration of an advance of money, by virtue of the act of parliament, granted an annuity to be paid out of the rates, which fell into arrear. The act provided, that in any action brought concerning anything done in pursuance of the act, the commissioners might be sued in the name of their clerk:—Held, first, that as the commissioners were not personally nor individually liable on this grant, they were responsible for a breach of a public duty in not paying the annuity out of the rates, and, therefore, were rightly sued in the name of the clerk: secondly, that an action on the case was a proper form of action: and thirdly, that such an action was concerning a thing done in pursuance of the act of parliament, within the meaning of the clause.

To a declaration alleging the advance of the money, the grant of the annuity, the arrear, the retainer of funds out of the rates by the commissioners, their duty to pay the arrears, and their neglect to perform this duty, the defendant pleaded that it was not their duty to pay the arrear:—Held, on special demurrer, that the plea was bad, as traversing what was only an inference of law.

NEW SERIES, VI.—K.B.

Case against the defendant, clerk to the commissioners for paving and lighting the town of Harwich. The declaration stated, that after the passing of the local act, the plaintiff advanced to the commissioners, on mortgage, the sum of 1,350*l.*, for the purchase of an annuity on his own life; and thereupon by a grant then made, according to the form of the statute, five of the commissioners appointed in pursuance of the said act, did, by virtue of the said act, at a meeting held pursuant thereto, grant to the plaintiff an annuity of 140*l.*, out of the rates granted and to arise by virtue of the said act, payable quarterly, the first payment to be made on the 1st of March then next ensuing: that a quarterly payment afterwards became due, and before it became due, the commissioners had received, and then retained in their hands, out of the rates, sufficient funds to satisfy the said quarterly payment. Averment of request to pay, and that thereupon it became the duty of the commissioners to pay the said quarterly payment, or cause the same to be paid to the plaintiff. Breach, non-payment thereof.

Plea—That it was not the duty of the commissioners to pay, or cause to be paid, the said quarterly payment, *modo et forma*.

Special demurrer to that plea, and joined in demurrer.

Cresswell, in support of the demurrer.—This plea is bad, either on the ground of duplicity and multifariousness, as putting in issue all the facts alleged in the declaration, or because it traverses what is merely an inference of law arising out of those facts.

[LORD DENMAN, C.J.—You need not trouble yourself on that point.]

Then it will be contended, that the declaration is bad; and the first objection is to the form of the action. It will be said that case is not the proper form. It is submitted that it is. It was the duty of the commissioners to pay this annuity. The act directs that they *shall* pay the annuity out of the rates, and it is averred that they have money in their hands from the rates. It is a principle of law, that upon every breach of duty, the result of which is a private injury to any individual, an action on the case may be maintained—

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Sutton v. Johnson (1), and *Henley v. the Mayor of Lyme* (2).

[LORD DENMAN, C.J.—There was no breach of contract alleged in those cases. What is to be understood by the *grant* stated in the declaration?]

It is only the mode by which the annuity was conveyed. There are also other authorities—*Com. Dig.* 'Action on the Case for Negligence,' (A 1,) 1 *Roll. Abr.* 98, *Keighley's case* (3), *Schinotti v. Bunsted* (4), and *Lacon v. Hooper* (5).

[COLERIDGE, J.—Might not a mandamus be applied for to compel the commissioners to raise the money and pay the annuity?]

That would be the proper remedy to compel them to raise the money; but here the complaint is, that they have not paid the annuity out of money already raised. *Sprossly v. Evans* (6), and *Steinson v. Heath* (7), also support this part of the plaintiff's case. The second objection is, that the clerk is not the proper party to be sued, but that the action ought to have been brought against the commissioners who executed the grant. But the body of the commissioners are liable for everything done by virtue of or in pursuance of the act, and where they are liable they may be sued in the name of their clerk. The annuity was granted by virtue of and in pursuance of the act, for it is provided that any five of the commissioners may do any act, and may borrow money for the purposes of the act, upon the credit of the rates, and, therefore, the action is rightly brought against their clerk.

Ogle, contra.—The plea is not bad, it is a traverse of what is a mixed question of fact and law, namely, the actual liability of the commissioners to pay this annuity, and thus give the plaintiff a priority over other creditors. Such a traverse is lawful (8); and as to the plea being multifarious, all the facts alleged in the declaration make up but one proposition, namely, the liability of the commissioners. But the declaration is itself defective. First, this action is not

sustainable against the commissioners. They are not personally liable. It was intended that the rates, and the rates only, should be the security for the payment of the annuity; and that is manifested in the clauses of the act (9), which authorize the commissioners to grant the annuities and to mortgage the rates. In *Horseley v. Bell* (10), commissioners were held personally responsible, because they had, in fact, incurred a personal liability. So in *Eaton v. Bell* (11).

[LORD DENMAN, C.J.—It must be taken there that the money had been raised on the credit of the rates.]

Here the grant itself shews that the credit was given to the rates. That being the case, the proper remedy would have been either a mandamus to the commissioners to raise the rate and pay the money, or an action of covenant or assumpsit on the grant against the five commissioners who signed it. But secondly, assuming that some action may be maintained, there are two objections to the present declaration. First, in point of form, *case* is improper; either covenant or assumpsit should have been brought. Here the liability arises on the contract; in all the cases referred to, the duty arose from the law. Secondly, the clerk is not the proper party: where a wrong is done, the actual wrong-doer must be sued; the parties here in fault are the five commissioners, not the whole body, whom the clerk represents—*Everett v. Guoch* (12). Again, the clerk is not to be sued, when the commissioners have been guilty of a nonfeasance only, and the clerk is only to be sued when they have been guilty of a misfeasance or malfeasance—*Umphelby v. M'Lean* (13), and *Waterhouse v. Keen* (14). The clause in the statute is, "that the commissioners may sue or be sued for or concerning anything which shall be done by virtue or in pursuance of this act, in the name of their clerk for the time being;" but that is followed by another, the usual limitation clause, which enacts, "that no action shall be commenced against

(1) 1 Term Rep. 509.

(2) 3 B. & Ad. 77.

(3) 10 Co. Rep. 139.

(4) 6 Term Rep. 646.

(5) Ibid. 224.

(6) 1 Roll. Abr. 103.

(7) 3 Lev. 400.

(8) *Com. Dig.* 'Pleader,' (G, 5.)

(9) P. 56—38.

(10) Amb. 770.

(11) 5 B. & Ald. 412.

(12) 7 Taunt. 1.

(13) 1 B. & Ald. 42.

(14) 4 B. & C. 200; s. o. 6 D. & R. 360.

any person for anything done in pursuance of this act, until fourteen days' notice shall have been given to the clerk of the commissioners." And this latter clause explains the former. And a final objection is this, that the declaration does not allege that the money was advanced by the plaintiff, for the purposes of the act; and it is quite consistent with the declaration that the five commissioners applied it to their own purposes.

Cresswell, in reply, was stopped by the Court from arguing the insufficiency of the plea.—It has been argued, that the commissioners are not personally liable. That is true; the act of parliament authorizes any five of them to do certain acts, for which they shall not be personally liable; and when any five do act, they bind the whole body of commissioners; and the non-payment of the annuity when they are in possession of the rates, is a neglect of duty by all the commissioners. *Everett v. Gooch* is not very easily understood, but this may be collected from it, that if the party who acted could have bound the rest, the treasurer might have been sued;—that is the present case; and, therefore, the clerk is properly made the defendant. Then it is said, because the case does not fall within the clause which requires a notice of action to be given to the clerk, it is not within the clause empowering the clerk to be sued. But the clauses were passed for very different objects, and it is impossible to say, that their granting of this annuity was not an act done in pursuance of the act, and there is nothing to confine the clause to acts of malfeasance or misfeasance. The objection, that it does not appear that the money was advanced for the purposes of the act, should have been taken by plea, or on special demurrer. However, it does appear that it was so advanced, for it is alleged that the money was advanced to the commissioners, and that they granted the annuity by virtue of the act.

LORD DENMAN, C.J.—The Court have already intimated a clear opinion, that the plea is bad, because it traverses merely an inference of law. Then two objections are made to the declaration. The clause in the act of parliament, which requires the commissioners, on raising the money, to

grant an annuity, gives the form which is set out in the declaration.—[His Lordship here read it.]—The annuity is granted out of the rates to arise by virtue of the act. The first question is, whether this is an act done within this act of parliament, so as to entitle a party to make the clerk the defendant. If the grant can be brought within the terms of the clause, he can be sued. The strongest argument to shew that he cannot, arises on the limitation clause, which, it is contended, is correlative to the clause enabling him to be sued. But it appears to me, that the language of the latter is essentially distinguishable from the former. In the limitation clause, it speaks of actions *for anything done* by the commissioners; whereas in that which enables the clerk to be sued, it is *for or concerning anything done by virtue of or in pursuance of the act of parliament*. It seems to me, that when the grant of this annuity was made, it was an act done in pursuance of the act of parliament; and therefore, that the clerk was properly sued. Then the second question is, whether the action is properly brought in *case*. I confess, that upon this point I have felt some doubt. The word "grant," in the instrument declared on, certainly makes it look like a contract, and I should have thought, that an action on the contract was maintainable. However, the consideration that the commissioners are not personally liable on the contract, and are acting in execution of a public trust, makes it proper that an action should be brought against them, for a neglect of that public duty in this form; therefore, the clerk is properly sued, because this was an act done by virtue of the act of parliament, and the form of action in *case* is proper, because there has been a breach of a public duty.

PATTON, J.—The plea is clearly a traverse of an inference of law, and not of any fact. Then, with regard to the clerk being the defendant, it appears to me, that he is properly made so. This is not an action against him personally, so as to make him personally responsible. The act says, "that the commissioners shall be sued in the name of their clerk." It follows, however, that he can only be sued in cases where they would all be liable as a body; and in this view the case in *7 Taunton* is good law. If this had been a contract with

the five commissioners only, so that they were personally liable, I should agree that the action should have been brought against those five; that it would not lie against the whole body; and, consequently, that the clerk could not be sued. But, as I apprehend, this is not a contract personally binding the five commissioners, who made the grant, and who are only the instruments of the whole body of commissioners, to make the grant, to be charged upon the rates; I think the clerk is properly sued for their neglect in not paying over the rates, provided the language of the clause authorizing the action to be brought against him will allow it; and it appears to me, that it does bear this construction. The language of this section is certainly distinguishable from the limitation clause. In the former, the word "concerning" is found, which is not in the latter. The grant is a thing done by the commissioners in pursuance of the act; this action is for money due under that grant; it is, therefore, *concerning* an act done in pursuance of the act of parliament. Then, will an action on the *case* lie? It is quite of course, if the commissioners as a body are liable; because there can be no contract made with the whole body, either individually or as a corporation. The only form of action is, therefore, the present.

WILLIAMS, J.—The plea is bad; it obviously puts in issue an inference of law. As to the alleged hardship arising from the priority which the plaintiff will obtain over the other creditors, if the commissioners have no funds, it is answered by the fact that it is alleged on the record, that they have funds more than sufficient to pay the plaintiff. It has been stated, that the five commissioners only are liable:—that is an assumption against the act of parliament, which directs, that five commissioners shall represent the whole body; and they have not bound themselves, but have charged the annuity on the rates; so that neither the five nor the whole are personally liable. But their responsibility in this action arises from the duty of the commissioners to pay out of the rates when collected. Then, the language of the clause is large enough to let in this action against the clerk.

COLERIDGE, J.—A great part of the ar-

gument as to non-liability of the commissioners personally was not applicable; because a party may be so far liable as to be subject to an action, although an execution cannot be enforced against him—*Wombwell v. Railton* (15), and this is of importance when the next two points are considered. The first question is, whether the action has been properly brought against the clerk. Now, the circumstances of this case, and the situation of the parties, must be looked at. The plaintiff advanced the money, and the five commissioners granted the annuity; if any personal liability was incurred at all, it can only have been incurred by these five; and it never can be contended, that the whole body were personally liable. Then, the five purport to act for the body of the commissioners. They grant an annuity to arise out of the rates. What is their act more than a receipt of money by them in their character of commissioners, in pursuance of the act, and setting aside a portion of the rates to be raised under the act to satisfy the annuity granted to the person who advanced the money? It is impossible to say, that they are personally liable. Then arises the question, whether the commissioners as a body are properly sued in the name of their clerk. Certainly, we ought not to restrain the construction upon the words of the section, which is a very convenient section to all parties. Surely something has been done in pursuance of the act. There has been an advance of money on the one part, and the grant of an annuity on the other. This is an action brought concerning a thing done in pursuance of the act of parliament. Then, is this the proper form of action? It is not brought on the loan of the money, but for the neglect to pay over the rates which had been raised; and it seems to me to be the proper form. Is there, then, any defect in the declaration which can be taken advantage of on general demurrer? It was said, that it did not appear that the money was advanced for the purposes of the act; that might have been fatal on special demurrer, but it is cured on general demurrer by the allegation that the five commissioners did, *by virtue of the act*, grant the annuity, which they could only do in

discharge of monies advanced for the purposes of the act. Another objection urged is, as to the priority of the payments; but there is nothing on the record to raise it; and, indeed, the declaration rather excludes the point.

Judgment for the plaintiff.

1836. { THE KING v. THE JUSTICES OF
SUFFOLK.

Mandamus—Case.

The Sessions having quashed an order of removal upon the 4 & 5 Will. 4. c. 72. ss. 79 & 81, on the ground that the respondents had not sent a copy of the examination as to the chargeability of the paupers, subject to a case upon the necessity thereof, which case the respondents had not brought up, the Court refused a mandamus to compel the Sessions to enter continuances, and hear the appeal.

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 37.]

1836. }
Nov. 15. } DOE d. HARRIS v. SAUNDERS.

Inclosure Act, Construction of—Mortgage.

By a local inclosure act (51 Geo. 3. c. 25.) the commissioners were empowered to allot the lands to be inclosed among the proprietors interested; and by the 46th section it was enacted, that the several lands so to be allotted and awarded, and the new allotments should, immediately after such allotment should have been made, remain and enure to the persons to whom they should be allotted, who should thenceforth be seised and possessed thereof to the same uses, &c. as the lands, in lieu of which they were allotted, were subject to:—Held, that the legal estate in the allotment vested in the allottee immediately upon its being made, and did not require to be completed by the award. Consequently, a proprietor, to whom an allotment was made, and possession delivered, was empowered to convey the same to a mortgagee, though the award was not signed by the commissioners for many years afterwards.

Ejectment for lands, at Charlbury, in Oxford, tried before Williams, J. at the Spring Assizes for 1835, when a verdict was taken for the lessor of the plaintiff, subject to the opinion of this Court on the following

CASE.

There were two demises, by Congreve Harris, in the declaration—one on the 1st of January 1829, and the other on the 1st of January 1835; and the lessor of the plaintiff claimed the premises in question as mortgagee of one Jonah Smith, under deeds of lease and release of the 17th and 18th of December 1824, between the said J. S. and Mary his wife, of the one part, and the said Congreve Harris, the lessor of the plaintiff, of the other part. These deeds were in the ordinary form, and granted, released, and confirmed unto the said Congreve Harris (*inter alia*), a messuage and building, lands, and premises by the open field, the description being, half a yard land late Daniel Smith's, and all such allotment or allotments, pieces, or parcels of land or ground and premises, which the commissioners acting under or by virtue of an act of parliament, 51 Geo. 3, intituled, 'An Act for inclosing certain lands in the hamlets of Chadlington West, Chadlington East, and Chilson, in the parish of Charlbury, in the county of Oxford,' had set out only, or should set out, allot, and award in lieu of and satisfaction for the open field, lands, grounds, and right of common of the estate of the said Jonah Smith, called late Daniel Smith's, consisting of half a yard land, in Chadlington aforesaid, and each of them and every part thereof.

The usual provisions for redemption, &c. followed.

It appeared that the commissioners under the above recited act duly made their award on the 2nd of July 1825; and that they thereby did set out, and allot, and did thereby award unto and for the said Jonah Smith in lieu of and satisfaction for the open field, lands, grounds, and right of common of his estate, called late Daniel Smith's, consisting of half a yard land, the allotment next therein described, that is to say, one plot or parcel of land or ground, situate, &c., containing 10 acres and 2 roods, &c.

The premises sought to be recovered in

this action were the 10 acres and 2 roods of land allotted by the commissioners as above; and it appeared, that the whole of the title-deeds relating to the property were placed in the hands of the solicitor of Congreve Harris at the time of the execution of the mortgage-deeds in December 1824, and had continued uninterruptedly in his possession ever since.

The defendant claimed to be a prior mortgagee, and put in an indenture of mortgage, dated 21st of November 1818, whereby the said Jonah Smith granted and demised for 500 years unto Samuel Saunders (the defendant), his executors, administrators, and assigns (*inter alia*), one plot or parcel of land or ground being one of the allotments in lieu of a half yard land late Daniel Smith's, purchased by the said Jonah Smith of one John Smith, situate in the said hamlet of Chadlington West, at Crooked Oaks Furlong, containing 10 acres and two roods, &c.—following the words of a description of the allotment which was delivered to him by authority of the commissioners in 1817, afterwards inserted in the award as above set out, and which shewed these lands to be the same sought to be recovered in the present action.

The defendant also put in indentures of lease and release of 28th and 29th of December 1826, between the said J. S., of the first part, the defendant of the second part, and one E. V. H. of the third part, which, after reciting the mortgage of November 1818, and that doubts had been entertained with respect to the validity of that mortgage, and whether the said J. S. was at the time of the execution thereof seised of the fee simple of the said hereditaments and premises thereby demised, by reason that the said commissioners had not then signed their award; and that the defendant had therefore requested the said J. S. to execute such further assurance to him of the said hereditaments and premises as thereafter were mentioned, which he had agreed to do, further witnessed, that, in pursuance of the said agreement, and in consideration of 5s. to the said J. S. paid, the said J. S. did grant, bargain, sell, and demise, ratify, and confirm unto the said Samuel Saunders, his executors, &c. all the said premises, &c.

The commissioners set out the allot-

ments, and among other proprietors, put Jonah Smith in possession of this allotment of 10 acres and 2 roods in the year 1812; and he remained in possession until his death in 1827; since which to the present time his wife Mary and the defendant in this action have been successively in possession.

The deeds and documents above mentioned to be referred to by either party in argument.

The question for the consideration of the Court was, whether, under the circumstances stated, the lessor of the plaintiff was entitled to recover the premises in question.

W. J. Alexander, for the plaintiff.—First, the lessor of the plaintiff has the legal estate in this allotment, and the defendant has only an equitable title. This appears from a due consideration of sections 34 (1) & 46 (2) of the local act. Until the commissioners signed the award, the interest of Jonah Smith in the allotment was not vested in him, and could not be conveyed by him to another. That allotment belongs to the old estate; and, therefore, the conveyance of the old estate to the lessor of the plaintiff operated to carry the allot-

(1) Which enacts:—"That the commissioners thereby appointed shall set out, divide, and allot all the lands thereby directed to be inclosed amongst the several proprietors thereof, and persons interested therein, in proportion and according to their several and respective lands, rights of common, and other rights and interests in, to and over the same."

(2) Which enacts:—"That the several lands and ground so to be allotted and awarded upon the said division and inclosure to the several persons concerned, and the several messuages, lands, tenements, and inclosures, new allotments, and other hereditaments, which shall be exchanged in pursuance of this act, or the said recited act, immediately after such allotments and exchanges are made as aforesaid, shall be, remain, and enure to the several persons to whom the same shall be respectively allotted or given in exchange as aforesaid, who shall from thenceforth stand and be seised and possessed thereof to such and the same uses, estates, trusts, and purposes, and subject to such and the same wills, settlements, limitations, powers, remainders, leases, (except leases at rack-rent,) charges, and incumbrances, as the several and respective messuages, land, tenements, old inclosures, or other hereditaments, in lieu of such allotments or exchanged premises shall be respectively made or taken as aforesaid, are now held under, subject to, or liable to be charged with, or affected by, or might or would have been held under, or subject to, or liable to have been charged with, or affected by, in case this act had not been made."

ment to him, when the award was completed—*Doe d. Sweeting v. Hellard* (3); and that the allotment does not vest until the award is signed, appears from *Farrer v. Billing* (4), where the terms of the act of parliament were similar to those in the present case. In *Kingsley v. Young* (5), which may be relied on for the defendant, the language of the inclosure act was different; and there were clauses empowering parties to execute conveyances before the award. See also *Lowndes v. Bray* (6) and *Cave v. Baldwin* (7).

[COLERIDGE, J. referred to *Doe d. Dixon v. Willis* (8).]

The report of that case is too meagre and loose to be relied on, and the clauses of the act are not set out; it does not therefore appear, whether there was not a clause authorizing conveyances before the award.

[COLERIDGE, J.—It is also reported in 3 *Moo. & Pay.* 24(9).]

If that distinction do not exist, it has been since overruled by the Master of the Rolls in *Mortlock v. Kentish* (10). Secondly, the lessor of the plaintiff has a right to succeed, being a second mortgagee without notice, and in possession of the title deeds—*Goodtitle v. Morgan* (11), recognized in *Right v. Bucknell* (12). Thirdly, the defendant stands in the situation of Jonah Smith, the mortgagor, having taken the deed of confirmation from him, and therefore cannot dispute the title of his mortgagee.

Cripps, contra.—One material fact, omitted in the argument on the other side, makes out the defendant's case, and that is, that the mortgage to the lessor of the plaintiff was prior to the award. Therefore, if the allotment is to take effect from the award, the plaintiff cannot take advantage of it. The allotment, in fact, was made in 1812; the party was put in pos-

session of it, and he and the defendant have remained in possession ever since. In 1818, he granted a term of years of this allotment to the defendant. Then the 46th section operates to transfer Smith's interest in this allotment, which was an estate in fee, to the defendant. That interest was created immediately upon the making of the allotment. *Farrar v. Billing* is distinguishable, because the estate became vested, in that case, after the award was made. The statute 1 & 2 Geo. 4. c. 23. also supports the defendant's case, for by s. 2, any person, to whom an allotment has been made and possession has been given, may maintain ejectment to recover possession thereof, though no award have been made. Then, as to the plaintiff recovering, because he has possession of the title deeds, that possession might probably be explained; the defendant's mortgage may not have extended over all the property conveyed by them, and there may be a covenant for the production. Besides, the doctrine of Buller, J. in *Goodtitle v. Morgan*, has been overruled—see *Bailey v. Fermor* (13).

Alexander replied.—The first part of the 46th section is, "that the lands so to be allotted and awarded;" and though the latter word is omitted in the afterpart of the section, it must be understood to be contained therein. As to the 1 & 2 Geo. 4. c. 23, it makes against the defendant, for it shews that, previous to the award, the legal estate is not in the party to whom it is allotted.

LORD DENMAN, C.J.—In this case the lessor of the plaintiff seeks to recover by a title under Jonah Smith, who conveyed to him in 1824. The answer of the defendant is, "I was already entitled under Jonah Smith by virtue of the inclosure act"—the 46th section of which is this—[here his Lordship read it.] Now that act passed in 1811, and an allotment was made to Jonah Smith, who conveyed to the defendant, and under the words of that section, I think he was entitled to do so.

PATTERSON, J.—This case turns on the construction of this act of parliament, as in *Farrer v. Billing*, where Lord Tenterden says, "The legislature may certainly,

(3) 9 B. & C. 789; s. c. 7 Law J. Rep. K.B. 79.

(4) 2 B. & Ald. 191.

(5) 17 Ves. 468; s. c. 18 Ves. 207.

(6) 1 Sugd. V. & P. 342, 9th edit.

(7) 1 Stark. N.P.C. 65.

(8) 5 Bing. 441.

(9) And in 7 Law J. Rep. C.P. 170.

(10) July 1833. Not reported.

(11) 1 Term Rep. 755.

(12) 2 B. & Ad. 278; s. c. 8 Law J. Rep. K.B. 204.

(13) 9 Price, 262.

by proper words, give the seisin and legal estate or the allotment only." And on looking at the 46th section, I think it does contain words sufficient to bear that interpretation. *Immediately after such allotments and exchanges are made*, would naturally mean, after the allotments only; but Mr. Alexander contends, that it means, after they have been staked out and confirmed by the award. I do not think that is the meaning. The clause then goes on, that the party shall be thenceforth seised and possessed of the allotment to such uses, &c. Upon that it must be taken that Jonah Smith became seised of this allotment as soon as it was made. He conveyed it to the defendant in 1818, and as the 1 & 2 Geo. 4. c. 23, which has been referred to, was not passed until 1821, it cannot affect the case, and will not protect the defendant.

WILLIAMS, J.—I am entirely of the same opinion on the construction of this 46th section. So far from the vesting of the legal estate being made to turn on the completion of the award, the act gives the estate immediately upon the allotment being made.

COLERIDGE, J.—The defendant in this case has the prior title in point of time; and the question, whether that title could be given to him, turns upon the construction of the 46th section [which his Lordship read]. Now, without referring to the cases which have been cited, the act itself must be looked to, and we find that we can hardly turn to any section where the word *allotments* is used, that it does not occur without any reference to their completion by the award. Immediately, therefore, that the allotment was made to Jonah Smith, he became seised in fee, and could convey it to the defendant. When this point of construction is settled, *Doe d. Sweeting v. Hellard* is an authority for the defendant.

Judgment for the defendant.

1836. } THE KING v. THE INHABITANTS
Nov. 16. } OF BILLINGHAY.

*Poor Law—Case sent up from Sessions—
Parol Evidence—Contract of Hiring and
Service.*

*The Sessions sent up a case to the Court of King's Bench, which found certain facts, and set out this written agreement: "Memorandum, that the undersigned R. L. agrees on behalf of his son R. L., that he shall serve R. M., of &c., in his business of a wheelwright, from this time to the 27th of May 1830; the said R. M. paying, at the expiration of the said term, 5*l.* to the said R. L. the younger; R. L. to find his son clothes, washing, and all other necessities, and R. M. meat, drink, and lodging;" and the case also stated that the respondents proposed to give in evidence, conversations between the parties before and at the time of signing the agreement; and also an indorsement on the paper on which the agreement was written, which evidence was rejected; and the case concluded by submitting to the Court, as a distinct question, whether the agreement was an agreement of hiring and service, but not submitting any question as to the admissibility of the evidence:—Held, first, that this agreement was a contract of hiring and service; secondly, that the purport of the conversations not appearing, and no question being submitted thereon, the Court could not say that the evidence was improperly rejected, nor would they send the case down to be restated.*

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 38.]

1836. } THE KING v. THE OVERSEERS
Nov. 23. } OF WESTON.

Overseer—Production and Inspection of Documents.

The Court refused, at the instance of the overseers of one parish, to compel the overseers of another parish to produce an indenture of apprenticeship to the Commissioners of Stamps, in order to have an assignment indorsed thereon stamped, to enable it to be produced in evidence on a trial as to the settlement of the apprentice.

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 61.]

1836. } DOE d. BURGESS AND ANOTHER
Nov. 24. } v. THOMPSON.

Copyhold — Lord's Title — Ejectment — Demand of Possession.

Where an admission to a copyhold is in pursuance of a surrender, and not of a voluntary grant from the lord, the legality of the title of the steward or lord who admits, is immaterial.

On the death of a tenant at will, his heir-at-law entered into possession, and continued to occupy until an action of ejectment was brought by the devisees of the owner of the land:—Held, that the action was maintainable, without a notice to quit or demand of possession.

Ejectment, for freehold and copyhold lands in the county of Cambridge.

On the trial, before Tindal, C. J., at the last Assizes for that county, it appeared that, in 1787, the property in question was conveyed to William Thompson, father of James Thompson, and grandfather of John Thompson the defendant, in fee.

In 1807, on the marriage of his son James, William Thompson put him in possession of the lands in question. James continued to cultivate them until his death in 1831: after which, first, his widow, and then the defendant, entered upon them, the latter continuing in possession until the time of the action; and one question was, whether William Thompson had given the lands absolutely to his son James, or only during pleasure, retaining the right to resume the possession whenever he thought proper.

William Thompson died in September 1833, having previously in the same year made his will, whereby he devised all his lands, in general terms, to the lessors of the plaintiff, in trust, to sell and divide the proceeds amongst certain persons therein named. In pursuance of this power, they sold the copyhold to one Susannah Thompson, who was immediately admitted. In April, 1836, she made a conditional surrender of the same premises to the lessors of the plaintiff, and, on the 19th of July (a few days before the trial), they were admitted, "at a special court of Joseph, lord bishop of Ely and lord of the manor of Ely Barton, before Hugh Evans, steward of the

said manor." It was objected, that as Dr. Joseph Allen, the bishop, had not been confirmed in the see, and the see was vacant at the time this court was held for the admittance of the plaintiffs, what then took place was invalid. No evidence, however, was given that Dr. Allen had not been confirmed in the see, and a verdict passed for the plaintiff, the jury also finding that James Thompson had held the lands for upwards of twenty years before his death, but not adversely to William Thompson.

Gunning, on a former day in this term, moved for a rule to shew cause why the verdict should not be set aside, and a new trial had or a nonsuit entered, on the ground, that the plaintiff had failed to establish any valid title to the copyhold lands; and he produced an affidavit, by which it appeared that Dr. Sparkes, the former bishop of Ely, died in April 1836; that Dr. Joseph Allen, bishop of Bristol, was thereupon translated to the see of Ely, and that he was not confirmed in the see, and the temporalities of the see were not restored to him by royal grant till the 19th of August following. He contended, that, during the vacancy of the bishoprick, the temporalities belonged to the king—*Burns's Eccl. Law*, tit. 'Bishops,' 6; and the steward of the manor had therefore no authority to hold a court at the time of the admission in July; and, consequently, as to the copyholds no title was made out—*Coke's Copyholder*, 154. Secondly, he contended, that the plaintiff was barred by the Limitations Act, 3 & 4 Will. 4. c. 27. ss. 2 & 7. The defendant's father, for more than twenty years, and the defendant for five years since his death, were tenants at will (1) of William Thompson, of the lands in dispute; consequently, more than twenty years had elapsed since the commencement of such tenancy; and the tenancy never having been determined, the plaintiff was barred by the provisions of the 7th section, which were uncontrolled by the 15th section, as that clearly did not apply to the case of a tenancy at will, and the defendant was entitled to a nonsuit. Thirdly, as there had been no notice to quit, nor any demand of possession, nor any determination of the tenancy at will, he submitted, that the defendant could not be treated as

(1) Com. Dig. tit. 'Estates,' (H, 1).

a trespasser. He referred to *Co. Lit.* 55 (B), *Com. Dig.* tit. 'Estates' (H, 6), and the authorities there cited, to shew that the tenancy was not determined by the devise to the lessors of the plaintiff.

Cur. adv. vult.

LORD DENMAN, C. J. now delivered the judgment of the Court.—A nonsuit or a new trial was moved for in this case on several grounds, none of which we think tenable. With respect to the admission of improper evidence, it appeared on affidavit that the lessors of the plaintiff, who claimed as devisees under the will of one William Thompson, had been admitted at a court held by the steward of the manor, as steward and in the name of the present bishop, before any grant to him of the temporalities of the see of Ely, the copyhold land in question being holden of a manor which was parcel of the see. We are of opinion, that, as the admission of the lessors of the plaintiff was made in pursuance of a surrender, or what by statute is equivalent thereto, and not as or in consequence of a voluntary grant by the lord, that the lord's title was immaterial. It was contended also, that, under the 3 & 4 Will. 4. c. 27, the continued possession for twenty years by James Thompson, during the lifetime of William Thompson, barred the lessors of the plaintiff, who were his devisees; but the jury have found, that the possession of James Thompson was not adverse to William Thompson, the testator; and as the present action is brought within five years after the passing of the statute 3 & 4 Will. 4. c. 27, the proviso in the 15th section of that statute saves the right of the lessors of the plaintiff.

Rule refused.

1836. }
Nov. 24. } GROSS v. METCALFE.

Amendment—Arbitration—Jurisdiction.

A verdict was taken for the plaintiff by consent, and all matters in difference in the cause were referred to an arbitrator, who certified, that for the justice of the case the record ought to be amended by allowing the plaintiff to substitute a replication, putting all the circumstances averred in the plea in

issue: the Court held, that they had no power to direct such an amendment.

This cause came on for trial at the last Spring Assizes for Yorkshire, before Lord Denman, C.J., when a verdict for the plaintiff was taken by consent, and all matters in difference in the cause were referred to a barrister, who made the following certificate:—

"As the arbitrator to whom this cause stands referred, after hearing all the evidence tendered by both parties thereon, and the arguments of counsel, I certify respectfully to the Court that I am of opinion that it will be agreeable to the justice of the case to allow the plaintiff to amend the replication to the last plea, by substituting for the present a replication *de injuriâ*, or other replication putting in issue all the allegations in that plea, upon payment of the ordinary costs of the amendment and applications for leave to amend, if such an amendment can be ordered to be made in the present stage of the cause."

Addison having obtained a rule *nisi* to amend the record accordingly,—

W. H. Watson shewed cause.—The Court, after verdict, has no power to direct an amendment of this kind; for the acts of parliament, 9 Geo. 4. c. 15, 3 & 4 Will. 4. c. 42, giving Judges at Nisi Prius power to amend the record, are confined to cases of variance, and do not authorize any substitution of pleadings; and the common law power of amendment only exists while the proceedings are on paper. The application cannot be supported on the principle which directs this Court in awarding a repleader, as a repleader is never granted to the party who makes the first default. *Tidd's Prac.* 9th ed. 921; 2 *Wms. Saund.* 319, c, n. 6.

Addison, contra.—The Court possesses the power, and it ought to be exercised, as the certificate of the arbitrator shews that justice will not be done without it. In 1 *Tidd's Prac.* 713, 9th ed. it is said, that the Courts have in particular instances permitted the plaintiff to amend his declaration or replication, and the defendant to amend his plea, in cases where there has been nothing to amend by, after issue joined, and after the proceedings have been entered upon record, and even after a trial has been had

thereupon. In *Richardson v. Mellish* (1), after error had been brought in the King's Bench, an amendment in the verdict was made by the Court of Common Pleas, and a similar amendment was made in the record in error (2). In *Smith v. Fuller* (3), an amendment after verdict in an action of trover was made, by charging one of fifteen defendants with conversion; and in *Tite v. the Bishop of Worcester* (4), an amendment, by the insertion of a defendant's name, was allowed after verdict. So on demurrers, where the record is supposed to be made up, the Court frequently allows amendments on material points. He also cited *Hooper v. Mantle* (5).

Per Curiam.—None of the cases apply to an amendment like the one now sought for, which is a substitution of a totally different issue to that raised by the parties. The verdict here is taken by consent; and it is only on the verdict that the arbitrator has any power. What authority can this Court have to substitute different matters for those which were agreed to be referred?

Rule discharged.

1836. }
Nov. 18, 25. } MANNING v. WASDALE.

Pleading—Profit à prendre—Easement.

A right in the occupier of an ancient messuage to water his cattle at a pond, and to take the water thereof for culinary and other domestic purposes, is not a profit à prendre, but a mere easement; and if it were a profit à prendre,—semble that on general demurrer the claim of such a right is sufficiently limited by an allegation, that the water was to be taken for the more convenient use and enjoyment of the messuage.

Case. The declaration stated, that the plaintiff was an inhabitant residing and inhabiting within the parish of St. Ives, in the county of Huntingdon, to wit, in and upon a certain ancient messuage, with the

appurtenances, there situate; and by reason of his occupation thereof of right was entitled to the use and easement of washing and watering his cattle in a certain pond in the parish aforesaid, called "Jarwood, otherwise Darrod's Pond," and also of taking and using the water of the said pond for culinary and other domestic purposes, for the more convenient use and enjoyment of the said messuage, every year and at all times of the year, at his free will and pleasure. Yet the defendant wrongfully encroached upon and filled up, lessened and obstructed the said pond, and also rendered the plaintiff's access to the said pond, for the enjoyment of his privilege and easement aforesaid, less convenient and easy; whereby the plaintiff during &c., was and is greatly injured and disturbed in the use and enjoyment of his said right, privilege, and easement. The second count stated, that the plaintiff was an inhabitant residing and inhabiting within the parish and county aforesaid, to wit, in and upon, and occupying a certain other messuage, with the appurtenances, there situate, and by reason thereof, during all the time aforesaid, of right was entitled to the use and benefit, privilege, and easement of washing and watering his cattle in the said pond, and of taking and using the water thereof for his domestic and other purposes, at all times of the year, at his free will and pleasure; and it was then alleged, that the defendant had built upon the pond. Issues were joined on several of the pleas, upon which the cause went down for trial, and the defendant obtained a verdict. To a plea to the first count stating, that the plaintiff had not, nor had the owners or occupiers of the said messuage for the time being, at any time within twenty years next before the committing of the grievance in the said first count mentioned, used, exercised, or enjoyed the said use, benefit, privilege, and easements in the said first count mentioned, concluded with a verification, and to a similar plea to the second count, the plaintiff demurred specially, and the defendant joined in demurrer.

Kelly, in support of the demurrer, was stopped by the Court, who called upon—*Wightman* to support the pleas.—He objected to the declaration. First, the

- (1) 3 Bing. 334; s. c. 4 Law J. Rep. C.P. 68.
- (2) 7 B. & C. 819.
- (3) 1 Lord Raym. 116.
- (4) 1 Lord Raym. 94.
- (5) 13 Price, 695, 736.

right claimed by the plaintiff is divisible into a right to take water for his cattle and for culinary purposes, and the claim is made in respect of his ancient messuage. That claim is too large, as it is, in effect, for any number of cattle, and is not restricted to cattle levant and couchant, as it ought to be—*Mellor v. Spateman* (1). Now, "prescription to have common for all cattle commonable is not good, for thereby he may put in as many beasts as he will" (2). The reason is, that the right claimed is a profit à prendre in alieno solo, and that, if unlimited, would tend to the destruction of the inheritance. The claim should have been to take water for all cattle levant and couchant on the ancient tenement, and not in such general and indefinite terms—*Wilson v. Willes* (3).

[COLERIDGE, J.—Have you any authority for stating that the right to take water for cattle is a profit à prendre, or anything more than an easement? The 2 & 3 Will. 4. c. 71. s. 2. relates to easements, or to any watercourse, or to the use of any water, and clearly does not contemplate the use of water to be such a profit of the soil as your argument supposes.]

In the case of running waters *publici juris*, that may be applicable, but not to private ponds; and *Gateward's case* (4) seems to shew that the water being on the soil, and of value, is a profit of the soil, as much as the herbage growing upon it. The declaration should also have stated, that the water taken for culinary purposes was to be expended in and upon the ancient messuage,—in analogy to the case of a right to take turves, where it must always be alleged that the turves were to be used and spent upon the ancient messuage—*Valentine v. Penny* (5), *The Dean and Chapter of Ely v. Warren* (6), *Wilson v. Willes*.

[PATTESON, J.—The declaration says that the plaintiff was entitled to the privilege of taking and using the water of the said pond for culinary and other domestic purposes, "for the more convenient use and

enjoyment of the said messuage." The question, therefore, is, whether that is not an imperfect allegation that the water was taken to be spent in and upon the messuage, which has been cured by pleading over. The very point arose in *Corbyson v. Pearson* (7), where the plaintiff in trespass for impounding his cattle, prescribed for right of common for his cattle levant and couchant, omitting to aver that the cattle taken were levant and couchant; yet the Court held, that the defect was cured by the Statute of Jeofails.]

That was after verdict; but this objection may be taken by the defendant, as it would be open on general demurrer, for the plaintiff might have shewn a user of the water anywhere else away from the messuage, or he might have sold the water, both of which users are quite inconsistent with the principle of a profit à prendre.

Kelly, contra.—In an action to recover the possession of water, it must be described as so much land covered with water, which shews that this right is not a profit à prendre. The distinction between an easement and a profit à prendre, was taken in *Fitch v. Rawling* (8), and there, as well as in *Blewett v. Tregonning* (9), a right like the present was admitted to be a mere easement. The objection that water should be claimed to be taken from a pond in limited quantities only, as otherwise the pond might be exhausted, would be equally applicable to a well or spring, which has been held to be an easement. As to the other objection, that could not prevail even on special demurrer, as no use could be made of the water elsewhere than at the house, for the more convenient use and enjoyment of the messuage.

Wightman, in reply, relied on *Blewett v. Tregonning*, as an authority that the right claimed was a profit à prendre.

LORD DENMAN, C. J.—It is not very consistent with the ordinary use of language to say that the right to take water from a pond is a profit à prendre, which naturally applies to some produce of the soil. But supposing the right claimed to be a profit à prendre, it is not improperly

(1) 1 Wms. Saund. 342.
 (2) March, 83; Cas. 137.
 (3) 7 East, 121.
 (4) 6 Rep. 59, b.
 (5) Noy, 143.
 (6) 2 Atk. 189; see also *Tyringham's case*, 4 Rep. 37.

(7) Cro. Elis. 458.
 (8) 2 H. Bl. 393.
 (9) 5 Ad. & Ell. 554.

laid in the declaration; for, limited as the right is to take water for certain culinary and other domestic purposes, the Court cannot infer that there is not such a constant supply of water to the pond, as to allow the plaintiff to take such quantities from it without any fear of diminution.

PATTESON, J.—The inclination of my mind is, that this is not a profit *à prendre*; and if it were, I doubt whether, on general demurrer, the question could be raised. The right claimed in the declaration is to take water “for the more convenient use and enjoyment of the said messuage;” that is not, strictly speaking, an averment that the water shall be used in and upon the said messuage only; but still, on general demurrer, the allegation would be sufficient, being cured by the Statute of Jeofails, 27 Eliz. c. 5. The answer to the case I cited (10), that the objection there was cured because it was after verdict, is not sufficient, because the statute remedying certain defects after verdict was not passed till the 21 Jac. 1. c. 13. The question then arises, whether this is a profit *à prendre* or not; and it seems to me, that the taking of water from a pond is not a profit *à prendre*, which must be something arising out of the soil, and that is not the case here. There is one instance in which a right of this sort really might exist in the inhabitants of a parish by law. In inclosure acts, the commissioners are ordered, not unfrequently, to set out a pond for the use of all the inhabitants as a watering-place; and in such case I am not at all prepared to say that the plaintiff might not, in a declaration against a stranger for filling up that pond, have claimed the right in the manner here stated.

WILLIAMS, J.—It seems to me that, on Mr. Wightman's own objection, there is a sufficient and intelligible restriction in the use and application of the water to be taken from the pond; because, for the convenient use and occupation of the messuage and dwelling, in respect of which it is claimed, on general demurrer, is a sufficient restriction of the application of that water within a reasonable, because a limited purpose. Upon the second count, for the reasons given, we are not driven to con-

sider this by the rule applicable to the cases of profits *à prendre*. I do not think sufficient appears on this record, or that the right claimed is of a nature to make it fall within that class of cases.

COLERIDGE, J.—My judgment certainly proceeds on a ground that makes it immaterial to consider the distinction between the two counts. I do not think the right here claimed, is a right to take a profit from the soil of another person. It appears to me that this is a right that might have been claimed by custom, although it is not so claimed here, and that it is a mere easement, and does not fall within the principle of the cases cited.

Judgment for the plaintiff.

1836. } DOB *d.* CROSTHWAITE AND AN-
Nov. 25. } OTHER *v.* DIXON AND ANOTHER.

Descent—Partition.

One of two coparceners conveyed his moiety to a purchaser, who made partition with the other coparcener by deed of lease and release, conveying the whole of the estate to a trustee in fee, to the use of the parties for their respective portions:—Held, that, by this deed, the descent ex parte maternâ was not broken, so as, on the death of the latter coparcener, to let in his heir ex parte paternâ.

Ejectment for land in the parish of Brigham, in Cumberland.

At the trial, before Lord Abinger, at the Summer Assizes for that county in the year 1835, a verdict was found for the plaintiff, subject to the opinion of the Court upon the following

CASE.

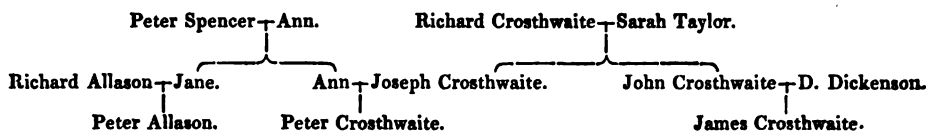
The lessor of the plaintiff, James Crosthwaite, claims the property as heir *ex parte paternâ* of Peter Crosthwaite, deceased; and the defendants claim as devisees of Peter Allason, who was heir-at-law *ex parte maternâ* of the same Peter Crosthwaite.

Peter Spencer was formerly owner of an estate, of which the property in question forms a part, and upon his death his estate descended to his two daughters, Jane, wife of Richard Allason, and Ann, wife of Joseph Crosthwaite, in coparcenery. Upon the death of Jane, her estate in the pre-

(10) Corbyson *v.* Pearson.

mises descended to Peter Allason, her son and heir; and upon the death of Ann, her estate in the premises descended upon the said Peter Crosthwaite, her son and heir.

The following pedigree shews the relative position of the different parties, and their title by descent.



In 1810, John Nicholson purchased Peter Allason's share of the property, and the same was duly conveyed by Peter Allason to John Nicholson by indentures of lease and release, dated respectively the 15th and 16th of November, 1810. The latter deed was made between Peter Allason of the one part, and John Nicholson of the other part, habendum to John Nicholson, his heirs and assigns.

In 1816, Peter Crosthwaite and John Nicholson made partition of the property by indentures of lease and release. The latter deed was made between Peter Crosthwaite of the first part, John Nicholson of the second part, and John Huddleston of the third part; by it the whole of the property was released to John Huddleston, habendum as to one portion, being the premises sought to be recovered, to the use of Peter Crosthwaite, and as to the remainder, to the use of John Nicholson.

Peter Crosthwaite from that time became and was sole seised thereof in fee, and died so seised in 1819, intestate. Upon his death, Peter Allason entered into the premises in question, claiming to be entitled as heir *ex parte maternâ*, and continued possessed until the time of his death.

In 1831 he died, having devised his estate and interest in the premises to the defendants.

The question for the Court is, whether James Crosthwaite, being heir *ex parte paternâ* of Peter Crosthwaite, is as such entitled to all or any part of the premises in question, or whether the defendant or devisees of Peter Allason, who was heir-at-law of Peter Crosthwaite *ex parte maternâ*, are entitled.

Wightman, for James Crosthwaite, the heir *ex parte paternâ*.—The partition by lease and release changed the nature of the estate, and the land became descendible *ex*

parte paternâ. It is true, that if a man makes a feoffment in fee, without declaring any use, and the use result, the nature of the descent will not be changed, and the use will descend in the same manner as the estate out of which it arose was descendible; but if the party declares the use, and takes back an estate, the nature of the descent is changed—*Co. Litt.* 12, b; 2 *Rolle's Abr.* 780, 'Uses,' (D.) 3; *Abbott v. Burton* (1), *Godbold v. Freestone* (2). At all events, that portion of the estate conveyed by Nicholson was descendible *ex parte paternâ*, as it was acquired by purchase.

W. H. Watson, contra.—Peter Crosthwaite took the land by descent *ex parte maternâ*. If a person seised of lands descendible *ex parte maternâ*, makes a feoffment, and declares the use to himself and his heirs, the use is descendible *ex parte maternâ*—*Martin v. Strachan* (3). A partition only regulates the enjoyment of the estate; it does not alter the quality. Thus, in *Com. Dig.* tit. 'Parceners,' (C, 15,) it is said, "Upon partition made, the occupation and descent, which before were in common, shall be several and distinct." "So parceners after partition shall be in from the common ancestor as before, for the partition doth not make any degree." Partition by writ does not operate as a revocation of a will; nor, according to *Luther v. Kidby* (4), and *Risby v. Dame Baltinglass* (5), does partition by deed. This proposition was doubted in *Tickner v. Tickner* (6), and *Swift v. Roberts* (7); but *Luther v. Kidby*

(1) 2 Salk. 590; s. c. 1 Com. Rep. 160.

(2) 3 Lev. 406.

(3) 5 Term Rep. 107, n.

(4) 3 P. Wms. 170, n; s. c. Vin. Abr. 'Devise,' (R.) 6, pl. 30.

(5) Sir T. Raym. 240.

(6) Cited in *Parsons v. Freeman*, 3 Atk. 741; s. c. Amb. 116.

(7) Amb. 617; s. c. 3 Burr. 1428.

is recognized by Lord Eldon, in *Harmood v. Oglander* (8), and by Lord Kenyon in *Goodtitle v. Otway* (9).

Wightman replied.

Cur. adv. vult.

On this day, the judgment was delivered by—

LORD DENMAN, C.J.—In this case, one of two parceners alienated his moiety in fee, whereby the alienee and the remaining parcener became tenants in common. Afterwards by deed of partition between the alienee and the remaining parcener, the land was divided by metes and bounds, and each of them took a moiety in severalty. The question is, whether by that deed the parcener took anything as purchaser, so as to break the descent *ex parte maternd*, and to let in the heir *ex parte maternd* on the death of the parcener.

It is admitted, that if the deed of partition had been between the parceners themselves, the descent would not be broken—*Com. Dig.* tit. 'Parceners,' (C, 15). But it is said, that inasmuch as one of the parties to the deed was a stranger in blood, whatever was taken from him by the parcener must be taken by purchase. And doubtless this would be so if anything was taken from him, but we are of opinion, that nothing was taken by the parcener from the alienee under the deed. The effect of it was only that the parcener had by it a divided moiety in severalty, discharged from any right in the alienee, instead of an undivided moiety in common: but he had the same estate in the land as before.

The consequence is, that a nonsuit must be entered.

1836. { THE KING v. THE COMMISSIONERS OF CUSTOMS.

Mandamus—Commissioners of Customs.

The Court refused to grant a *mandamus* to the Commissioners of Customs, ordering them to deliver up, on payment of certain duties, goods which they had saved and held subject to the payment of higher duties, they

being either justified, or if not, subject to an action.

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 65.]

1836. } GOODMAN v. HARVEY AND
April 28. } OTHERS.*

Bill of Exchange—Gross Negligence—Fraud.

Where a bill of exchange has been obtained from the payer fraudulently, and without any consideration for it, and it comes into the hands of a holder for valuable consideration, the proper question to be left to the jury is, whether there was any mala fides in the transaction, by which the holder became possessed of it; and not merely whether he was guilty of gross negligence, which is evidence only of mala fides, but is not the same thing.

Assumpsit on a bill of exchange. The declaration stated, that the defendants, on 1st of September, 1832, at Limerick, in that part of the United Kingdom called Ireland, made their bill of exchange, and directed the same to Gould, Davie & Co., and thereby required Gould, Davie & Co. to pay to John Scott, Esq., or order, the sum of 262*l.* 13*s.* 1*d.*, value in freight, per *Cairo*, four months after the date thereof: that the said John Scott then and there indorsed the same to D. Levy, and the said D. Levy indorsed to the plaintiff, and the same was presented to G. D. & Co. for acceptance, which was refused,—of all which the defendants had notice.

Plea—Non assumpsit (before the new rules).

At the trial, before Lord Denman, C. J., at the London sittings after Hilary term, 1835, the plaintiff put in the note, and proved, that he gave value to D. Levy for the bill in question before it became due, but after it had been protested by Levy for non-acceptance; the bill itself then having the notarial marks upon it, thus—"Will not be paid in consequence of a notice from

(8) 6 Ves. 199; s. c. 8 Ves. 106.

(9) 7 Term Rep. 416, 417.

* This and the following cases were decided in the course of the year 1836, and are those referred to in 5 Law J. Rep. (N.S.) K.B. 256.

the creditors of John Scott, who states he has received no value for it, and they require us not to pay it." On the part of the defendants, (Scott the payee) proved that he gave the bill to a Captain Hodgson to get it discounted—that it came back into his, Scott's, possession after the time when it was proved to have been so protested, and was then again returned to Hodgson to get it discounted, who however did not account for the produce to Scott, nor did the latter ever see the bill again, or get anything upon it.

His Lordship thought that the plaintiff could not recover, as, at the time of its discount by him, the bill bore its death-wound visibly upon it from the notarial marks, and that he could not after that have any title conveyed to him. The jury found, that the notarial marks conveyed notice of the dishonour; and his Lordship gave the plaintiff an opportunity, if he chose, of going to the jury, saying, he should leave it to them to say, whether the plaintiff was guilty of gross negligence in receiving the bill. After the expression of the opinion of his Lordship, his counsel declined that, and preferred to be nonsuited. The plaintiff was accordingly nonsuited.

A rule had been obtained, calling on the defendants to shew cause why that nonsuit should not be set aside, and a new trial had; against which, cause was shewn by—

Mr. Attorney General (Campbell) and *Mellor*, who contended, that this action was not maintainable. Where a person takes a bill before it becomes due, and does not know that the bill was dishonoured for non-acceptance, it is no defence that no notice has been given of the non-acceptance to the drawer. But if the holder take it with knowledge of the dishonour for non-acceptance, he is bound to prove notice to the drawer, that he might have it in his power to withdraw the effects in the hands of the drawer. The exception to the rule, that notice must be given, is, that the holder took the bill without knowing that it had been dishonoured for non-acceptance. The notarial marks on the bill itself, when the plaintiff took it from Levy, indicated to all the world that it had been presented for acceptance on the 20th of September, and dishonoured for non-acceptance.

[*PATTESON, J.*—At the time of the non-

acceptance, Gould, Davie & Co. had no funds, but they might have had before the bill became due.]

The only way to get rid of the necessity of proving notice, is to shew that there were no funds from the time when the bill was dated, up to the time when it became due, and also that there was no reasonable expectation of its being honoured. What is the plaintiff's title to the bill in question? The bill is in the hands of Scott, the payee, after it had been dishonoured for non-acceptance. Suppose it had been in his hands after dishonour for non-payment, and, subsequent to the time when it became due, he had asked Hodgson to get it discounted, and he had defrauded the payee of the proceeds, could Goodman, as indorsee, have maintained the action? He claims under Hodgson, although Hodgson's name is not on the bill, and as Hodgson could not have maintained the action, so neither could Goodman. When the bill has become due, the holder who receives it takes it subject to all its defects. Now, it is true, that in this case Goodman took the bill before it became due, but when he took it, it had the notarial marks on it, denoting its dishonour for non-acceptance; and any one who takes such a bill, takes it subject to the infirmity of title in the person from whom he received it; and as Hodgson was not the *bond fide* holder for a valuable consideration, Goodman, who makes out his title through him, cannot recover. His Lordship offered to leave the question to the jury, whether Goodman was guilty of gross negligence upon the circumstances under which he took the bill. Gross negligence is equal to fraud, and the plaintiff's counsel having refused to have that question left to the jury, it is the same as if the jury had found that he was guilty of gross negligence. There is no distinction between a bill being noted for non-acceptance, and for non-payment. *Crossly v. Hand* (1), and *O'Keefe v. Dunn* (2), were cited. Lastly, a copy of the protest ought to have been sent to the drawer—*Selw. N.P.* 327; *Bull. N.P.* 271-2. This being a bill drawn in Ireland, is a foreign bill—*Makoney v. Ashlin* (3).

(1) 13 East, 502.

(2) 6 Taunt. 305.

(3) 2 B. & Ad. 478; s. c. 9 Law J. Rep. K.B. 264.

Erle, contra.—As to the last objection, no such objection was taken at the trial.

[LORD DENMAN, C.J.—The objection made was to the form of the letter.]

Suppose the cases to apply to a person living in Limerick?

[LORD DENMAN, C.J.—We have no doubt upon that point.]

Here, then, on the 31st of August, the drawee sends notice to the drawers not to pay the bill when presented. On the 29th of September they refuse to accept the bill for want of funds, because they had had notice not to accept.

[LORD DENMAN, C.J.—Nothing was reserved upon that point.]

[LITLEDALE, J.—The law will imply notice of dishonour to the drawer. On the same principle, where funds are not in the hands of the drawee, no notice of dishonour need be given to the drawer. The law implies that fact.]

Then, the question is, whether the notarial marks upon the bill, which the jury have found did convey notice of dishonour, made it impossible for the plaintiff to recover. Does Goodman shew a title to the bill? The principal difficulty arises from the decision in *O'Keefe v. Dunn*; but that was decided on the principle, that if the last indorsee takes the bill without notice of prior dishonour, he can recover; but not so the payee who has notice. Here, Scott had a right to put the bill in circulation; and it may be admitted, that if Scott had given to the subsequent holder notice of the dishonour, the subsequent holder would only have the same right as Scott. All that he would have to ascertain would be, whether the drawer had notice of the dishonour. This is not like a bill tainted in its original creation with usury or gaming, and it would be the same thing as if the bill had been kept in circulation, and no dishonour till presentment for payment. Scott took the bill, and gave it to Hodgson to get it discounted. He did so, and having put it in circulation, Goodman gave to David Levy a consideration for it; and the only question to be left to the jury was, whether Goodman was guilty of any fraud.

LORD DENMAN, C.J.—The only question I offered to leave to the jury was, whether Goodman was guilty of gross negligence.

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Gross negligence may be evidence of *mala fides*, but it is not precisely the same thing. The question ought to have been, whether the holder was guilty of any fraud under the circumstances in which he took the bill. We have already shaken the dictum, that the question to be left to the jury is, whether the holder took the bill under circumstances in which a prudent and cautious man would have done so; and by this decision, we get rid of the last remains of that dictum; and unless there is *mala fides* in the transaction, by which the holder of a bill became possessed of it, the bill passes.

The rest of the COURT concurring—

Rule absolute.

1836. } EVANS V. ELLIOTT AND
May 27. } PATRICK.

Replevin—Pleading—Detainer.

At common law, an action of replevin lies for a wrongful detainer after a lawful distress.

The plaintiff declared in replevin for taking and detaining cattle, and the defendant avowed for rent in arrear:—Held, that a plea in bar, that after the taking, and before impounding, the plaintiff tendered the rent and costs of distress, was good on special demurrer.

Declaration in replevin, alleging in the usual form, that the defendants took the cattle of the plaintiff, and unjustly detained the same against sureties and pledges, until, &c. Avowry and cognizance, whereby the defendant Elliott avowed and Patrick acknowledged the taking of the cattle, and justly, &c., for half a year's rent, due to Elliott on a demise to the plaintiff.

Plea in bar, that after the taking of the cattle, and before the impounding thereof, to wit, on &c., the plaintiff tendered to Patrick, who was then duly authorized to receive the said rent, the said sum of 27*l.* 10*s.*, so due for rent, as in the said avowry and cognizance mentioned, together with 5*l.* for the costs and expenses of the taking of the said distress, that sum being reasonable and sufficient for the costs and expenses in that behalf, which several sums

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respectively, Patrick then wholly refused to accept, and afterwards unjustly detained the said cattle, against sureties and pledges, until, &c. in manner and form as the plaintiff hath above thereof complained: concluding with a verification.

Demurrer to the plea in bar, stating for cause, that it does not traverse or sufficiently confess and avoid the several matters in the avowry and cognizance above set forth, in this, to wit, that the said plea is pleaded to the whole of the avowry and cognizance, and contains matter in answer only to part thereof, inasmuch as the matters contained and set forth in the said plea, in answer to the said avowry and cognizance, avowing and acknowledging the taking and detaining, stated in the declaration, do not shew that the taking stated in the declaration was not just.

Joinder in demurrer.

J. Evans, in support of the demurrer.—The plea in bar admits that the *taking* was legal, and merely goes to the detention. If, therefore, it could be sustained, the plaintiff might recover damages in respect of the distress, notwithstanding such admission. Now the authorities shew, that for a wrongful detainer only, detainee, and not replevin, is the proper form of action. Thus, Lord Coke in his note upon the *Six Carpenters' case* (1), after stating that tender on the land before the distress, makes the distress tortious, and after distress, and before impounding, makes the detainer wrongful, observes, "If the plaintiff make him (the avowant) a sufficient tender, he may have an action of detainee for the detainer after;" and in 2 *Inst.* 107, the same distinction is stated as to the unlawfulness of the distress, and the detainer where the distress is for rent in arrear, or for damage feasant. So also in *Selv. N.P.* 7th edit., it is laid down, "If a distress has been made, and, before impounding, the arrears are tendered, then the detainer only is unlawful, and the tenant must bring detainee." He also contended, that the plea was a departure from the declaration.

E. V. Williams, contra.—It seems to be admitted, that if the plaintiff had entered a *nolle prosequi* as to the taking, he might have proceeded, and have recovered damages

for the wrongful detention. It is clear, however, that replevin lies for a wrongful detainer only, for in *Fitzherbert, N.B.* 69, G, it is said, "If a man take cattle damage feasant, and the other offer sufficient amends, and he refuseth; now, if he sueth replevin, &c. for the cattle, he shall recover damages only for the detaining of them, and not for the *taking*, because this was lawful; and, therefore, no return shall be;" and this passage is quoted in the *Six Carpenters' case*. So in *Vin. Abr.* tit. 'Tender,' (S), pl. 1, and in *Gilbert on Distresses*, it is laid down, that if there be a tender by the owner between the taking and impounding, he may bring replevin. In *Allen v. Bayley* (2), the pleadings were nearly similar to the present; and the only objection made, was, that the tender was not averred to be before the impounding; but, in that case, as well as in *Pilkington v. Hasting* (3), it was assumed that replevin will lie for the wrongful detainer only. In *Anacomb v. Shore* (4), it was held, that an action on the case could not be supported for detaining cattle distrained and impounded, where a tender of amends was not made till after the impounding; and it is made a question, if such action can be sustained, if the tender of amends has been made before the impounding, as the proper mode to try the validity of the distress is, by action of replevin, or trespass. All the authorities therefore shew, that replevin lies after a tender by the owner; and the only question is, if these pleadings are informal. Now, if there is any fault, it is occasioned by the declaration following the writ, which is always for taking and detaining. Besides, the effect of the plea in bar obviously is, to shew that the taking in the declaration is an implied taking included in the detention. This argument is supported by *Virtue v. Beasley* (5), where it was held, that trespass lies for a detainer of a distress after a tender of rent, and also upon the well-known principle in the law of larceny, as to the taking of goods in one county, and detaining them in another. Besides, this plea in bar is nothing more than a replication in the na-

(2) 8 Lutw. 1594.

(3) Cro. Eliz. 813.

(4) 1 Campb. 285.

(5) 1 Mo. & Rob. 21.

(1) Co. Rep. 146, a.

ture of a new assignment: see 1 *W. Saund* 300, b, alleging that the declaration is not for the lawful taking of the cattle, but for the subsequent wrongful detention, which includes a new tortious taking—*Baker v. Johnson* (6).

Evans, in reply.—The detention does not include the taking, for they are expressly distinguished in the plea in bar. It has been shewn, that trespass and detinue would lie for a detention only; but it is singular, that notwithstanding the authority of *Fitzherbert*, there is no writ in replevin applicable to a case of detention only. The plea in bar is to the whole avowry, but it impeaches the detention only.

LORD DENMAN, C.J.—This appears to me to be a very critical objection. The plea in bar does not, in distinct terms, allege a new taking and detaining; but I do not see how we can confine the meaning of the word "take," so as to apply it to the first taking only. As every continuing trespass is a new trespass, so every detainer is a new taking.

LITLEDALE, J.—The words of the declaration are satisfied by a detaining after the tender.

PATTESON, J.—The authorities cited by Mr. Williams, abundantly shew that replevin lies.

WILLIAMS, J. was of the same opinion.

Judgment for the plaintiff.

1836. } HAYSELDEN v. STAFF.

Pleading—General Issue.

To a count in indebitatus assumpsit for work, labour, and materials, the defendant pleaded, that the work was done, and the materials provided, in endeavouring to prevent a chimney of the defendant's from smoking, upon an agreement that they should not be paid for unless the plaintiff succeeded in preventing the said chimney from smoking:—Held, on special demurrer, that this plea

was bad, as amounting to the general issue.

Indebitatus assumpsit for work and labour as a builder, and materials, and upon an account stated.

Pleas—Non assumpsit, except as to a certain sum; and as to that, payment before action brought; and to a part of the sum mentioned in the second count, "that the said work was done, and materials provided for the same, by the plaintiff, in and about the endeavouring to prevent a certain chimney of the defendant's from smoking, upon the terms, agreement, and understanding between the plaintiff and the defendant, that the plaintiff should not be paid for the said work and materials, or any part thereof, unless he should succeed in preventing the said chimney from smoking. Averment, that the plaintiff did not succeed in preventing the said chimney," &c.; concluding with a verification.

Special demurrer to the last plea; assigning for causes, that it amounts to the general issue, and tends to unnecessary prolixity of pleading; that it is argumentative, and an evasive and indirect denial of the cause of action in respect of which it is pleaded; and that it does not well or sufficiently traverse, or confess and avoid.

Joinder in demurrer.

Busby, in support of the demurrer.—The rule laid down in *Com. Dig.* 'Pleader' (E, 13) is, that "where a man has no special matter for his justification or excuse, he ought to plead the general issue, to avoid prolixity in records;" and the only exceptions are (E, 14), that "matter of law may be pleaded specially, though it may be given in evidence under the general issue; and that a plea, which confesses and avoids the plaintiff's title, is good, though the matter may be given in evidence under the general issue." This distinction is noticed by Bayley, J. in *Carr v. Hinchliffe* (1), who refers, in illustration of its correctness, to *Brown v. Cornish* (2), *Vanhatton v. Morse* (3), and *Paramore v.*

(1) 4 B. & C. 547; s. c. 4 Law J. Rep. K.B. 5.

(2) 1 Lord Raym. 217; s. c. 1 Salk. 515.

(3) 2 Lord Raym. 787.

(6) 1 Barn. 209.

Johnson (4). Where, therefore, the defence may be given in evidence under the general issue, and is not within either of the exceptions, the defendant, according to these authorities, cannot plead specially. Now, the present plea neither confesses and avoids the contract or promise alleged, nor introduces matter of law; and it is consequently bad at common law. It is also bad within the new rules, for, although indirectly, it substantially denies the contract alleged; and the rule is, that "the plea of non assumpsit shall operate as a denial, in fact, of the express contract alleged, or of the matter of fact from which the contract or promise alleged may be implied by law." The argument, that this special plea is not demurrable, as amounting to the general issue, because it does not go to the whole cause of action, is not entitled to any weight; for the objection, that such a plea tends to prolixity, would apply more forcibly if the defendant could split the plaintiff's demand, and plead specially to each subdivision.

Martin, *contra*.—According to the first rule of Hilary term, 4 Will. 4, and the example, that "in an action of *indebitatus assumpsit* for goods sold and delivered, the plea of non assumpsit will operate as a denial of the sale and delivery in point of fact," this plea is clearly good, for the defence it sets out could not be given in evidence under non assumpsit, or does not amount to non assumpsit, so as to make the plea bad on special demurrer. Besides, the plea confesses that the work was done, and the materials provided; but, by way of avoidance, states facts negating the promise, and so is within the rule that directs, that "in every species of assumpsit, all matters in confession and avoidance, including not only those by way of discharge, but those which shew the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded." Now, the word "confession," as there used, is not confined to the admission of a debt only, for, in many of the instances used in illustration of the rules, no debt could arise,

as upon a contract made during coverture, or void from illegality. In *Potts v. Sparrow* (5) it was held, that the defendant could not set up the illegality of the contract upon which the action was brought, under a plea of non assumpsit; and in *Edmunds v. Harris* (6), that in debt for goods sold and delivered, and a plea of *nunquam indebitatus*, evidence that the goods were sold on a credit not expired, was inadmissible.

[LORD DENMAN, C.J.—If rightly decided, this case is in point; as there the defence was part of the contract. In all the other cases, it consisted of matters dehors the contract. That case, however, has been very much questioned.]

[PATTESON, J.—It has been thought, that "the sale and delivery," of which the plea of non assumpsit is to operate as a denial, means the sale and delivery mentioned in the declaration; and if so, that in *Edmunds v. Harris* the plea of *nunquam indebitatus* would operate as a denial of a sale and delivery of goods to be paid for on request. The plea here states, that the work and labour mentioned in the declaration were not to be paid for on request, but only in the event of their being successful.]

In the case cited, there was "a sale and delivery" in point of fact, within the meaning of the rule.—He also referred to *Cousins v. Paddon* (7), which, he argued, did not overrule *Edmunds v. Harris*, and to *Waddilove v. Barnett* (8); and he further contended, that the plea was good at common law, as it gave colour to the plaintiff,—citing *Stephen on Pleading*, p. 421, and *Bird v. Higginson* (9).

Busby, in reply, distinguished *Bird v. Higginson*, as no judgment, upon a point resembling the present, was there pronounced; and he also relied on *Waddilove v. Barnett*.

Cur. adv. vult.

(5) 1 Bing. N.C. 594; s. c. 4 Law J. Rep. (N.S.) C.P. 201.

(6) 2 Ad. & El. 414.

(7) 2 Cr. M. & R. 547; s. c. 5 Law J. Rep. (N.S.) Exch. 49.

(8) 2 Bing. N.C. 538; s. c. 5 Law J. Rep. (N.S.) C.P. 145.

(9) 2 Ad. & El. 696; s. c. 4 Law J. Rep. (N.S.) K.B. 124.

(4) 1 Lord Raym. 566; s. c. 12 Mod. 376.

Judgment was afterwards delivered by—

LORD DENMAN, C.J. [who stated the declaration and plea, and then proceeded]—To this plea there is a demurrer, which assigns for special causes, that it amounts to the general issue; that it is an argumentative, and evasive, and an indirect denial of the cause of action; and that it does not sufficiently traverse, or confess and avoid the cause of action. It must first be considered, whether the defence set up in the plea could be given in evidence under the plea of non assumpsit, because, if it could not, then there is no ground for the demurrer. There is no doubt that it might be so before the new rules, because not only might the fact of the actual contract itself have been denied, but it might also be shewn that it was void in law, or that the contract had been performed, or that the defendant was excused from the performance of it by many other circumstances. But since the new rules (which rules have the force and effect of an act of parliament), in actions of assumpsit, the plea of non assumpsit is to operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law. In actions of assumpsit for goods sold and delivered, the plea of non assumpsit is to operate as a denial of the sale and delivery in point of fact, and in every species of assumpsit, all matters in confession and avoidance, including not only those by way of discharge, but those which shew the transaction to be either void or voidable, in point of law, on the ground of fraud or otherwise, must be specially pleaded. One of the general objects of these new rules was to compel a defendant to put his defence specially upon the record; and, in conformity with this object, the case of *Edmunds v. Harris* was decided. That was an action of debt for goods sold and delivered, to be paid for on request (and which, as to this, is the same thing as *indebitatus assumpsit*), to which there was a plea of *nunquam indebitatus*; and, at the trial, the defendant proposed to prove that the goods were sold on a credit, which had not expired when the action was brought; and, on a question, whether this

defence was admissible on the general issue, the Court of King's Bench held, that it was not, that it ought to have been specially pleaded, and that this was one of the cases which the new rules were framed to avoid. But that case was doubted in *Taylor v. Hilary*, on the ground, that if the time of credit has not expired, the plaintiff proves a different contract from that which he has stated in the declaration, which was, to pay on request: and so also in *Knapp v. Harding*, Parke, B. considered it as doubtful whether *Edmunds v. Harris* was properly decided. We think, therefore, that the case of *Edmunds v. Harris* cannot be considered as a binding authority, and, if not, as the defence set up on this record shews a different contract from that which is stated in the declaration, inasmuch as the contract stated in the plea is, that the money should be paid on a certain condition, which has not been performed, it is not a contract to pay upon request, and therefore the defence might be gone into upon the general issue. In the case of *Waddilove v. Barnett*, which was an action for use and occupation, it was determined by the Court, after considering the effect of the new rules, that under the issue of non assumpsit, the defendant might give in evidence, that the plaintiff had mortgaged the premises before the defendant came into the occupation, and that the mortgagee had given notice to the defendant not to pay the plaintiff any rent becoming due after such notice.

But though the defence might be gone into under the general issue, it does not necessarily follow that the defence may not be specially pleaded. In the case of *Carr v. Hinchliff*, a defence was put upon the record, which, it was admitted, might have been gone into upon the general issue, and yet allowed to be a good plea. That was an action for goods sold and delivered, and the plea was, that the goods were sold by the plaintiff as the agent of a third person, with the proper averments of want of knowledge, &c., and then the defendant set off a debt due from that third person. The question was much considered in that case; but there, in the first instance, a complete contract was admitted by the plea, shewing a *prima facie* liability in the

defendant to the action, because, independently of the set-off, the defendant would have been liable. There was, therefore, a confession of the contract stated by the plaintiff; but the plea stated matter which avoided that contract, so far as to exonerate the defendant from the performance of it. There is a great distinction between the case of a plea, which amounts to the general issue, and that of a plea which merely discloses matter which may be given in evidence under the general issue. In the latter case, though, as has been observed in the earlier part of this judgment, the various things enumerated may be given in evidence under the general issue, independently of any of the new rules, yet it is incorrect to say that these things amount to the general issue; they only defeat the contract; but what, in correct language, may be said to amount to the general issue, is a plea containing an allegation that, for some reason specially stated, the contract does not exist in the form in which it is alleged, and where that is the case, the plea, instead of a direct denial, presents an argumentative denial of the contract, which, according to the established rules of pleading, is not allowed. The allegation in the declaration is, that the defendant is indebted for work and labour, and materials, and that being so indebted, he promised to pay on request. The plea does not confess that the defendant was indebted at all; it admits that work was done, and that materials were found and provided; but instead of confessing that any debt was created by that, and shewing anything to avoid it, he says, that no money was to be paid unless the chimney was cured of smoking, which was not done. This is really saying, in most distinct terms, that no debt ever arose; and it therefore falls completely within the meaning of what may be termed an argumentative denial of the debt. In *Solly v. Neish*, the declaration was for money had and received; the defendant pleaded, that the money was the proceeds of goods pledged to the defendant, with a power of sale, by persons who allowed the plaintiff to hold the goods as his own, which, in fact, were the property of those persons and the plaintiff, and that the defendant was willing

to set off against the proceeds of the goods the advances made on them. There were subsequently pleadings which led to a demurrer. The Court, though they gave judgment for the defendant, said, the plea would be bad on a special demurrer. In *Gardner v. Alexander*, the declaration was for goods bargained and sold. The defence was, that the goods were sold under a special contract, that they should be shipped within the current month, and landed in London within a given time, which was not done. On an application to plead several matters, the question was, whether these facts could have been given in evidence under the general issue, or whether it was necessary to plead them specially. The Court of Common Pleas said, it was unnecessary to plead them; the special contract might be given in evidence under the general issue. And in *Cousins v. Paddon*, in the Exchequer (10), it was held, that in debt for goods sold and delivered, and work and labour, the defendant may give in evidence, under the general plea of *nunquam indebitatus*, that the goods were worthless and the work useless. Upon the whole, therefore, we are of opinion, that the plea now before us cannot be supported.

Judgment for the plaintiff.

1836. } STOCKDALE v. CHAPMAN.

Pleading—Similiter.

To a replication to a plea of leave and licence, concluding to the country, no similiter was added, nor was there any &c. at the end thereof. The Court, after verdict, refused to grant a new trial for want of the similiter; the question of leave and licence having, in fact, been involved in the other issues, and no objection having been made to the omission before verdict.

In trespass and false imprisonment against the marshal of the King's Bench Prison, the defendant pleaded leave and licence, and four other special pleas, alleging that the plaintiff had been convicted of a misdemeanor, and committed to the de-

(10) 5 Law J. Rep. (N.S.) Exch. 49.

defendant's custody for a year and a day, and justifying under a right to detain until certain fees were paid. The plaintiff, in his replication to the first plea, traversed the leave and licence, concluding to the country; but no *similiter* was added, nor was there any &c. at the end of this replication. Upon the other pleas, issues were joined; and the plaintiff, at the trial, before Lord Denman, C.J., at the Sittings after Michaelmas term, 1835, obtained a verdict, damages 70*l*.

Andrews, Serj., moved for a new trial, objecting, that as no issue was joined upon the replication to the plea of leave and licence, there being no *similiter* added, and no &c., there had been a mis-trial. He cited *Cooke v. Burke* (1), *Griffith v. Crockford* (2), and *Swain v. Lewis* (3).

[LORD DENMAN, C.J.—*Hollis v. Buckingham* (4), so far as it goes, is in your favour; but, the whole question of leave and licence was involved in the other issues; and it has, in point of fact, been tried.]

Andrews, Serj. admitted that to be so.

The COURT, having referred to 2 *Wms. Saund.* 319, n. 6, refused the rule, on the ground of a defect in the record.

Rule refused (5).

1836. } LAKE V. RUFFLE.

Baron and Feme—Plea of Coverture.

A replication to a plea of coverture, that the plaintiff's husband at the time of the promise in the declaration, had been absent seven years, and, during that period, he was not known, nor is he now known by the plaintiff to be alive, is bad on special demurrer.

Declaration in assumpsit by the payee against the maker of a promissory note.

Plea—That the plaintiff, at the time of the making of the note, was and still is the wife of one Simon Lake.

Replication—That the said Simon Lake, in that plea mentioned, had been and was continually absent from the plaintiff for the space of seven years next before the making and delivery of the note, and the making of the defendant's promise, and had not been, and was not known by the plaintiff to be living within that time; and that the said Simon, at the time of making and delivering the note, and making the promise, was, and from thence continually and hitherto has been, and still is, absent from the plaintiff, and has not been known by the plaintiff to be living within that time, and is not now known by her to be living. *Verification.*

Demurrer, assigning the following causes—That the plaintiff, instead of pleading that her husband is dead, pleads circumstances from which she wishes a legal presumption of that death to be raised, and so the replication is argumentative; and, that in pleading the circumstances, the plaintiff has pleaded them insufficiently for the purpose, by reason that she only states her own want of knowledge of her husband's being alive, and not that there was such want of knowledge generally.

Joinder in demurrer.

G. T. White was to have argued in support of the demurrer; but the Court called on—

Espinasse, in support of the replication.—This is a good replication, for it states facts which entitle the plaintiff to sue upon the note, and upon which issue may be taken.

LORD DENMAN, C.J.—The replication merely states the evidence which is to lead to an inference that the plaintiff's husband is dead. I know of no authority for saying that the absence of the husband, and his not having been heard of for seven years, is a good answer to a plea of coverture.

Judgment for the defendant.

1836. } THE KING V. THE INHABITANTS
Nov. 19. } OF MILVERTON.

Highway—Stopping up.

An order of Justices under 55 Geo. 3. c. 68, for stopping up more than one high-

(1) 5 Taunt. 164.

(2) 3 Bro. & Bing. 1.

(3) 3 Dowl. P.C. 700.

(4) 3 Dowl. & Ryl. 1.

(5) A rule nisi was granted on the ground of excessive damages.

way, or for stopping up part only of a highway, is void.

Justices have no authority to narrow a highway.

What is the proper course to be taken for the purpose of stopping up a highway which runs into different counties, or different divisions of a county.

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 73.]

1836. }
Nov. 25. } PEACOCK v. HARRIS.

New Trial—Costs.

The plaintiff, by rule 64 of Hilary term, 2 Will. 4, is not entitled to the costs of a trial, on which he has obtained a verdict, where a rule for a new trial subsequently granted is silent as to the costs, and, after the plaintiff has applied for a special jury, the defendant withdraws his plea, and suffers judgment by default, and damages are assessed thereon.

At the Spring Assizes for the county of Denbigh, in 1835, the plaintiff, who sued as the assignee of J. Jones, an insolvent debtor, to recover a sum of money for work and labour and materials, supplied by the insolvent to the defendant, had obtained a verdict. On the application of the defendant, the Court granted a rule nisi for a new trial, on the ground of the reception of improper evidence, which rule was afterwards made absolute. The plaintiff gave notice of trial for the ensuing Spring Assizes, but after he had applied for a special jury, the defendant withdrew his plea, and suffered judgment by default, and upon the execution of a writ of inquiry, the damages were assessed at the same sum as at the former trial. The rule for a new trial was silent as to the costs of the first trial; but the Master, on the authority of *Jackson v. Hallam* (1), having allowed the plaintiff the expenses of the first trial, the defendant had obtained a rule to review the taxation.

Jervis now shewed cause.—The course

taken by the defendant clearly shews, that he defended the action without any real ground of defence, and he has put the plaintiff to unnecessary costs. In *Booth v. Atherton* (2), and in *Jackson v. Hallam*, the defendants, after obtaining rules for new trials, without going to trial, gave the plaintiffs cognovits, and the Court held that they were liable to pay the costs of the trial. The defendant, by withdrawing his plea, is in the same situation as if he had executed a cognovit, since he has thereby acknowledged that he had no ground of defence to the action.

[COLERIDGE, J. referred to *Gray v. Cox* (3).]

The practice has not been altered by the rule of Hilary term, 2 Will. 4. That rule applies where a second trial takes place: In *Sweeting v. Halse* (4), after a verdict for the defendant, a new trial was granted, and the plaintiff having discontinued the action, the Court granted the defendant the costs of the first trial.

R. V. Richards, in support of the rule.—*Gray v. Cox* and *Sweeting v. Halse* do not apply. Before the new rules, the granting of costs of the first trial was a mere matter of practice, and the practice of the courts differed. Rule 64, Hilary term, 2 Will. 4. declares, that if a new trial be granted without any mention of costs in the rule, the costs of the first trial shall not be allowed to the successful party, though he succeed on the second; and in *Newberry v. Colvin* (5), it was laid down by Little- dale, J., that where the rule for a new trial says nothing about the costs of the first trial, they fall to the ground as a matter of course. *Porter v. Cooper* (6) also establishes the same rule.

Per Curiam.—We clearly have no power to grant these costs.

Rule absolute.

- (2) 6 Term Rep. 144.
- (3) 5 B. & C. 458; a. c. 8 D. & R. 220.
- (4) 9 B. & C. 369; a. c. 7 Law J. Rep. K.B. 339.
- (5) 2 Dowl. P.C. 415.
- (6) 2 Cr. M. & R. 232; a. c. 4 Law J. Rep. (N.S.) Exch. 192.

(1) 2 B. & Ald. 317.

1835. } DOE d. SPILSBURY AND OTHERS
Nov. 25. } v. BURDETT AND OTHERS.*

Power—Will—Attestation.

An estate was conveyed to trustees under a marriage settlement, to hold, in trust, from and immediately after the decease of L. H. W. to the use and behoof of such person or persons, for such estate or estates, as the said L. H. W., whether covert or sole, and notwithstanding her present intended, or, any future coverture, by her last will and testament in writing, or any writing purporting to be, or in the nature of her last will or testament, or by any codicil, &c. "to be by her signed, sealed, and published in the presence of, and attested by three or more credible witnesses," should devise. L. H. W. made her will, concluding in these words:—"I declare this only to be my last will and testament. In witness whereof, I have to this my last will and testament, contained in one sheet, set my hand and seal." (Signed L. H. W., and seal affixed. Witness, C. B., E. B., A. B.) This was held to be a good attestation, and the instrument a good execution of the power.

This was an action of ejectment to recover estates in the county of Derby; and, at the trial, before Tindal, C. J., at the Lent Assizes 1834, a verdict was found for the plaintiff, subject to the opinion of the Court upon a

CASE:

by which it appeared, that by a settlement made on the marriage of Lydia Henning Ward with William Augustus Skynner, Esq., the estates in question were, among others, conveyed to trustees, to hold in trust, &c. from and immediately after the decease of the said Lydia H. Ward, to the use and behoof of such person or persons, for such estate and estates, &c. as the said Lydia H. Ward, whether covert or sole, and notwithstanding her present intended or any future coverture, by her last will and testament in writing, or any writing purporting to be or in the nature of her last will and testament, or by any codicil or codicils thereto, to be by her signed, sealed, and published in the presence of,

* This is the case referred to, and of which the placitum is given, in 4 Law J. Rep. (N.S.) K.B. p. 85. The report of it has been unavoidably delayed to the present time.

and attested by three or more credible witnesses, should give, devise, direct, limit, or appoint; and for want of such gift, &c. limitation over to the use of Lydia H. Ward, her heirs and assigns for ever. Lydia H. Skynner made her will, making her husband devisee and executor.

The instrument concluded in these words:—

"I declare this only to be my last will and testament. In witness whereof, I have to this my last will and testament, contained in one sheet, set my hand and seal the 12th day of September in the year of our Lord 1789.

"Lydia Henning Skynner."

"Witness

"Charles Ball,

"Elizabeth Ball,

"Anne Ball."

The lessor of the plaintiff claimed under a devise from Benjamin Ward, the heir-at-law of Lydia H. Skynner; and the defendants, under purchases from the devisee and executor under the will of Lydia H. Skynner.

Anne Ball, one of the three witnesses, was still alive, but was not examined at the trial.

On the 18th of November 1789, a bill in Chancery was filed by the husband (the executor and devisee of his late wife) against the heir-at-law and the trustees of the settlement, praying to be at liberty to examine the witnesses to the will, in order that their testimony might be perpetuated. On the 26th of March 1790, the depositions of Charles Ball and Elizabeth Ball, as to the execution of the will, were filed in the above suit, which, amongst other things, contained the matter following:—"That the witnesses examined were severally subscribing witnesses to the execution of the will of L. H. Skynner, and that they did severally see her sign, seal, publish, and declare the same as and for her last will and testament."

No final order or decree was made in that suit. These depositions were received in evidence, although objected to by the counsel for the plaintiff.

The main question for the opinion of the Court was, whether there was due execution of the power of appointment given by the marriage settlement to Lydia H. Skynner.

Preston, for the lessor of the plaintiff.—On principle, upon authority, and in reason, the will of Lydia H. Skynner was not an execution of the power given to her by the marriage settlement, because it was not attested according to the power, the want of which sufficiency of attestation cannot be supplied by parol evidence. The power requires that the will should be signed, sealed, and published in the presence of, and attested by three or more credible witnesses; and the attestation, to be in pursuance of the power, ought to have been to the three individual acts of signing, sealing, and publishing. It may be admitted that, under the Statute of Frauds, an attestation in the form of the present attestation would be sufficient; but, a clear distinction exists between the execution of a will under the statute, and the execution of a will under a particular power, reserved by a particular instrument. In the latter case, all that is required by the power to be done, must be strictly pursued, otherwise it will be no valid execution of that power. It may be said, that the testatrix has herself, in the body of the will, said, that she signed, sealed, and published her will in the presence of the three witnesses; but, that would have been an assertion made before the actual fact could have possibly taken place, for a person cannot say that he has signed, sealed, and published his will in the presence of witnesses, until those witnesses are actually present, ready to attest to the truth of such an assertion; and the Court cannot look into the body of the will, but only to the attestation, to see what was attested. In *Stanhope v. Keir* (1), where a power was to be executed by a will signed and published in the presence of, and attested by three witnesses, it was held, that a will concluding with this declaration, "This is my last will and testament," and expressed to be signed by the testatrix in the presence of three attesting witnesses, was not a good appointment, because the publication was not attested; and, in *Moodie v. Reid and others* (2), it was held, that where the power required that the will should be signed and published in the presence of, and attested by two or more

credible witnesses, the attestation of the witnesses must be to the signing and the publishing, and that an appointment by will, made as follows, was an insufficient execution of the power:—"These my last bequests, signed by me this 4th day of Feb. 1822. S. M. Witness, B. H. and J. H." Again in *Doe d. Hotchkiss v. Pierce* (3), where the power to appoint was by deed in writing under the donee's hand and seal, and attested by two or more credible witnesses, it was held, that an attestation noticing the signing only, and not the seal, did not pursue the power. So in *Doe d. Mansfield v. Peach* (4), where the power was to appoint by deed or writing under their hands and seals, an attestation that it was sealed and delivered, was held insufficient. *Wright v. Wakeford* (5) is an authority to the same effect. Secondly, the depositions of the witnesses in the Court of Chancery were not admissible. The bill was filed to perpetuate the testimony of the witnesses, and no bill could have been filed to establish the validity of the appointment, for it is well established in a court of equity, that the Court will never establish a will against the heir, without directing an issue *devisavit vel non*, and until after the trial of that issue. Nor is it competent to a party to make use of the testimony of deceased witnesses, whilst the testimony of a living witness can be resorted to. The depositions were taken *de bene esse* to perpetuate testimony, and they cannot be read till the death of the other witness—*Harris v. Cotterell* (6), *Morrison v. Arnold* (7).

[LITLEDAL, J.—It may be necessary in a court of equity; but the contrary has been acted upon in a court of law, and the evidence of a deceased witness has been received, although another witness was alive.]

[LORD DENMAN, C.J., referred to *Wright v. Doe d. Tatham* (8).]

All that that case decides is, that if the testimony of a deceased witness is receivable, you need not call a living witness, who may have been a witness to the same

(1) 2 Sim. & Stu. 37; s. c. 2 Law J. Rep. Chanc. 166.

(2) 7 Taunt. 355; s. c. 1 Madd. 516.

(3) 6 Taunt. 402.

(4) 2 Mau. & Selw. 576.

(5) 17 Ves. 454; s. c. 4 Taunt. 213.

(6) 2 Mer. 678.

(7) 19 Ves. 670.

(8) 3 Nev. & Man. 268; s. c. 3 Law J. Rep. (N.S.) Exch. 366.

fact, before you can resort to the testimony of the deceased; but, here, the evidence was not admissible in itself: nothing could be looked at or received, except what was embodied in the attestation itself.

Mr. Solicitor General (Follett), Sir John Campbell, Waddington, and White, appeared for the different defendants.—It was contended for the defendants, that the will was a good and valid execution of the power. Upon the face of the instrument it purports to be signed, sealed, and published in the presence of, and attested by the three witnesses. The argument on the other side is, that there ought to have been the words introduced in the attestation, "signed, sealed, and published in the presence of." But, it is not necessary that the attesting witnesses should state anything more than that they are witnesses; and the Court will presume that they attested every act which, in the body of the instrument, is stated to have been done by the testatrix. If the Court should think that some of the cases which have been decided are against this general proposition, it is to be observed, that those cases are distinguishable from the present. In those cases, the attestation was imperfect, inasmuch as it was an attestation to one or more of several acts, to the exclusion of some other, which was required by the power. But, on the face of this instrument, it must be presumed, that the witnesses attested all the formalities required by the power, and stated to have been complied with by the testatrix. There is also this further distinction, that there is the evidence of the witnesses upon the depositions, that all those formalities had been complied with. The word "attested," whether required to be so by act of parliament, or by a power, purports a witnessing that the person executing has gone through all the requisites of the act of parliament, or the power; and if the witnesses were dead, the law would presume that the parties, whose names were there, had been present, and seen all the formalities gone through. In *Wright v. Wakeford*, Sir J. Mansfield enters into the inquiry as to the meaning of the word "attest."

[*LORD DENMAN, C.J.*—That case, as well as the case of *Doe v. Peach*, certainly seems to take for granted the converse of your proposition.]

In those cases the attestation applied particularly to some of the acts required, and they might have proceeded on the principle, "*expressio unius est exclusio alterius*." The decisions which have taken place on the Statute of Frauds ought to have some weight with the Court in determining this question. The statute requires, "that all devises of lands shall be in writing, and signed by the party so devising the same, and that they shall be attested and subscribed in the presence of the devisors, by three or more credible witnesses." Suppose three persons to put their names to a will, as attesting witnesses, without in the attestation itself stating, that they attested any of the formalities required by the act; would not the attestation be valid, and the will good? It has been decided, that such a general attestation is sufficient. In *Ellis v. Smith* (9), where the testator did not sign the will in the presence of the witnesses, but declared it to be his will, that was held to be a good attestation. *Hands v. James* (10) is an authority to shew, that it need not appear to what acts the party was a witness; and in *Croft v. Pawlet* (11) it was held, that signing in the devisor's presence need not be mentioned in the attestation, and still it will be a good execution. *Brice v. Smith* (12) and *Westbeeck v. Kennedy* (13) are also authorities to the same effect; so that, as far as relates to the Statute of Frauds, the argument on the other side would not be listened to. Then, with respect to powers, it does not appear in the books that the two have ever been distinguished; and Mr. Sugden, in his *Treatise on Powers*, considers them as the same. In *Macqueen v. Farquhar* (14), the deed executing the power was required to be signed in the presence of witnesses; but the power did not there require that it should be attested; and the word "signed" was omitted in the attestation, but in the body of the deed it was stated to be signed by the donee, in the presence of the witness, according to the power; Lord Eldon held

(9) 1 Ves. jun. 11.

(10) Com. Rep. 531.

(11) 2 Stra. 1109.

(12) Willes, 1.

(13) 1 Ves. & Bea. 362.

(14) 11 Ves. 454.

such attestation to be good. It will be said, on the other side, that that case is no authority, because here the execution of the power is required to be attested. In *Wright v. Wakeford* and *Doe v. Peach*, the attestation expressed, that the witness had seen some of the acts done, but not all the acts which were required by the power; and the principle of law would apply, *expressio unius est exclusio alterius*. *Stanhope v. Keir* is a case to which that observation applies. That case was decided by the same Judge as afterwards decided *Butler v. Burt*, a copy of which, from the MSS. of Sir J. Leach, has been obtained (15); and it was there decided by Sir J. Leach, Master of the Rolls, that where the word "witnesses," without more, is used in the attestation, it affirms that all has been done in the presence of witnesses, which is stated in the body of the deed. Now, in the present case, every word is inserted in the statement made in the body of the will, which is essential to the due execution of the power. And yet the Court are called upon to presume that the witnesses did not see the signing, sealing, and publishing of the will, and even to refuse to hear the depositions of the witness as to those facts. *Moodie v. Reid* turned on the word "published;" and in the will no statement was made of the will being published. In *Ward v. Swift* (16), an attestation similar to the present was held sufficient. The act of parliament, to amend the laws respecting the attestation of instruments of appointment, &c. made in exercise of certain powers in deeds, wills, and other instruments, 54 Geo. 3. c. 168, would also seem to imply a legislative enactment of the sufficiency of such a general attestation. Then as to the depositions being received in evidence, it is said, they were not admissible, because one of the witnesses was still living; but it has been decided, in *Wright v. Doe d. Tatham*, that such a deposition of a deceased witness is admissible; and that, although the living witness may at the time be in court. If those are admitted, the Court have then evidence of a strict compliance with all the formalities

required by the power. In *Williams v. Williams* (17), an exemplification of the depositions taken in an ancient suit, to perpetuate testimony, to which the plaintiff and defendants were privies, was held to be admissible evidence.

Preston, in reply.—The case of *Ward v. Swift* is an authority for the plaintiff; all the different acts required to be done by the power, were there alleged in the attestation. Had such general attestation as is contended for, been sufficient, the act of 54 Geo. 3. c. 168. would have been unnecessary. No presumption can arise from the word "witness," that the parties witnessed all the acts required by the power. The attestation itself must state itself to be to those acts. It has been laboured to embody, what is stated in the will itself, in the attestation; but that cannot be done.

Cur. adv. vult.

This case was argued in Hilary term, January 27th, 1835, and in Michaelmas term, Nov. 25, 1835, the judgment of the Court was delivered by—

LORD DENMAN, C.J.—In this case there was a marriage settlement of Lydia Henning Ward with William Augustus Skynner, on the 15th of December 1788, which, after creating some prior estates in the property in question, directs, that after the death of Lydia Henning Ward, it shall go to the use and behoof of such person or persons, and to and in such trusts, and to and for such intents and purposes as she, whether covert or sole, notwithstanding her intended or future coverture, by her last will and testament, in writing, or by her codicil thereto, by her signed, sealed, and published, in the presence of and attested by three or more credible witnesses, should give, devise, direct, and appoint; and in default of such limitation, there was to be an appointment over. On the 12th of December 1789, Lydia Henning Skynner, before marriage Lydia Henning Ward, made her will. The defendants, who claim under that, contend, that it was made in pursuance of and in a due execution of the power in the marriage settlement. The plaintiff says it was not a due execution of the power, and claims under a subsequent

(15) See a report of this case, 7 Law J. Rep. Chanc. 107.

(16) 1 Cr. & Mee. 171; a.c. 3 Tyrw. 122; s.c. 2 Law J. Rep. (N.S.) Exch. 45.

(17) 4 Mau. & Selw. 497.

limitation ; and one question in the special case is, whether that will be a due execution of the power in the marriage settlement. At the beginning of the will, Lydia Henning Skynner publishes and declares that to be her last will and testament ; at the end of it she declares that to be her only last will and testament, and says, "in witness whereof, I have, to this my last will and testament, set my hand and seal, on the year and day above mentioned ;" and then there is signed the name of Lydia Henning Skynner, and the seal is affixed opposite to it. On the face of the instrument, it therefore appears that in the beginning of the will she publishes it, and at the end of the will she declares it to be her last will and testament, and that she has put her hand and seal to it ; and there is her hand and seal clearly affixed to it. On the face of the instrument, therefore, it purports to be her will, and to be signed by her, sealed by her, and published by her, and her name and seal are affixed.

It was proved by the depositions of Charles Ball and Elizabeth Ball, now deceased, as is stated in the case, that the will was signed, sealed, and published by Lydia Henning Skynner, in the presence of Charles Ball, Elizabeth Ball, and Ann Ball ; an objection was made, that these depositions, in that stage of the proceedings, and considering who were the parties to the suit, were not admissible in evidence ; and also, that, there being one of the witnesses alive, that witness ought to be called. We think these objections, if well founded, on general principles, in themselves are not material in the present case, for reasons to be given hereafter. As the settlement creating the power requires the signing, sealing, and publishing, not only to be in the presence of, but also to be attested by three or more credible witnesses, unless they attest the signing, sealing, and publishing, the mere fact of signing, sealing, and publishing would not support the instrument. The plaintiff contends, that the attestation ought to have expressed that the will was signed, sealed, and published by Mrs. Skynner, in the presence of three or more credible witnesses, and that, not being so expressed, that will is a void execution of the power. On the other hand, the defendant says, that whatever

might have been the case, if some of the requisites of signing, sealing, and publishing had been expressed in the attestation, and that it had been silent as to the others, this being a general attestation, without going into particulars, must be taken to infer that all has been done in the presence of witnesses which is stated in the body of the will ; and as it is there stated, that the will was signed, sealed, and published, the attestation is to be taken to attest that all these three things had been done. But it may be said, there are three ingredients, which together make one complex circumstance, which must be verified ; and although each, taken by itself, is proved, yet, as it does not express that the attestation applies to the whole, it may apply to one or two, or it may apply to the three ingredients altogether ; and from the uncertainty as to which it does refer to, it must be rejected altogether. And several cases on this point were referred to, none of them exactly *ad idem*, but yet containing a sufficient body of legal reasoning and authority to make their principle applicable to the present case. The case most relied upon is that of *Wright v. Wakeford*, in which Lord Chief Justice Mansfield thought that the attestation to the sealing and delivery must be considered as an attestation to the signing, but the other three Judges thought not, and that the power which required the instrument to be signed was, in consequence, not well executed. The principle of this decision was adopted by the whole Court of King's Bench, in the case of *Doe d. Mansfield v. Peach*, and in *Wright v. Barlow* (18) ; now the present case differs from these decisions, which must have proceeded upon the ground that the attestation expressing part, but not the whole, the maxim, "*expressio unius est exclusio alterius*," was to be applied.

Before the case of *Wright v. Barlow* was decided, the act of parliament of the 54 Geo. 3. had passed, to remedy the inconvenience and mischief which might have occurred in consequence of the decision of *Wright v. Wakeford*, and the other cases ; that act had only a retrospective effect ; but if the case of *Wright v. Wakeford* were now to be considered, that act might be contended to

operate as a legislative declaration, that those cases were rightly decided. The act was, however, mentioned in *Wright v. Barlow*, and it did not draw forth any opinion from the Court, that it had the effect of such a legislative declaration. There is another class of cases where the attestation has been general, as is the case here, and their application to the present case must now be considered. In the case of *Moody v. Reid*, the Vice Chancellor directed a case to be sent to the Court of Common Pleas. On the general form of attestation, the power was held not to be well executed; but, from the language of the Chief Justice, it seems as if the decision had been come to, on the ground that, in fact, there was no publication which the power required, and if there had been, in fact, that publication, the general terms of the attestation would have been sufficient: at the same time, taking the actual decision and the reasons together, we think, that it does not lead us to a clear conclusion, as applicable to the present case. The next case of a general attestation, is *Stanhope v. Keir*. There, there was a power given to Eugenia Stanhope, by her last will and testament, in writing, or codicil, the same to be signed and published by her in the presence of, and attested by, three or more credible witnesses, to appoint. The execution of the power was by a will in the following, amongst other words:—"I, Eugenia Rice, formerly Eugenia Stanhope, hereby give and bequeath all my property, by this my last will and testament, made and signed in the year of our Lord," &c., Signed Eugenia Rice, with the seal opposite, in the presence of A. C. D. and E. F. To a bill filed, to have a declaration made as to the property, on the ground, that the will was not executed according to the power, the defendant pleaded the will, and set forth the will and attestation, and averred, that the will was signed in the presence of, and attested by, three or more credible witnesses. On the argument for the will, it was insisted, that the appointment was not duly made; and it was admitted, that the power required that the witnesses should attest the signing and publishing of the appointment; but it was insisted, that the declaration, with which the will concluded, was, in fact, a publication as well as a signing, and that the wit-

nesses, by adding their names to that declaration, attested both facts.

Now, whether or not we entirely agree with the Vice Chancellor's observations on this case, we must remark, that though the attestation is general, it immediately follows, and may be taken as adopting a statement of the testatrix, that the will was signed by her, and not signed and published in the terms of the power.

It is to be remarked, that Sir John Leach was the Master of the Rolls who decided *Butler v. Burt*, which I am about to mention, a case heard before him in February 1829, a copy of which has been furnished to us, and is as follows: Louise Smith, a married woman, being empowered to dispose of personal property, by a deed sealed and delivered in the presence of two or more credible witnesses, executed an instrument, purporting to be a distribution of part of the property in favour of the defendant Burt. This instrument concluded in the following words: "Signed and sealed at such a place, this 13th day of December—Louise Smith;" and then, there follows, in the place usual for witnesses, J. B. and H. B. The plaintiff, by his bill, alleged, that this instrument had never been delivered, and that, even if it had been delivered, there was not a due execution of the power, for want of a proper attestation. The defendant Burt, who claimed under the appointment, swore, that he believed that the instrument had been delivered by Mrs. Smith to his father, J. W. B, among whose papers it had been found. The only question argued at the hearing was, whether the instrument was a due execution of the power; and the Master of the Rolls said, that "the attestation of the witnesses being considered as a part of the appointment, it must follow, that where the word 'witness' without more, is used in the attestation, it affirms that all was done in the presence of the witnesses, which is stated in the body of the deed." Here, in the body of the deed, it is stated to be signed and sealed, but it is not stated to have been delivered; and if the general word, "witness," can affirm no more than the deed states, then, in this case, there has been no attestation of the essential part which is required for the due execution of the power, the delivery of the

deed; the power, therefore, is not well executed. The Master of the Rolls goes on to say, that "the case of *Moodie v. Reid* is a complete authority for this decision;" he adds, "The difference in the circumstances between the two cases is only that there the word 'published' was omitted in the body of the deed, and here there is the omission of the word 'delivered.'" In this case, the general terms of the attestation were held not to be sufficient to make the instrument a good execution of the power; but this reason is well and satisfactorily explained in the Master of the Rolls's judgment, in which judgment we fully acquiesce. The latest reported case on the subject is a case of *Ward and others v. Swift*, where, under indentures of lease and release, a power was given to Mary Swift to appoint by deed, or by her last will, to be duly executed and published, under her hand and seal, in the presence of three or more credible witnesses; and on the 3rd of August 1801, she signed, sealed, and delivered, as and for her last will and testament, an instrument, to which her signature and the attestation are as follows:—"In witness whereof, I have set my hand and seal, this 5th day of August 1801, in the presence of the witnesses underwritten." "Signed, sealed, and delivered, this 5th day of August 1801, as the last will and testament of and delivered by the said testatrix, Mary Swift, who, in her presence, and in the presence of each other, have put our names as witnesses thereof," and then three names follow.

Now, on the trial of the issue, the jury found, that Mary Swift signed, sealed, and delivered the instrument, as her last will and testament, in the presence of three witnesses, who attested the execution thereof. The Court of Exchequer, on a case reserved, certified, that it was a due execution of the power; the main question, however, seems to have been, whether this was a publication of the will: and this case was much relied upon on the part of the plaintiff. We do not feel that it operates further than to shew, that the precise words of the power need not be pursued in the attestation, but that an attestation containing equivalent words, may be good.

In the present case, the power required that the will should be signed, sealed,

and published, in the presence of, and attested by three or more credible witnesses. The will, on the face of it, has all the requisites which the power required: it purports to be published, signed, and sealed, and the attestation is in general terms, which, we are of opinion, in the language of the Master of the Rolls in the case of *Butler v. Burt*, affirms that all has been done in the presence of the witnesses, which is stated in the body of the instrument; and, therefore, upon the formal terms of that instrument, we are of opinion, that it is a good execution of the power.

Besides the attestation, it is necessary to have the fact proved by evidence, that the will was signed, sealed, and published, in the presence of three or more credible witnesses. We stated, that the depositions were objected to, on the ground, that they were taken under circumstances that they could not be received; and also, that one of the subscribing witnesses being alive, that witness ought to have been called, notwithstanding the case of *Doe d. Tatham v. Wright*; but we said, that the objections were immaterial, for the reasons which we should afterwards assign, and now give. The will is more than thirty years old, and, therefore, proves itself, without calling any of the witnesses, even were they all alive; and the will being put in, it must appear to be witnessed in such a way as proves that, upon the face of it, it was regularly and clearly executed according to the power; and as we are of opinion, that the attestation goes the whole length (so far as the mere attestation goes,) of attesting, that all the requisites of the power were complied with, it therefore purports to be an instrument, on the face of it, executed with all the requisites; and it, therefore, becomes an instrument which proves itself as much as any other instrument of that age, whether a deed or will.

There was something said on the argument respecting the Statute of Frauds, which requires that all devises of land shall be in writing, and signed by the party so devising the same, or some other person in his presence and by his express direction, and shall be attested and subscribed in the presence of the said devisor, by three or more credible witnesses. There is no doubt the attestation in the present form

would be sufficient to satisfy the Statute of Frauds. All that the statute requires to be done by the testator is, that he should sign; and one may call that the statutory power; and, therefore, if it be in fact signed, and the witnesses put their names as witnesses to a document, with the signature before their eyes, that is all that the statute requires them to attest; and no doubt can ever be entertained that that is an attestation of the signing; but as the power in this case requires other things to be attested besides the signature, we think it requires more discussion and consideration than would arise on the Statute of Frauds; and, therefore, though, as far as it goes, the attestation under the Statute of Frauds may assist the decision, yet something more is required to enable us to come to the conclusion we have come to. The special case presents other points for our consideration, the fact of the proceedings in the Court of Chancery, the copyhold courts, and the fines; but in the view we have taken of the case, these points need not be noticed. Upon the whole, we are of opinion, that there must be judgment for the defendants in the two cases.

Judgment for the defendants.

1836. }
April 18. } WISE V. CHARLTON.*

Promissory Note, what—Stamp.

"On demand, I promise to pay to Mr. J. O. Johnson, or order, the sum of 120l. with lawful interest for the same, for value received; and I have deposited in his hands title deeds to lands purchased from the devisees of Mr. Toplis, as a collateral security for the same:"—Held, to be a promissory note within the statute of Anne.

The commissioners are not prohibited from placing a stamp after the execution of an instrument which contains a promissory note and an agreement, so that the stamp so subsequently placed is not referable to the instrument as a promissory note.

Assumpsit by indorsee against the maker of a promissory note.

* This is one of the cases standing over from Easter term, 1836.

At the trial, before Lord Abinger, C.B., at the Spring Assizes, 1835, for the county of Derby, it appeared that the instrument on which the action was brought was in form as follows:—

"On demand, I promise to pay to Mr. J. O. Johnson, or order, the sum of 120l., with lawful interest for the same, for value received; and I have deposited in his hands, title deeds to lands purchased from the devisees of W. Toplis, as a collateral security for the same."

On this was affixed a promissory note stamp of sufficient value, and a mortgage stamp of 2l. had been affixed, upon payment of the penalty, since the commencement of the action.

It was objected, that the instrument in question was not a promissory note within the statute of Anne, so as to be assignable; and secondly, if a promissory note, that, as the instrument was not produceable in evidence without a mortgage stamp, the Commissioners of Stamps could not properly affix the stamp subsequently, the instrument being not only a mortgage, but at the same time a promissory note.

His Lordship overruled the objections, reserving to the defendant leave to move to enter a nonsuit.

Whitehurst now moved, pursuant to the leave reserved, on these two grounds, for a nonsuit.—To be a promissory note within the statute, it is necessary that the sum should be to be paid absolutely, and not subject to any condition. Upon the face of the note, the maker would not be liable to pay the note, without having the title deeds returned. Then with respect to the second objection: supposing the instrument to be a valid promissory note, as it contained a promissory note as well as a mortgage, it could not be stamped subsequent to the making of it. By the 23 Geo. 3. c. 49, it is required, that a promissory note should be stamped. By the 31 Geo. 3. c. 25, the commissioners are directed not to stamp any such instrument at any time after the making thereof. They had no power, therefore, to stamp this instrument with the 2l. stamp—*Green v. Davies* (1), and *Butts v. Swann* (2).

(1) 4 B. & C. 235; s. c. 3 Law J. Rep. K.B. 185.

(2) 2 Brod. & Bing. 78; s. c. 4 B. Mo. 484.

LORD DENMAN, C.J.—I do not find anything in the instrument to qualify the payment of 120*l*. What follows is a mere memorandum that the title deeds were deposited as a collateral security. The promissory note stamp, having been affixed before the making of the note, was sufficient to entitle the plaintiff to recover on it.

LITLEDALE, J.—I must own, with regard to this instrument being a promissory note, it does appear to me to be a distinct and absolute promise. The exception in the Stamp Act, as to affixing the stamp after the making of the instrument, I apprehend, merely prevents the commissioners from putting the stamp on promissory notes and bills of exchange, as such; but they may affix a stamp subsequently on an instrument, being in itself a promissory note and an agreement, where the

stamp affixed has nothing to do with the promissory note. The case in *Broderip and Bingham* is quite distinct from the present case. In that case, the order for the payment of money was so incorporated, that nothing could be made of it.

PATTESON, J.—It is not the less a promissory note, because it has an agreement upon the same paper. In the cases cited there was no proper stamp. Here the promissory note stamp had already been affixed.

COLERIDGE, J.—If once stamped as a promissory note, it was admissible in evidence as such. Nor is it the less a promissory note, because it has incorporated in it at the end an agreement. That, if anything, was a collateral security; and how can it affect the principal security?

Rule refused.

RULE OF COURT.

IT IS ORDERED, that, from and after the last day of this term, all rules upon sheriffs, other than the sheriffs of London and Middlesex, to return writs either of mesne or final process, and rules to bring in the bodies of defendants, be eight-day rules instead of six-day rules.

(Signed by all the Judges.)

END OF MICHAELMAS TERM, 1836.

CASES ARGUED AND DETERMINED

IN THE

Court of King's Bench.

HILARY TERM, 7 WILL. IV.

1837. }
Jan. 16. } BROWN v. THORNTON.

Evidence—Copies of Foreign Contracts.

By the Dutch law, which is in force at Java, the parties upon entering into a charter-party, go before a notary public, who writes the contract in his book, which the parties sign, and he makes out copies either at that time, or when requested, which he delivers to them. In the courts in Holland, these copies are received as evidence; but at Java the original book must be produced:—Held, in an action upon a charter-party entered into at Java, that such copies were not receivable in evidence, either on the ground of the notary being a public officer, whose duty it was to deliver out copies to the parties, or of his being their agent, by whose acts they had agreed to be bound.

Assumpsit for freight and carriage of goods from Batavia to Antwerp.

At the trial, before Lord Denman, C.J., at Guildhall, at the sittings after Trinity term, 1835, it appeared that the plaintiff who sued as the manager of the Australian Company of Edinburgh, claimed 1,668*l.* 19*s.* 9*d.* for freight of the ship *Portland*,

the property of the company, earned on a voyage from Batavia to London and Antwerp, in 1828 and 1829. To prove a charter-party entered into at Java, a witness was called, and was shewn a written document, purporting to be signed, sealed, and attested. He said that the document was signed by a notary public at Java, with whom he was acquainted, and that the signature of the notary was attested by the first member of the colonial government at Java: that when such a contract is entered into between parties at Java, the notary writes down the contract in a book, which is signed by the parties, and the notary gives to each a copy, immediately, or at any future period, when required by either party: that in Holland the copies delivered out by the notary were received in evidence by the Courts there; but in Batavia the original, in the notary's book, was produced, and the signature of the notary proved. It was objected, that this copy of the charter-party could not be received in evidence, not having been proved. The Lord Chief Justice admitted it in evidence, but, a verdict having passed for the plaintiff, he gave the defendant leave to move to set that verdict aside and enter a nonsuit.

Cresswell, in Michaelmas term, 1835,

obtained a rule *nisi* accordingly; against which—

Sir J. Campbell and *W. H. Watson* now shewed cause.—The evidence was admissible. The copies of the contract which is entered into before the notary are given out under his notarial seal, and are binding on the parties, because by going before him they authorize him to make the copies. It is not contended that the copy given in evidence was admissible by reason of any rule of evidence in the courts in Holland, but because the copies are delivered out by the authority of the contracting parties. By the law of the country where the contract was entered into, the copies given out have the force of originals, and their force is not impaired by the entry in the notary's book. *Appleton v. Lord Braybrook* (1), and *Black v. Lord Braybrook* (2), are inapplicable. Those were actions on judgments obtained in the Supreme Court of Jamaica, and in each case it was decided, that the judgment had been properly authenticated. But the copies here resemble brokers' notes, which are admissible between the contracting parties, as shewing the contract.

Cresswell, *contra*.—These copies are not like brokers' notes, for the contract in the notary's book is signed by the parties themselves. Even in Batavia, the original contract entered in the notary's books, and signed by the parties, must be produced. But even if the copies delivered out by the notary are admissible in evidence abroad, they are not admissible in the courts of this country; for although by the comity of nations, the Courts will give effect to a foreign judgment, the rules of evidence of a foreign country are not to be adopted. There was no proof here when the copies were delivered; and as there was sufficient time to send to Batavia after the action was commenced, it is to be inferred that they were delivered out long after the contract had been entered into. And as to any agreement between the parties to make the notary their agent to deliver out copies, it cannot be supposed that they consented to waive any objections which might arise

on their production in an English court of justice. A chirograph of a fine is evidence between the parties to the fine in the courts here—*Lewis v. Lark* (3); because the chirographer is an officer appointed by the Courts here to deliver out copies, which form part of the title of the parties, and his duty is not completed until that has been done. So, also, copies of court rolls, and the indorsement of the inrolment of a deed, are evidence—*The King v. Hopper* (4). But the notary is not an officer appointed by any Court to make out copies.

LORD DENMAN, C.J.—It appears clearly to me, that, unless the plaintiff can prove the charter-party, he cannot recover in this action; for, though there is a common count, yet this refers itself to the charter-party, without which, indeed, the plaintiff could have no right of action against the defendant. It is not sufficient for the plaintiff here to give secondary evidence of the charter-party, and the original is in the notary's book at Batavia. The parties have signed it, and the notary has the privilege of retaining it, and of giving out to them a copy. These copies, thus obtained by the parties, have full faith given to them in the Dutch courts, not however excluding the original, for in Java the original must be produced; but, at Rotterdam and Antwerp, copies might be produced, and full faith would be given to them. That does not amount to saying, that they are binding documents, but that the Court would receive them as evidence. It occurred to me, that the officer might be considered as the agent for both parties authorized to give out copies, but that is not quite so. If the copies, on being produced, proved that they were given out when the contract was entered in the book, it might be so; but it appears here, that these copies can be obtained at any time, and that their being here is no proof whatever that they were not made within six months of the trial. It appears to me, therefore, that the force of the Dutch law gives to these copies authority, and that in a way which we cannot recognize. The

(1) 6 Mau. & Selw. 35; s. c. 2 Stark. Rep. 6.

(2) 6 Mau. & Selw. 39; s. c. 2 Stark. Rep. 7.

(3) Plowd. 410.

(4) 3 Price, 495.

cases that have been referred to are clear authorities to shew, that this Court cannot adopt rules of evidence from foreign courts, by which it is to be bound. The consent of parties cannot make evidence; and, as Mr. Cresswell has rightly said, the consent of parties does not mean that the parties are to waive all objections to the admissibility of documents. I am, therefore, of opinion, that this rule must be made absolute.

WILLIAMS, J.—I am of the same opinion, but I do not willingly yield to this objection. I was at one time much struck with the argument that the notary must be considered as the agent for the purpose of giving out authentic copies, but I now think that it is impossible to view him in that light. The parties go before a notary in conformity with the custom, usage, or law of the place, where the contract was entered into, but they do not make any agreement, that anything there done shall give validity to, or place papers, which would not otherwise be admissible, in the situation of binding documents. The contract entered in the notary's book is the original. Then comes the question, whether the copy given out by him is an authentic copy, as required by our law, by analogy to a chirograph. With respect to that, the reason given is different from what Mr. Cresswell supposes. In *Buller's Nisi Prius* (5), it is said, that it is received in evidence, because the officer who makes the copy "is appointed by the law for the purpose, and the law must trust him as far as he acts under its authority, and therefore the chirograph is evidence, because the chirographer is appointed to give out copies of the agreements between the parties that are lodged of record;" and he gives the same reason as the principle on which the proclamations of a fine cannot be proved by copies, though indorsed by the chirographer—namely, that he "is not appointed to copy the proclamations."

COLERIDGE, J.—The plaintiff cannot maintain this action without giving some legal evidence of the charter-party. That raises the question of what is evidence, and that question must be decided accord-

ing to the law of this country, though it relates to what was done in a foreign country. We must, therefore, now decide whether what has been done here can satisfy the requisites of our law. This, it is said, is not a copy, but an original, and binding as the contract between the parties, because made out in their presence by the notary public; but that cannot be, for it appears, that he may at any future time, as well as at the moment of the parties appearing before him, give out copies. We do not know, when these were given out, or whether they were given out in the presence of the parties or not. The original, signed by the parties, cannot be produced. If the original cannot be produced, it is not denied that, in certain cases, secondary evidence of it may be given. But, then, it is said, that there is good secondary evidence here, for that this is either the very document made by the officer, or it is a copy made by a person duly authorized to make it by the parties themselves, and to deliver copies to each of them, each copy binding the other. I do not think, when we examine the facts of the case, that it amounts to more than this, that the parties take from the notary copies which would have, in the foreign country, all the effect that is properly attributed to them in the courts of that country, but which are not on that account receivable in the courts of this country, according to the laws of evidence which govern us here.

Rule absolute.

1837. }
Jan. 20. } DOE d. REED v. HARRIS.

Devise—Revocation by Burning.

A will having been properly executed, a witness, on the trial of an ejectment by the heir-at-law against the devisee, stated, that a short time before his death the testator expressed an intention to burn his will, but that he had been prevented by the devisee; and stated a conversation by the devisee, in which she admitted that the testator had thrown the will on the fire, but that she had caught it off the fire, and had promised to burn it; the witness also gave evidence of a subsequent quarrel between the testator and the devisee,

when the former asked for his will, and the latter promised to destroy it the next day. The will was produced at the trial without any mark of fire upon it:—Held, that this was no evidence of a revocation of the will.

Ejectment for houses and land in Glamorganshire, tried before Patteson, J. at the Summer Assizes of 1835, for the county of Glamorgan. The lessor of the plaintiff claimed as heir-at-law of one John Reed, and the defendant as the devisee in trust under a will executed by the latter. The execution of the will was proved; but it was contended, on the part of the plaintiff, first, that it had been executed under the undue influence exercised by the defendant, and evidence was given to establish this charge; and, secondly, that it had been revoked by the testator. The will itself was neither cancelled nor torn; but a piece of brown paper, in which it had been wrapped, was said to have been scorched; and a witness called for the plaintiff stated, that a short time before the death of the deceased, he inquired of the witness, who was a servant in his house, for his will, and expressed a determination to burn it, but said that he could not get it from the defendant, who was his niece, and lived in his house with him. The witness then stated, that she applied to the defendant to give it up to him, which she refused to do, saying, that she had given him the will on the previous night, and that he had thrown it on the fire, and that she had scrambled it from there; that if he had it again he would do the same thing with it; adding, that she would burn it herself before his eyes: that after this conversation the deceased and the defendant had a quarrel, during which time the deceased frequently asked for his will, and the defendant promised to give it him the next morning. On this evidence the learned Judge told the jury, that if they believed that the testator had thrown the will on the fire with the intention of burning it, and that the defendant took it off, but promised to burn it, the will was revoked; and he also left it to them to say, whether the will had been obtained by importunity, amounting to undue influence. The jury found a verdict for the lessor of the plaintiff.

In the ensuing Michaelmas term, J. Evans obtained a rule nisi, for a new trial, on the ground of misdirection respecting the revocation of the will; and also on the ground that the verdict was against the evidence. He cited *Doe v. Perkes* (1), and contended, that *Bibb v. Thomas* (2), on which the direction proceeded, if not distinguishable, could not be supported.

Chilton and *James* now shewed cause.—Two questions were distinctly left to the jury, either of which would entitle the plaintiff to retain this verdict. Now the jury gave a general verdict; if the direction, as to one question, be right, the Court will not disturb the verdict.

[LORD DENMAN, C.J.—It is quite clear, that if there was a misdirection on one question, the verdict cannot stand.]

Then *Bibb v. Thomas* is a complete authority in support of this direction, and is good law. There it was held, that a slight tearing of a will, and a throwing it on the fire with a deliberate intent to consume it by the testator, though it fell off, and was preserved by a by-stander without his knowledge and consent, was a revocation. It was not denied on the trial that that case was in point, but its authority was impeached.

[COLERIDGE, J.—A distinction was pointed out on the motion, that there some mark of the fire appeared on the will, whereas there was no such mark here.]

Still the same facts were proved there as in the present case. It may be said, that the witness only proved the declarations of the deceased and the defendant; and the cases decided on the Statute of Limitations will be relied on, in which it has been held, that the verbal acknowledgment of a part payment will not satisfy the 9 Geo. 4. c. 14—*Willis v. Newham* (3), *Wilby v. Henman* (4). That, however, has been qualified by *Haydon v. Williams* (5), which holds, that parol evidence of a written acknowledgment, which is lost, may be given in evidence. These, however, were determined on the construction which the

(1) 3 B. & Ald. 489.

(2) 4 W. Bl. 1043.

(3) 3 Y. & Jer. 518.

(4) 2 Cr. & M. 658; s. c. 4 Law J. Rep. (N.S.) Exch. 267.

(5) 7 Bing. 163; s. c. 9 Law J. Rep. C.P. 16.

Court gave to the statute. 'It is clear, that the mode of proving the facts, whether by testimony of the actual fact, or of admissions by the party, cannot be material. But it is said, that the Statute of Frauds will not allow those facts to operate as a revocation. That statute authorizes a revocation by *burning*; and the question arises, what is a *burning*? It is enough if the will be singed. It cannot be necessary to prove that it was entirely burnt.

[COLERIDGE, J.—Then you contend, that singing the envelope, with intent to destroy the will, is a burning, within the meaning of the statute, so as to operate as a revocation?]

Certainly. In *Doe v. Perkes*, the doctrine of *Bibb v. Thomas* was recognized to the full extent. Here, the committing to the flames shewed the intent of the party to revoke, and that is sufficient.

Maule, J. Evans, and E. V. Williams, contra, were stopped.

LORD DENMAN, C.J.—A will is a most solemn instrument, and the statute has required that it shall be executed with certain solemnities; but it is revocable; and where the intention to revoke is clear, the will shall be revoked, provided certain acts, which the statute points out, be done. One of these is the burning of the will. Now, there is no evidence that that act has been done. The singeing of the cover is not the burning of the will. It is impossible to hold that that is sufficient. If we did, we should go farther than the statute intended. The statute prescribes very reasonable acts. Cases may be put, where the burning or the tearing only of a small part may operate as a revocation; but the current of authorities is against the argument urged by Mr. Chilton. There are two cases: first, *Bibb v. Thomas*, where the party slightly tore the will, with intent to destroy, and it was afterwards thrown on the fire: the Court thought two of the acts mentioned in the statute were proved. The extent of that case is to shew, not that the Court will dispense with those acts, but that enough had been done to satisfy the statute. Then in *Doe v. Perkes*, where the will was torn in four pieces, but the act was not complete, and the testator allowed it to remain so, the Court said, that the

revocation was not complete: and they were right. He arrested his act before he had completed it, and his intention of revoking was itself revoked. It was, therefore, rightly left to the jury to say, in that case, whether the deviser had a complete intention to revoke. Those cases do not support the present; there was no revocation here. We should violate the language of the statute if we were to say there was; and the greatest inconvenience would result if we could get rid of a substantial compliance with the statute. On the other hand, no inconvenience will result if we say, that if the party mean to revoke his will, he shall do some of the acts mentioned in the statute, which some witness must prove. In the absence of all evidence of any one of those acts, we are bound to say, that what has been done is insufficient.

PATTESON, J.—I am now satisfied that I left the question to the jury wrongly. I did not then see the distinction that exists between *Bibb v. Thomas* and this case; and I told the jury that if they believed the testator intended to revoke his will, there was a revocation. That was wrong; there was something more in that case than in this, namely, a tearing, and the Court relied upon it. The will was there torn, though the corner was not torn off. It is plain, that on the production of the instrument, the tear would appear: not that that was important if the tearing could be shewn. It is impossible to say here, that the burning of the corner of the envelope is sufficient. If my direction be supported, we must say that an attempt to burn is a burning: that we ought not to say. And there was no evidence here of any actual or partial burning of the will.

WILLIAMS, J.—There was no revocation at all in this case.

COLERIDGE, J.—If we were to adopt the argument of difficulties, we should lay the foundation for a repeal of the Statute of Frauds; for very wise purposes that statute does not allow this subject to rest in mere intention, but the definitive acts are to be performed. Thus, a will cannot be made by mere intention, however strongly expressed; and when it has been made, the same rule is applicable to the destruction of it; for that purpose some act must be

done coupled with the intention to destroy it. We have been pressed with the difficulty of a partial destruction, and have been asked, whether it is necessary that the whole should be destroyed. It is not quite necessary to answer that question here, but I should say, not—but that there should be such a burning as destroys the entirety of the will, for in such a case the will of the testator no longer exists as he framed it. Here there was no evidence of a revocation. The fire did not touch the will, but was prevented from doing so by the fraud of the devisee. Suppose a testator intended to revoke a will in writing, and he were prevented by the fraud of the devisee, still that would not suffice. We must give effect to the words of the statute, according to the meaning which common sense and legal reasoning require.

Rule for a new trial absolute.

1837. } THE KING v. THE INHABITANTS
Jan. 25. } OF SNAPE.

Settlement—Renting a Tenement.

A case stated, that the pauper in 1817 was engaged by a master to take care of his stock on certain marshes. It was agreed that he should receive 12s. a week wages, the keep of one cow, four sheep, and two pigs on the marshes, and should occupy rent-free a house situate there, which had always been appropriated to the person who looked after the stock. The pauper was to go into the house at Michaelmas; and at the time when he commenced taking care of the stock, it was stipulated that he should not be obliged to leave the house, unless he had notice to quit at Michaelmas. He took charge of the stock, and had possession of the house for nine years, and during that time had no other employment than the taking care of this stock. The Sessions having found, that the occupation by him was in the character of servant, the Court refused to set aside that finding.

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 33.]

1837. } FARLEY AND OTHERS v. BRIANT
Jan. 30. } AND OTHERS.*

Executors—Costs—3 & 4 Will. 4. c. 42. s. 31.

As a general rule, since the statute 3 & 4 Will. 4. c. 42. s. 31, executors plaintiffs are liable to costs where they do not succeed; and it is incumbent on them to shew some facts, which may satisfy the Court, that they should be exempt in the particular case.

The fact that they were advised by counsel, that a point of law, which was ultimately decided against them, was in their favour, or, at all events, that there was sufficient doubt as to the plaintiffs ought to take the opinion of a court of law upon it, is not sufficient.

The conduct of the defendant, after action brought, as that there was greater prolixity of pleading than necessary, &c., will not be considered by the Court, in exercising their discretion as to relieving executors from costs.

This was an action of debt on covenants, brought by the plaintiffs, who were executors and executrix of Sir Thomas Hussey Apreece, against the defendants, the heir-at-law and devisee of John Briant, on the stat. 3 & 4 Will. & M. against fraudulent devisees. Upon a demurrer to the pleas of Mary Briant, judgment was given for the defendant.

A rule had been obtained subsequently, on behalf of the plaintiffs, for the purpose of relieving them from costs, by virtue of the stat. 3 & 4 Will. 4. c. 42. s. 31, which enacts, "that, in every action brought by any executor or administrator in right of the testator or intestate, such executor or administrator shall, unless the Court in which such action is brought, or a Judge of any of the superior Courts, shall otherwise order, pay costs to the defendants, in case of being nonsuited, or a verdict passing against the plaintiff, and in all other cases in which he would be liable, if such plaintiff were suing in his own right upon a cause of action accruing to himself; and the defendant shall have judgment for such costs, and they shall be recovered in like manner."

The affidavit on the part of the plain-

* This case will be found reported ante, 4 Law J. Rep. (N.S.) K.B. 246, upon other points.

tiffs disclosed that the claim on the estate of John Briant was a considerable one; that it was believed the assets were large; but the estate being under administration in Chancery, it was necessary to establish the claim as a debt at law before it could be carried into the Master's office; and that before the action was commenced an eminent counsel was consulted, who advised they were likely to succeed, or, at any rate, that it was a point on which it was their duty, as executors, to take the opinion of a court of law. It was further imputed to the defendants, that, by an unnecessary prolixity of pleading, they had unnecessarily increased the expense of the suit, and one of them must, before its commencement, have been in possession of the facts which were set out in one of the pleas, and which, if communicated to the plaintiffs, might have discouraged them from bringing the action.

Maule shewed cause in Michaelmas term.—It was the intention of the legislature by the provision of 3 & 4 Will. 4. c. 42. s. 31. to remedy an evil which arose from executors and administrators, plaintiffs, being free from the costs of the suit as against the defendant. The learned Judge, in the case of *Lysons v. Barron* (1), certainly, in delivering his judgment, appears to have thought, that whether an executor should be made subject to costs or not, depended on whether the executor had done anything wrong—whether, in point of fact, the action brought by him was vexatious or not; but there is nothing in the statute to shew that executors were only to become liable to costs, in case it should turn out that their action was vexatious or founded on frivolous grounds. In a subsequent case of *Southgate v. Crowley* (2), the Court laid down a sound and satisfactory rule, that the executors should not be exempt, unless there was some misconduct on the part of the defendants.

Stephen, Serj., contrà, mainly relied upon the rule as laid down in *Lysons v. Barron*, and contended, that this was a reasonable case for the Court to exercise their power to relieve the plaintiffs from costs. He

also cited the case of *Engler v. Twissden* (3).

LORD DENMAN, C. J.—It will be our study, if we can, in this case, to lay down such a rule as may reconcile all the cases.

Cur. adv. vult.

LORD DENMAN, C. J.—This was an action brought by the plaintiffs as executors, against the defendants as devisee and heir-at-law of John Briant, under the 3 & 4 Will. & Mary, c. 14, in which, upon a demurrer to the plea, judgment passed for the defendants.

The present is a motion on the part of the plaintiffs, under the 3 & 4 Will. 4. c. 42. s. 31, to be relieved from the payment of costs; and being the first case which has brought that clause of the statute under the consideration of this Court, it stood over for the purpose of determining the rule for its future construction.

The language of the statute itself clearly points to this, that executors, plaintiffs, are now, generally speaking, placed, in reference to payment of costs, upon the same footing precisely as persons suing in their own right. This is the general rule, and may be considered to be founded upon the natural justice of indemnifying a successful defendant from the costs of an action wrongfully brought against him, upon the principle, that the exemption which has hitherto been enjoyed by executors, suing as such, is attributable not so much to the consideration of any circumstances legitimately operating in their favour, as to the language of the stat. 23 Hen. 8. c. 15. (by which costs were first given to a defendant where the plaintiff is nonsuited or loses the verdict,) not embracing these cases of actions in which the parties sue in their representative character. Upon that general rule, however, the statute 3 & 4 Will. 4. has engrafted an exemption, which empowers the Court, in which the action is brought, or any Judge of the superior Courts, to interfere for the relief of executors.

This being an exemption, we are clearly of opinion, that it is incumbent on the party applying for relief to make out the grounds for the interference of the Court. In the

(3) 2 Bing. N.C. 263; s. c. 5 Law J. Rep. (N.S.) C.P. 1.

(1) 10 Bing. 563; s. c. 3 Law J. Rep. (N.S.) C.P. 192.

(2) 1 Bing. N.C. 518; s. c. 4 Law J. Rep. (N.S.) C.P. 102.

present case, the affidavit on the part of the plaintiffs discloses that the claim on the estate of John Briant was a considerable one; that it was believed the assets were large; but the estate being under administration in Chancery, it was necessary to establish the claim as a debt at law, before it could be carried into the Master's office; and that before the action was commenced an eminent counsel was consulted, who advised they were likely to succeed, or, at any rate, that it was a point on which it was their duty, as executors, to take the opinion of a court of law. It was further imputed to the defendants, that, by an unnecessary prolixity of pleading, they had unnecessarily increased the expense of the suit; and one of them must, before its commencement, have been in possession of the facts which are set out in one of the pleas, and which, if communicated to the plaintiffs, might have discouraged them from bringing the action.

But we dismiss these two points from our consideration; the first, because we think the plaintiffs' liability to the costs cannot be affected by such conduct of the defendants after the suit has commenced: the latter, because it does not appear that any previous inquiries were made of the defendants by the plaintiffs; and, to say the least, we think it was rather the duty of the plaintiffs to make every endeavour to procure all such information before they brought their action, than of the defendants to volunteer any disclosure of matters, which would avail them in their defence.

The plaintiffs' case, therefore, must rest on the matter first stated, the result of which is, that the action was brought *bond fide*, and under legal advice encouraging as to the result, or representing it as one which it was proper for executors to bring. We may add, however, from our knowledge of the case, that it must always have been considered an action of a very doubtful result—the first attempt of the kind, as appeared upon the argument; and the plaintiffs failed upon the point of law; and, therefore, we are of opinion that, under these circumstances, there is not sufficient to warrant us in depriving the defendants of their costs. The defendants were the heir and devisee; they were not parties to the original transactions, nor have they been guilty

of any fraud or concealment; and they have been put to the expense of defending themselves against an action which was not maintainable. On the other hand, there is no ground for relieving the personal estate, for if a doubt existed as to the result, although the executors might have been justified in bringing the action, they were not bound to do so. No authority was cited, nor can be, we believe, to shew that the executors would have been guilty of a *devastavit* for declining to try a doubtful point; and if they were misled by advice, which, however *bond fide*, might have misled them, it is just that the estate, and not the defendants, should bear the expense. There are two decisions in the Court of Common Pleas on that subject—*Southgate v. Crowley*, and *Wilkinson v. Edwards* (4), which appear to us calculated to give full effect to the words and intent of the statute. We entirely concur in those decisions; and, therefore, this rule must be discharged.

Rule discharged.

Notes.—See also *Ashton v. Pointon*, 4 Law J. Rep. (N.S.) Exch. 71, and *Spence v. Albert*, in note thereto.

1837.

{ THE KING v. THE COMPANY OF
PROPRIETORS OF THE NOT-
TINGHAM OLD WATER WORKS,
ex parte SARAH TURNER.

Mandamus—Compensation under Local Act.

A company created by a local act of parliament had been commanded by mandamus to summon a jury, for the assessment of damages due under the act to a party grieved, and the jury had accordingly assessed the damages at a certain sum. The act provided, that the jury should be summoned before the Justices at the Quarter Sessions, who were to give judgment for the compensation so assessed, and that the verdict and judgment should be registered by the clerk of the peace, and be deemed records for all intents and purposes; and it was also provided, that the costs of the inquisition should be recoverable by distress under a warrant, to be granted by two Justices of the

(4) 1 Bing. N.C. 301; s. c. 4 Law J. Rep. (N.S.) C.P. 7.

Peace. No specific mode was pointed out for recovering the amount assessed. The Court refused to grant a mandamus to the company, to pay the costs either of the former mandamus or of the inquisition, as there were remedies for both these cases; but granted a mandamus to them, to pay the amount assessed, as it did not appear that there was any other convenient remedy for its recovery.

The mandamus having issued for the assessment of the compensation to be paid by the company as directed by the Court, in Michaelmas term, 1835 (1), a jury was summoned, an inquisition was taken, and the amount of the loss which Mrs. Turner had sustained was found to be 500*l*. This sum, together with the sum of 241*l*. for Mrs. Turner's costs, incurred by her on the application for the mandamus, and on the inquisition, was demanded by her of the company, but the payment was refused. She applied to the Court of Quarter Sessions of the county of Nottingham for a warrant of distress against the effects of the company, for the recovery of these sums; but that Court declined to grant her application, and a similar application was subsequently made to a Justice of the Peace, without success. In last term,—

Sir W. W. Follett had obtained a rule nisi for a mandamus to the company, to pay the sum of 500*l*. and the costs incurred by Mrs. Turner; against which, cause was now shewn by—

M. D. Hill, N. R. Clarke, and Whitehurst.—This is an unprecedented application, and quite unnecessary. The Court is required to call upon a company, by a writ of mandamus, to pay a debt which they have incurred. That is a writ which is never granted unless there be a total want of every other remedy—*The King v. the Bank of England* (2). Here, there is another remedy. According to the provisions of the statute, any person who is damnified by any act done by the company is entitled to have compensation, to be settled by a verdict of a jury; and the sum is to be recovered and levied in the same manner as is directed with respect to damages

before provided for by the statute (3). Now, although that clause does not give a specific remedy, it points out the remedy which is to be obtained, for by a previous clause it is provided, "that for settling all differences as to the compensation to be paid by the company for land which they may take, an inquisition is to be taken by a jury, before the Justices at the Quarter Sessions, who are to assess the compensation for the land, and damages which may be occasioned by the company's taking of the land; and "the said Justices shall accordingly give judgment for such purchase-money, recompense, or compensation, as shall be so assessed by such verdict, which said verdict, and the judgment thereupon to be pronounced as aforesaid, shall be binding and conclusive." And it is enacted, "that all such verdicts and judgments shall be registered by the clerk of the peace, and be deemed records to all intents and purposes." Then it is enacted, "that in case the verdict given by the jury shall exceed the sum offered by the company, all the costs and charges incurred in the summoning, impanelling, &c. the jury, in taking the inquisition, &c., and recording the verdict and judgment, are to be borne by the said company; and in default of payment of such costs, the same may be levied and recovered by distress and sale of the goods and effects of the company, under a warrant to be granted by any Justice of the Peace of the county of Nottingham." These clauses shew, that the judgment for the compensation has become a specific debt; it is a judgment which has been recorded; and, consequently, an action of debt will lie upon it, as on any common law judgment. Debt will lie even on a foreign judgment: why not, therefore, on the present, which is a record?

[*PATTERSON, J.* referred to *The King v. the St. Katherine's Dock Company* (4), where a mandamus was directed to the treasurer and directors, commanding a sum which had been settled on an award to be paid by the company.]

Then it is clear, that there is a distinct remedy for the recovery of such costs as the party is entitled to; and certainly the

(1) See 5 Law J. Rep. (N.S.) K.B. 11.

(2) Doug. 524.

(3) This clause is set out in the former report.

(4) 4 B. & Ad. 360.

costs of the mandamus cannot be obtained in this manner: the proper mode of obtaining them would be by an attachment.

Sir W. W. Follett and Bourne, in support of the rule.—There is no complete mode of enforcing the verdict of the jury. An action of trespass or on the case will not lie against the company, or their agents, for the injury to Mrs. Turner's mill; for the act of parliament justifies them in what they have done. The proper course under it is to have the damage assessed by a jury. That has been done: but how is that verdict to be enforced? It is said, that an action of debt may be maintained upon the order of the Court of Quarter Sessions; but there is no authority for such an action: all that can be done on the order is to prefer an indictment for disobedience. It is like a decree of a court of equity, on which no action can be maintained; and, indeed, it is but an assessment of damages, and not a certain ascertained debt, as was the case in *The King v. the St. Katherine's Dock Company*, where there was an award. It is similar to the case in which the Court has held, that it will enforce a judgment obtained against the officer of a company, whose own goods cannot be taken to satisfy it.

[PATTESON, J.—Will not debt lie on every judgment? And here the statute says, that the judgment shall be recorded.]

All matters at the Quarter Sessions are recorded.

[COLERIDGE, J.—Criminal matters, not matters of debt.]

In *The King v. Kingston* (5), there was an indictment against trustees for non-payment of costs, ordered to be paid by the Sessions, and not an action of debt. The legislature never meant that the party should be driven to an action.

[PATTESON, J.—The legislature has said, that the sum shall be levied, but has not pointed out the mode of levying it.]

If the remedy then be doubtful, or not so complete, convenient, or satisfactory, as by mandamus, the Court will grant the writ—*The King v. the Severn and Wye Railway Company* (6). The case of Lord

Boston (7) is also expressly in point. There, the Sessions had made an order for compensation, and this Court granted a mandamus to enforce the order. Some objections were made on the ground of Mrs. Turner being only tenant for life; that can only affect the quantum of compensation, which is not now to be questioned. So also it was said, that the verdict has not been registered; but the registering of the verdict is the act of the clerk of the peace, and not of the parties; and the omission, if there has been one, does not prevent her from receiving the money. If it be of importance, the rule may be enlarged until it is done; but the company did not refuse to pay the money on this objection. In regard to the subject of the costs, they certainly stand on a different footing. It may be conceded, that there is a remedy for them. The Magistrates refused to grant the warrant, thinking the clause did not apply to cases where compensation is granted for damages. But the costs certainly seem to follow the demand for the damages, and if the Court order the mandamus to go for the latter, it will, in the exercise of its discretion, also order it to go for the former.

PATTESON, J.—This is an application to compel a company to pay a sum of money awarded by a jury; and also to pay costs. I think it is quite clear, that if we should be of opinion, that one part of this rule may be made absolute, it might be too much for us to say, that that should be the case with the other. I remember many cases in which the Court, in such circumstances, has adopted a course of this kind. With respect then to the costs, it does seem to me that this act of parliament has given, in the section referred to, very distinct directions as to the payment of damages, but not as to the costs. It directs, that "the sum to be paid for the same shall be recovered and levied in the same manner as the damages hereinbefore provided for;" but it says nothing of the payment of the costs. But in the clause, as to the taking of the land, there is a provision as to the costs. It is there declared, "that if the

(5) 8 East, 41.

(6) 2 B. & Ald. 616.

(7) *The King v. the Thames and Isis Commissioners*, ante, p. 17

sum recovered shall be greater than that offered by the company, costs shall be paid, and may be levied by distress and sale." I think, therefore, that if costs are recoverable at all, they must be recoverable in the same manner as the damages; so that the rule cannot be absolute upon that point. With respect to the other matter, I have great difficulty in saying that this rule should be absolute, if there is any specific remedy applicable to that purpose; and I have had great difficulty in saying that there is not any such remedy. The act declares, "that the judgment shall be binding to all intents and purposes whatsoever," and that "the judgment being first signed by the clerk of the peace, shall be registered in the records of the Quarter Sessions of the county, and shall be deemed a public record, and that all persons shall be at liberty, at proper times, &c., to inspect the same." It seemed to me at first, that a judgment entered of record might be enforced like any other; but I afterwards saw some reason to doubt about that matter. This is not an ordinary record of the Quarter Sessions, and I have never heard of actions of debt on records of that court. The present is a claim for damages, for an injury committed under this act of parliament; and this Court of Quarter Sessions is constituted a court of record, for the special purposes of this act. The party injured is to make the claim in a particular manner; and a precept is to issue to the sheriff to summon a jury, to assess the damages. I feel it difficult to say how we are to act on such a document. If we look at the provisions for the payment of the purchase-money, we shall see that there is no mode pointed out by which that could be recovered. There must be a verdict and a judgment; but there the directions as to the proceedings cease. It is only in the 17th section that it is said, that when this is paid, the party shall be entitled to take possession; so that the legislature has only given that restriction as to taking possession of the land; as the means of the party securing payment for the price of it. The act afterwards provides for a different state of things, and says, "that if at any time the party suffers damages in his lands, &c., for which compensation shall not before have been provided, such

damages shall be ascertained and assessed by a jury." It is not said, that the amount may be agreed on by the party, nor that there shall be a demand made, nor an offer made; but that such damages shall from time to time be ascertained by a jury, and that the same shall be recovered, levied, and applied in the same manner as before directed. With respect to the value of lands sold, the legislature has taken it for granted, that there was some mode of levying these damages. If there were any process at the Quarter Sessions, by which they could be levied, there would be no need to have a mandamus from this court; but there is none. There is not any officer to whom the Court of Quarter Sessions could direct such process; so that the party cannot levy on this judgment, nor can it be removed by *certiorari*, and enforced in this court:—there is nothing in the act of parliament for this; so that the word "levy" cannot have any meaning in the act. Then, the only remaining way is, to treat the money as a debt to be recovered, and the main argument is, that it should be so treated, and that payment of it may be so enforced; and that, therefore, this Court cannot interfere in the matter by summary process. I am not prepared to say whether it can, or whether it cannot, be so enforced; but unless a clear remedy is preserved to the party, we are bound to enforce the performance of what the act of parliament has directed to be done by mandamus. In my opinion, therefore, this rule must be absolute as to that part. There are some other objections as to the regularity of these proceedings; but there are no affidavits on the part of the company to shew, that they are not regular, the objection simply being, that the affidavits on the other side do not shew that they are regular. I do not think that we are bound to require such affidavits. We must take it for granted, that all that has been done has been rightly done. We have directed a mandamus to summon the jury to assess the damages, and a jury has been summoned, and the damages have been assessed. We must presume, that all this has been done regularly. But then it is said, that this party is merely tenant for life, and that there is this objection to the verdict, that the jury should have been summoned to

assess the damages sustained by every person interested in the land, and that the damages thus assessed should be divided by the jury amongst the different persons interested, according to the amount of their respective interests. However that might be with respect to the clause as to the purchase of the land, it is not so here. It does not necessarily follow, that any other person should have a right to compensation. The words of the clause do not extend to all persons whatever, but to any persons of the kind therein particularly described. If the damages claimed are more than the tenant for life ought to have, that ought to be the subject of observation to the jury at the sessions. It should be distinctly pointed out to them in what manner they are to give their damages. The affidavits here do not object to the mode in which the chairman left the question to the jury; and we must, therefore, assume that it was rightly left to them. The rule, must, therefore, be absolute, so far as the 500*l.* are concerned, leaving the party to get costs as the Justices may think fit, or to come to us with an application in another shape. As to the costs of the mandamus, they can be enforced by attachment according to the provisions of the act, by which they were lately ordered to be given, upon a motion for a mandamus.

WILLIAMS, J.—I fully concur in this opinion. Serious doubts have been entertained on the principal part of the case, but very little as to the other. As to what was done at the Sessions, there is no doubt that we must presume that the Sessions proceeded regularly. The principal question with us has been, whether the party has any other full and effective remedy for the recovery of these damages. If he has, we think that a rule like the present ought not to be granted. This was the essential difficulty that struck our minds. The question, in fact, is, whether, when by a section of an act of parliament the decision is to be treated as a record, that is not in itself a legislative declaration, that there is a remedy upon it by action of debt. But the nature of the court, in which it is to become a record, being considered, I cannot but doubt, whether the party entitled can have a full and effective remedy for the recovery of his claim; and therefore I think that

for the 500*l.* we ought to allow the mandamus to go. I doubt whether it was the intention of the legislature to put a party to a circuitous remedy for the recovery of the very thing for which a summary remedy for ascertaining his right was given by the act.

COLERIDGE, J.—As my Brother Patterson has so fully gone into this question, I shall feel it necessary to say but a very few words upon it, especially as I completely agree with what he has said. The principle on which a mandamus is allowed to issue from this court is well known. Two things must concur before this Court will grant it. There must be the existence of a specific legal right, and the absence of a specific legal remedy. The costs here must be divided into two parts—those occasioned by the rule here, and those incurred in the proceedings below. As to the former, there is an absence of a specific legal right to them, till the Court has awarded them to the party. As to the others, it seems that we cannot know that the party has a right to costs; and here we are not dealing with a common law matter, but with that which is the creation of an act of parliament. On these grounds, I think that we must refuse the rule as to costs. As to the 500*l.*, the principle seems to me to be the other way. The party has here a clear legal right, and there is also an absence of any clear legal remedy. This is a judgment of the Court of Quarter Sessions, which cannot be enforced like the ordinary judgments of that court. If the party proceeded upon it by way of indictment, he would not have a beneficial remedy. The Court might fine or imprison the defendant for not obeying the judgment; but that would be productive of no advantage to the other party. On the other hand it cannot be said, that an action would lie upon this judgment. We have referred to the general expression used by Mr. Justice Blackstone in his *Commentaries*; and we cannot doubt that an action would not be maintainable. With respect to the other point, it is hardly worth mentioning; it must not be taken for granted, that when a second mandamus is sought for as ancillary to the first, the party against whom it is issued may come and say, that it prays for too little or too much, or set up objections to the proceed-

ings it is intended to enforce, which he might have taken upon the return to the first mandamus. As to the proceedings at the Quarter Sessions, we ought to apply the maxim, that in the absence of direct and plain impeachment of them, we must give credit to the Court below, that all that has been done there has been rightly done.

Rule absolute.

1837. } THE KING v. WM. PAYNE, ESQ.

County Rate—County Treasurer—Mandamus.

A treasurer of a county entered his accounts in a book, which he laid before the Justices at the Sessions, and they audited those accounts, checking them with the bills, orders, and vouchers, which he also produced to them at the same time, and giving him a discharge in that book. They returned this book to him, and deposited the vouchers, &c. with the clerk of the peace:—Held, that that book was the account of the treasurer, which, according to the 12 Geo. 3. c. 21. s. 8, ought to have been deposited with the clerk of the peace, and that a mandamus might issue to the treasurer to compel him so to deposit it.

Semble—that the Sessions could not compel the treasurer to return the book to them.

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 62.]

1837. } SILVERY v. HOWARD.
Jan. 16. }

Devise—Construction—Estate for Life.

A testator being seised of freehold land, gave several pecuniary legacies, and then devised as follows:—"I give unto W. L. and A. his wife, for and during their natural lives, all and every my messuages, lands, and tenements, hereditaments and premises whatsoever, in the city of N. or elsewhere in the kingdom of Great Britain; and from and after the decease of the said W. L. and A. his wife, my mind and will is, the said messuages, lands, and tenements, hereditaments and premises, shall be equally divided unto and amongst such of the children of the said

W. L. and A. his wife, as shall be then living." He then bequeathed the residue of his personal estate to his executors:—Held, that the children of W. L. took life estates only, as tenants in common, as there were no words conveying a clear intention to pass a fee.

Assumpsit on a contract between the plaintiff and the defendant for the sale of land: breach, that the defendant had not made out a good and perfect title. The defendant pleaded, that he did make out a good and perfect title, and upon that issue was joined.

At the trial, before Lord Abinger, C.B., at the Spring Assizes, 1835, for the city of Norwich, it appeared, that the title depended upon the construction to be put upon the will of John Lamb Love. The testator was an illegitimate child, and had died without issue. The will, after appointing William Lamb and another person to be executors, and giving various pecuniary legacies, proceeded:—"And I do hereby give and devise unto the said William Lamb and Ann his wife, for and during their natural lives, all and every my messuages, lands, and tenements, hereditaments and premises whatsoever, in the city of Norwich, or elsewhere in the kingdom of Great Britain; and from and after the decease of the said William Lamb and Ann his wife, my mind and will is, the said messuages, lands, and tenements, hereditaments and premises, shall be equally divided unto and amongst such of the children of the said William Lamb and Ann his wife, as shall be then living, share and share alike; and as to what shall remain of all and every my personal estate not hereinbefore disposed of, after payment of such just debts as I shall owe at the time of my decease, my funeral expenses, charges of probate of this will, and other charges incident thereto, and to the executorship thereof, my mind and will is, and I do hereby give and bequeath such remainder or overplus unto my said executors, William Lamb and Henry Taylor."

The question was, whether by this will an estate in fee or for life was devised to the children of William Lamb and Ann his wife. The Lord Chief Baron directed a verdict to be entered for the plaintiff, giving the defendant's counsel leave to move

to set that verdict aside and enter a verdict for the defendant. Accordingly, in Easter term 1835,—

Biggs Andrews obtained a rule nisi; against which—

Storks, Serj. and *Palmer*, on a former day in this term, shewed cause.—Under this will, the children of William Lamb took only a life estate, for there are no words specifically giving an estate in fee; and the word “estate” is not used, and the estate is not charged with the payment of debts. In *Denn v. Mellor* (1), the words were, “all the rest of my lands, tenements, and hereditaments, either freehold or copyhold, I give to A;” yet it was held, that a life estate only passed to A. The words of the present will are nearly the same. *Roe v. Holmes* (2), *Roe v. Blackett* (3), *Denn v. Gaskin* (4), *Morgan v. Griffith* (5), and *Doe v. Allen* (6), shew that a fee is not conveyed by such words. *Goodright v. Patch* (7) has been overruled; but *Doe v. Tucker* (8) is decisive against the defendant; and *Roe v. Wright* (9), *Chichester v. Ozenden* (10), and *Randall v. Tuchin* (11), are not adverse, for in those cases, the word “estate” occurred in the will.

Biggs Andrews, in support of the rule.—It has long been the wish of the Courts to give effect to the intention of the deviser as far as they could; the decision has been against the supposed intention in almost every case where the words of the devise have been so restrained as to give only an estate for life. By this will, the testator first appoints executors; he then gives several pecuniary legacies; then he disposes of his real property; he gives a life interest, and after that has terminated, he directs a division; disposing lastly of the residue of his personal property, thus shewing that he supposed he had entirely disposed of his real property. In this respect, the

case differs from *Doe v. Tucker*; but *Baddeley v. Leppingwell* (12), and *Oates v. Brydon* (13), are both cases in point, and the latter was not cited in *Doe v. Tucker*, *Gall v. Esdaile* (14), and *Stewart v. Garnett* (15).

Cur. adv. vult.

LORD DENMAN, C.J. now delivered the judgment of the Court. — This was a question, whether by a devise of land to children, share and share alike, an estate passed for life or in fee. It has been held repeatedly, and particularly in a late case of *Doe v. Tucker*, that such words, uncontroubled by clear proof of an opposite intention in other parts of the will, carry an estate for life only. The cases cited against the application of the rule, all admit of a satisfactory distinction from the present—*Baddeley v. Leppingwell* was decided on the creation of a charge; *Gall v. Esdaile* and *Stewart v. Garnett*, on the peculiar force of the word “estate.” One case, however, was mentioned, *Oates v. Brydon*, which was not noticed by the learned counsel who opposed the doctrine in the argument on the present case, nor in that of *Doe v. Tucker*. That was a devise of a house and stable for the life of testatrix's husband, and after his death to her brother for life, afterwards “to the children of my cousins B. and W, share and share alike,” and if the brother should not be living at the time of the husband's death, “then my mind and will is, that the said house and stable, with the appurtenances, be divided amongst the said children of B. and W. as aforesaid.” Lord Mansfield and the Court were there of opinion, that there was enough, on the whole will, to shew an intention that the value of the house and stable should be divided among the seven children, and the defendant, a purchaser from them, had the postea delivered to him. This decision would be the more likely to escape notice, both on this and on former occasions, because the principal point in the case turns on the effect of confessing lease, entry, and ouster; and the question of estate is not mentioned

(1) 5 Term Rep. 561.

(2) 2 Wils. 80.

(3) Cowp. 235.

(4) Ibid. 657.

(5) Ibid. 234.

(6) 8 Term Rep. 497.

(7) Loft, 224.

(8) 3 B. & Ad. 473; s. c. 1 Law J. Rep. (N.S.) K.B. 161.

(9) 7 East, 259.

(10) 4 Taunt. 176.

(11) 6 Taunt. 410.

(12) 3 Burr. 1541.

(13) Ibid. 1895.

(14) 8 Bing. 323; s. c. 1 Law J. Rep. (N.S.) C.P. 195.

(15) 3 Sim. 398.

in the margin. Nor does Sir James Burrow's statement of the case appear very satisfactory, the editor, in 1812, making no less than three necessary corrections in the course of a single page. Lord Mansfield also commences his judgment on this point of construction, by observing, that the whole property was worth but 100*l.*, which low value of property of a wasting nature to be divided among seven children; after two lives, led the Court to think, that it must have been meant to be sold, and the produce divided. The result was, that upon the whole of that will there was enough to shew that the testatrix intended the value of the house and stable to be divided among the children. It seems unnecessary for us to say more on the present will than that we find no words in it which clearly convince us that the testator intended to pass a fee. The ordinary rule, therefore, must prevail, by which a clause so worded is deemed to carry a life estate only.

Rule discharged.

1837. } THE KING v. THE JUSTICES OF
Jan. 11. } STAFFORDSHIRE.

County Rate—Inspection of Accounts—Mandamus.

County rate payers have no right, either at common law or by statute, to inspect and take copies of the bills of charges of county officers, after they have been deposited by the clerk of the peace among the records of the county, in pursuance of 12 Geo. 2. c. 29. s. 8. The Justices of the Peace for the county are alone entitled to such an inspection:

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 65.]

1837. } DOB d. HICKMAN v. HASLE-
Jan. 16. } WOOD.

Devise—Construction—Estate in Fee.

Devise as follows: "I give unto my wife, her heirs, and assigns, for ever, all the residue of my goods, chattels and personal estate whatsoever and wheresoever, and also all my right, title, and interest, of, in, and to all and every sum and sums of money

whatever, which now is, are, or shall be due to me upon and in virtue of any bill, bond, or other securities. I do likewise make my wife full and sole executrix of the freehold house situate in Great Queen Street, in the parish of St. Giles:"—Held, that under this devise the wife took a fee simple in the house in Great Queen Street.

At the trial of this ejectment, before Lord Denman, C.J., at the Sittings after Michaelmas term, 1835, a verdict was found for the plaintiff, subject to the following

CASE.

George Haslewood; being seised in free of a house in Great Queen Street, made his will, which was in the following words: "In the name of God, amen. I, G. H., do make and ordain this, &c. I give and bequeath unto my wife Ann Haslewood, to her heirs and assigns for ever, all the residue of my goods, chattels, and personal estate, whatsoever and wheresoever, and also all my right, title and interest of, in, and to all and every sum and sums of money whatsoever, which now is, are, or shall be due to me upon and in virtue of any will, bond, or other securities; and I do likewise make my wife, the said A. H., full and sole executrix of the freehold house situate in Great Queen Street, No. 15, in the parish of, &c. being the north side of the street in the county of Middlesex. This my last will and testament, hereby revoking all former wills by me made. In witness whereof, I," &c.

The testator died in December 1805, leaving his widow him surviving. The testator and his wife lived in the house until and at the time of his death, and the widow afterwards continued in possession until her death, in November 1833. A. H. afterwards married T. V., who died in December 1817, and in July 1826, she was married to J. A., and she with her husband continued in possession of the said house until her death as aforesaid. The lessor of the plaintiff is her nephew and heir-at-law.

The questions for the opinion of the Court were, first, whether Ann Haslewood took an estate in fee simple under the will of her husband;—secondly, whether, under the facts of the case, the plaintiff is entitled to recover. The verdict to be entered ac-

ordingly. The case was argued in last term—

Sir W. W. Follett, for the lessor of the plaintiff.—Although this is a will drawn by an illiterate person, the intention is clear, that the wife should take a fee in the freehold house. The testator leaves his personal property to his wife, her heirs and assigns; but the executors would take, and not the heirs—*Holloway v. Holloway* (1). So real property may pass under the description of personal property—*Doe v. Tufeld* (2); and effect is to be given to the intention of the testator, if violence be not done to the words used. It is suggested that there is a miscopying in the will, and that the paragraph describing the house in Queen Street, should follow the words, “other securities and,” in the preceding sentence, and the words, “I do likewise make my wife executrix of,” should be read immediately before “*this my last will*,” occurring in the latter part of the sentence, which would certainly remove all doubt; but this transposition need not be made. The intention of the testator, in making his wife executrix of his freehold house, was not to make her executrix of all his freehold property; he wished to give her some interest in that particular freehold; and he meant to give her the same authority over it that she would have over personal property. She must therefore take either an estate in fee, or nothing, for there are no words to confine it to a life estate. The testator’s intention here was to give his widow the house in Queen Street, and there are authorities to shew that she is capable of taking it under the term “executrix.” *Loveacres v. Blight* (3), *Rose v. Hill* (4), and *Roe v. Patteson* (5), support this construction; and in *Doe v. Gillard* (6), where the testator made several bequests, and then said, “I constitute R. G. my sole executor for ever,” it was held that the executor took a fee simple in the lands. The only difference between that case and the present is, that the words “for ever,” are added.

[COLERIDGE, J.—In a similar case before the Court yesterday, *Piggot v. Penrice* (7), and *Shaw v. Bull* (8), were cited.]

Shaw v. Bull is reported in a book of no authority, and would probably receive a different decision at the present day. In *Piggot v. Penrice*, and *Clements v. Cassye* (9), and a case cited in *Com. Dig.* ‘Devise,’ (N) 3, the decisions are against the executors taking the land, because the intention to disinherit the heir was not clear; but here the intention is clearly expressed with reference to a particular freehold house.

[PATTERSON, J.—The words, “I make A. my sole heir,” were held, in *Taylor v. Web* (10), to pass the fee. If I make A. my sole executor, that should pass the fee also.]

Supposing the house were leasehold only, this devise would clearly give her the entire disposition of it.

[PATTERSON, J.—But if the word “executrix” is to be read “heir,” there would be no executrix to the will.]

She might be administratrix with the will annexed. But if the Court should hold that Mrs. Haslewood took no interest at all under the will, as she has been in possession for twenty years, that would be sufficient to give her a right to the property by adverse possession—*Doe v. Cooke* (11).

Bull, for the defendant.—A devise to the executrix in these words does not pass the fee; the utmost that the testator has given his widow is a life estate in the freehold house. *Loveacres v. Blight* is opposed by *Denn v. Gaskin* (12), and *Goodright v. Barron* (13), in which the will was, “I give and bequeath to my wife, whom I make my sole executrix, all and singular my lands, &c. by her truly to be possessed and enjoyed;” and it was held, that the wife took only an estate for life. *Clements v. Cassye* resembles also the present case; and was cited in *Shaw v. Bull*, where a similar decision was given; and *Piggott v. Penrice* is a stronger authority against the lessor of the plaintiff. In all those cases, the wills expressed either an intention to

(1) 5 Ves. 403.

(2) 11 East, 246.

(3) Cowp. 352.

(4) 3 Barr. 1881.

(5) 16 East, 271.

(6) 5 B. & Ald. 783.

(7) Prec. Chan. 471; s. c. 1 Eq. Cas. Abr. 13.

(8) 12 Mod. 593.

(9) Noy, 48.

(10) Styles, 301.

(11) 7 Bing. 346; s. c. 9 Law J. Rep. C.P. 118.

(12) Cowp. 657.

(13) 11 East, 220.

devise all the worldly estate, or the surplus of the estate, of the testator, which has been held to shew the testator meant to devise his whole estate. *Denn v. Mellor* (14) is also an authority to the same effect; and although the judgment in that case was afterwards reversed in the Exchequer Chamber, the decision of the King's Bench was ultimately confirmed in the House of Lords. *Doe v. Baines* (15) is also in point. A devise to an executor has never been held to give more than a life interest, except where there has been a charge upon the estate devised, when, unless the executor takes an estate in fee, he may not be able to execute the will of the testator—*Doe v. Gillard*, *Rose v. Hill*, *Doe v. Holmes* (16), *Goodtitle v. Maddern* (17), and *Doe v. Woodhouse* (18). The second point is not raised on the case.

Sir W. W. Follett replied.—The case finds that the widow was in possession from 1805 to 1833—*Doe v. Cooke*.

[PATTESON, J.—If nothing passed under this devise to the widow, she would be entitled to dower, under which she might have been put into possession.]

She would have no right to possession until her dower was set out by metes and bounds.

[PATTESON, J.—Why may it not be intended that that was done? The person against whom her possession would have been adverse, was the heir-at-law of the husband, but it does not appear who he is.]

No authority has been cited to shew that when a specific estate has been devised to a particular person, the Court has ever held that no estate passes. It is laid down in 6 *Cruise's Dig.* 'Devise,' c. 11, p. 225, pl. 6, that "a devise to a person to give and sell passes an estate in fee," and *Co. Lit.* 9, b, is cited. An executrix is a person who has power to sell and dispose of the property of the testator, and doubtless the testator thought he was giving his wife the house in question when he gave her those powers. As to the cases cited in *Denn v. Gaskin*, where the fee was held

not to pass, there are no expressions in the will relating to executors; and in *Goodright v. Barron*, it was merely held that the words "truly to be possessed and enjoyed," were not sufficient to pass the fee. But the question still remains, whether constituting a person executor of lands, does not give him an estate in fee. *Trent v. Hanning* (19), and *Doe v. Gilbert* (20), may also be referred to for the plaintiff. *Taylor v. Web* was confirmed by *Marret v. Sly* (21). In *Shaw v. Bull*, the testator had previously given an estate to his executrix and her heirs, shewing that he knew how to distinguish between the two estates. In *Piggot v. Penrice*, and *Clements v. Cassye*, the wills did not shew any intention to give any specific estate of freehold.

Butt.—*Doe v. Gilbert* was decided on the coupling of the introductory clause with the residuary clause. But here no intention is expressed at the commencement of the will, and there is no residuary clause.

Cur. adv. vult.

LORD DENMAN, C.J., on this day, delivered the judgment of the Court. After reciting the will, and stating the facts of the case, his Lordship proceeded as follows:—Upon the argument of this case, many cases were cited, not, we think, (with one exception,) bearing directly upon this, but rather in illustration of the general principle upon which our decision ought to be founded. We have referred to those cases and perused them, and are clearly of opinion, that none can be considered to be directly decisive of this point. We could not fail to observe, however, upon that perusal, a constant reference to the principles upon which this and every other will is to be construed, viz. that every case of this sort depends upon its own peculiar circumstances, for in every case the question is one of construction, to be made on the whole of the will: every case, therefore, is individual. The question for our decision seems to depend upon two points: first, whether the intention of the testator can be clearly and satisfactorily collected from the will; secondly, whether we are

(14) 5 Term Rep. 558; s. c. 1 B. & P. 558; 2 B. & P. 247.

(15) 2 Cr. M. & R. 23; s. c. 4 Law J. Rep. (N.S.) Exch. 141.

(16) 8 Term Rep. 3.

(17) 4 East, 496.

(18) 4 Term Rep. 89.

(19) 7 East, 97.

(20) 3 Brod. & Bing. 85.

(21) 2 Sid. 75.

enabled, consistently with the rules of law, to carry that intention into effect. Upon the first point it is to be observed, that it does not appear that the testator was possessed of any other property beyond that which is noticed by his will. Nor can we perceive an allusion to any other object of his bounty, except his wife. Moreover, in the earlier clause of the will, all the testator's personal property, including everything due to him upon securities of every kind, is, (though the word "heirs" is there as much misapplied as the word "executrix" to the freehold house,) beyond all doubt, bequeathed to the wife. Having thus completed his purpose, with respect to the whole of his personalty, the will immediately proceeds to notice the only remaining property of the testator—his freehold house, No. 15, Queen Street, in the parish of St. Giles. For what purpose then can we suppose that the house was introduced into the will at all? Why is it mentioned in immediate connexion with property most certainly disposed of, if he meant to die intestate with respect to it? We can discover no other probable or reasonable supposition, but that the house was introduced into the will, with the intention of disposing of it; and if so, there is no other conclusion possible, but that he meant the disposition to be in favour of his wife. We therefore think, that by the words "I do likewise make my said wife full and sole executrix of the freehold house, &c." the testator did intend to devise that house to his wife; and that, (however inartificially he has executed his purpose,) he fully believed that he had done so. Whatever effect can reasonably be given to the word "likewise," we are not, we think, authorized to reject and expunge as wholly insignificant and unmeaning,—a clause in the will in which we have no doubt that the testator himself thought his meaning had been most fully and even learnedly expressed. And if this clause must be retained, as we are of opinion it must, it seems impossible to say, that the testator did not intend to give to his wife *some* interest, and if so, there is not only nothing to limit the intention to giving her anything less than "the full and sole" dominion over the house in question, or, in other words, an estate in fee simple therein;

but the term "full and sole executrix," as it would import the grant of the entire interest and dominion in and over property whereto it is correctly applicable, evinces an intention to grant no less in that to which it is through ignorance misapplied. Thus much, therefore, as to the *intention* of the testator. The solution of the first point has, we think, a very considerable effect in disposing of the second; indeed, the last argument, if correct, concludes that question; because we are aware of no authority, and none such has been suggested, which affects to impose a limit beyond which the Courts shall not proceed in their favourable construction of wills, to carry into effect the intention of a testator. Words which are supposed to have (and which really have, when correctly and technically applied,) a precise and definite meaning, are bent and diverted continually from that meaning, if the sense of the will requires it. "Heirs," "issue," "son," &c. are familiar instances of the kind now alluded to. The word "legacy" must be admitted to have a direct reference to a bequest of personalty, and not to a devise of land; yet in *Hardacre v. Nash*, in which, by the former part of the will, there had been 150*l.* each given to a son and daughter of a testator, afterwards certain land to each, and afterwards it was provided, that upon their death, "those legacies that had been left them should return to his wife;" Lord Kenyon thus states and deals with the argument arising from the proper meaning of the word: "Considerable stress was laid on the word 'legacies,' and it was argued that that word was an appropriate term applicable to personal estate only, but the same technical and correct expressions are not to be expected from unlettered persons as are usually found in wills drawn by professional men; even if there were no decision warranting us in saying, that the word 'legacy' may be applied to real estate, if the context required it, I should have had no difficulty in making such a determination for the first time." His Lordship then adds, that such a construction had been put upon it (as it had most undoubtedly) in *Hope v. Taylor*, upon the short ground "that it was most agreeable to the intention of the testator, in that case, to construe the word 'legacy' to extend to

land." *Doe v. Tofield*, however, carries the principle as far perhaps as can be necessary for the decision of this, or indeed any other, case. The only question was, (as stated in the judgment delivered by the Court,) whether freehold lands passed under the words "all my personal estate," and the Court had no hesitation in saying that the lands did pass by that description. One only case, (the excepted one before alluded to,) we understood to be adduced as in point, for the purpose of shewing that whatever may be the probable conjectures, the Court cannot, or at least ought not, to infer that a fee passed to the wife in this case, because the same inference has been before repudiated under similar circumstances. This case is *Piggot v. Penrice*. We, however, are so far from thinking that it is in point, that the manifest distinction between the cases, and even the reasoning of the Lord Chancellor, seem clearly to lead to a conclusion in favour of the lessor of the plaintiff. The question in that case arose entirely upon the following words—"I make my niece executrix of all my goods, lands, and chattels;" and it was whether under those words any lands could pass. Now, before we refer to the reasons of the Lord Chancellor, it is impossible not to perceive the extreme dissimilarity between that case and the present. There, the word "lands" is placed in the midst of words strictly and legally referable to the character of executrix; in the present case, no personalty is alluded to in the clause in question, but the wife, after a bequest of the personalty, is made "sole and full executrix" of a freehold house only. The Lord Chancellor, in reasoning upon the case, for the purpose of shewing that the heir could not upon such uncertainty be disinherited, does not rest upon the effect of the word "lands" being neutralized by its juxtaposition with personalty, but proceeds to observe, "that the word 'lands' was not to be rejected as useless, for probably there might be rents in arrear of those lands, and by making her executrix of her (testatrix's) lands, those rents would pass." Now, in this view of the case, there was no inference whatever to be drawn in favour of an intention that land should pass; of course, therefore, it furnishes no argument against

giving that effect to words which make that intention clear.

The word "executrix" happens to have received a different construction in two other cases. In *Clements v. Cassye*, the devise was of Blackacre and Whiteacre to the wife for life, remainder in Blackacre to J. S. in fee, the remainder in Whiteacre not being given over: "and I make my wife executrix of my goods and lands." But here the limited devise of land, followed by the combination of land with goods, were justly thought to negative the intention of devising the remainder in Whiteacre to the wife. In *Shaw v. Bull*, testator, seised of five houses, devised four specifically to several persons, one of these four to his wife in fee charged with legacies; finally, "all the overplus of my estate to be at my wife's disposal, and I make her my executrix." The Court was divided in opinion, Nevill, J. thinking, that a fee passed to the wife in the fifth house also; the Chief Justice Trevor, Powell, J., and Blencowe, J., differed from him; not because the words were incapable of passing the fee, if the intent were clear, but because they thought the intent negatived by the other provisions. The last case which we shall notice is that of *Thomas v. Phelps*, and we do so partly because the testator had made nearly the same indiscriminate abuse of terms as in the present instance, and because the Master of the Rolls treats very lightly such abuse and confusion. In that case, the testator had given a certain house to his son, James Phelps, and then added, "him and my daughter E. P. I make my joint executor and executrix of this my will, of all that I possess in any way belonging to me, freely to be possessed and enjoyed, only my household furniture, which I give to my daughter who lives longest single," &c. Upon this will the argument was, that the gift being to an executrix, she could only take personal property; and further, that if the clause could pass a freehold, there were no words of limitation to carry it beyond a life estate. The Master of the Rolls observed, "that it was the will of a person who had not the advantage of professional assistance, and was plainly ignorant of the nature and character of the office of executor, and of the distinction between real and personal es-

tates, as it regards that office." He then adverted to the words above set forth, and said, that they were equivalent to the gift of all the testator's property, and would pass *all* the testator's interest in that estate. Upon the whole, we are of opinion, that the intention of the testator clearly was to give to his wife, Ann Haslewood, the freehold of the house in question; and further, that the words in the will are sufficient to carry that intention into effect, and that no rule of law will be contravened by our giving judgment for the plaintiff.

Postea to plaintiff (22).

1837. }
Jan. 16. } DOE d. PRATT v. PRATT.

Devise—Construction.

Testator after directing that his debts and funeral expenses should be paid by his executor, bequeathed annuities to two of his relatives, and gave 5s. to his heir-at-law; and he then used the following words:—"I appoint W. P. my whole and sole executor of all my houses and land situate at F:"—Held, that W. P. took an estate in fee.

Ejectment for land in the parish of Folekton, in the county of York.

At the trial, before Parke, B., at the Spring Assizes, 1835, for that county, the lessor of the plaintiff claimed as the heir-at-law of Thomas Pratt, and the defendant as his devisee; and the question in the case was, whether the defendant took any estate under the will of Thomas Pratt, which was in the following terms:—

"I, Thomas Pratt, of &c., do make this, &c.: first, I will that all my debts and funeral expenses be paid and discharged by my executor hereinafter named. I then give and devise to my sister, Alice Hall, the sum of 2*l.* 10*s.* annually for each year, during the term of her natural life. Also to my niece Ann Pratt the sum of 2*l.* 10*s.* annually during the term of her natural life. Also I give unto my nephew John Pratt, the sum of 5*s.*, to be paid at the end of twelve months after my decease. I appoint my nephew William Pratt my whole

and sole executor of all my houses and land situate at Flixton, in the county of York."

The learned Judge directed a verdict to be entered for the plaintiff, reserving leave to move to set that verdict aside, and enter a verdict for the defendant.

Starkie, in Easter term, 1835, having obtained a rule nisi for that purpose,—

Alexander and Wightman, in last term, shewed cause.—The words in the will, "I appoint William Pratt my whole and sole executor of all my houses and land," are not sufficient to disinherit the heir-at-law, for a will which disinherits the heir, must be construed strictly. In *Piggott v. Penrice* (1), the words were: "I make my niece executrix of all my goods, lands, and chattels:" the testator had real and personal estates, but no leasehold property, and the Lord Chancellor was clearly of opinion that the real estate did not pass to the niece by the will. See also *Clements v. Cassye* (2).

[COLBRIDGE, J.—How do you distinguish *Doe v. Gillard* (3)?]

There the estate was charged with the payment of debts. *Shaw v. Bull* (4) is also an authority against the devisee.

[PATTERSON, J.—You give no effect to the word "land."]

By that word such lands, viz. leaseholds, as an executor may take, pass—*Roll. Abr.* 618; 1 *Eq. Ca. Abr.* 209. And it is not necessary that the executor should have the fee to effectuate a single object the testator had in view. The real estate is not charged with the payment of the debts and funeral expenses, though if they had to be paid by the executrix out of the real estate, the fee would have passed—*Doe v. Baines* (5). Then, as the annuities are not charged on the real estate, they would be payable out of the personal. An annuity is a personal legacy—*Hume v. Edwards* (6); and where the portion of the personal estate set apart to pay an annuitant, proves insufficient, the deficiency will be made good out of the residue—*Davis*

(1) 1 *Eq. Ca. Abr.* 209, case 13; s. c. *Proc. in Chanc.* 471; *Gilb. Eq. Rep.* 137.

(2) *Noy*, 48.

(3) 5 B. & Ald. 785.

(4) 12 *Mod.* 593.

(5) 2 *Cr. M. & R.* 23; s. c. 4 *Law J. Rep. (N.S.)* Exch. 141.

(6) 3 *Ath.* 693.

(22) See the following case.

v. Wattier (7). The land is not necessary to meet that charge. As to the gift to the heir-at-law of 5s., it is clear that a gift to the heir-at-law will not forward a construction which is to disinherit him—*Denn v. Gaskin* (8). *Anthony v. Rees* (9) may be cited; but the annuity there was devised to be paid out of the freehold estates, and it was necessary that the trustees should have the fee simple to meet that charge. In *Loveacres v. Blight* (10), the testator shewed an intention to dispose of all his real estate; and there was also a charge on the real estate. If, however, the executor takes any estate by the will, it must be admitted that he takes an estate in fee.

Cresswell and Starkie, *contra*.—The argument, that by the word "land" leaseholds pass, is not applicable, as the testator was not possessed of any leasehold property. Then the Court will carry the intention of the testator into effect, whether it does or does not disinherit the heir-at-law. None of the cases cited decide the present case. In *Clements v. Cassye*, no particular lands, of which the wife was to be executrix, were mentioned; and *Shaw v. Bull* is a case of very questionable authority. In *Piggott v. Penrice*, the Court held the word "land" to mean leasehold land, because it was interposed between goods and chattels. On the other hand, in *Thomas v. Phelps* (11), there was a devise to A and B: "whom I appoint my executors of all that I possess in any way belonging to me, by them freely to be possessed or enjoyed, of whatever nature or manner it may be;" and the fee simple of the real estate was held to pass. Here, also, the words of the will are sufficient to convey a fee, if the Court can see that such was the testator's intention—*Doe v. Gillard*, though no such intention was there shewn. As to the real estate being charged with the payment of debts, although there is no specific charge on the lands, a general direction by a testator that his debts shall be paid, charges the real estate with the payment, unless the

testator has provided a specific fund for the payment of his debts; or the executors are directed to pay the debts, and no real property is devised to them—2 *Powell on Devises*, by Jarman, p. 655, *Ambrey v. Middleton* (12), and *Alcock v. Sparhawk* (13). If the executor takes any estate, he must take a fee simple, as it may be necessary to sell the estate for the purpose of paying the debts—*Goodtitle v. Maddern* (14).

Cur. adv. vult.

LORD DENMAN, C.J. on this day delivered the judgment of the Court.—This was a motion, by leave, to enter a verdict for the defendant, as devisee under a will, which, after directing all the testator's debts and funeral expenses to be paid by his executor, giving several annuities for life, and bequeathing 5s. to the plaintiff, who was his heir-at-law, concluded by appointing "the defendant his whole and sole executor of all his house and land situate at B."

We do not think it needful to go into the authorities which have been so recently considered by the Court, in the case of *Doe d. Hickman v. Haslewood* (15). It was admitted by the learned counsel for the plaintiff, and is perfectly clear, that if the defendant took any interest, it must be a fee simple; and no man applying common sense to the construction of the will can doubt that such was the estate given to the defendant. No decided case opposes any obstacle to our arriving at this conclusion, and the rule must be made absolute.

Rule absolute.

1837. } THE KING v. THE INHABITANTS
Jan. 25. } OF STOKE DAMEREL.

Settlement,—by Payment of Parochial Rates.

The settlement by parochial rates remains untouched by the 1 Will. 4. c. 18. Therefore, where a pauper rented a house at 16l. a year, but underlet a part, so that he could not gain

(7) 1 Sim. & Stu. 463.

(8) Cowp. 657.

(9) 2 C. & J. 75; s. c. 1 Law J. Rep. (N.S.) Exch. 44.

(10) Cowp. 352.

(11) 4 Russ. 348; s. c. 6 Law J. Rep. Chanc. 110.

(12) 2 Eq. Ca. Abr. 497, case 16; 4 Vin. Abr. 'Charge' (D.) 460, pl. 15.

(13) 2 Vern. 228; s. c. 1 Eq. Ca. Abr. 198, case 4.

(14) 4 East, 496.

(15) Ante, p. 96.

a settlement by renting a tenement, in consequence of the 1 Will. 4. c. 18, yet, as he was rated for, and paid the parochial rates for the house, it was held, that he thereby gained a settlement.

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 55.]

1837. { THE KING v. THE CORPORATION
OF OXFORD.

Corporation—Mandamus to restore.

J. T., a burgess of Oxford in 1835, was elected a councillor of the borough of Oxford, and would have continued in office until the year 1837; but in September 1836 his name was accidentally omitted from the burgess list, and he did not apply to have the omission supplied at the revision of the lists, though he had not lost his qualification. In November the mayor announced that his office of councillor was vacant, and at the election of new councillors another person was elected into his place. The Court refused to grant a mandamus to the corporation to restore J. T. to his place of councillor.

A rule nisi had been obtained, for a mandamus directed to the mayor, aldermen, and burgesses of Oxford, to restore John Towle into the place and office of a councillor. It appeared from the affidavits on both sides, that Mr. Towle was elected a councillor for the South Ward of the city of Oxford in December 1835, and was then entitled to continue as such councillor until November 1837. In September of the last year, when the burgess lists were made up, his name was accidentally omitted, and no application was made by him to the mayor and assessors at their court, held for the revision of the lists, for its insertion. Previous to the general election of councillors in November, the then mayor, having perceived that Mr. Towle was no longer on the burgess roll, gave notice that his place was vacant on that ground, and another person, named Dry, was elected to be a councillor in lieu of him. It was admitted that Mr. Towle had not lost his qualification for being on the burgess list.

The Attorney General and Amos shewed cause.—First, this application is misconceived. The office which is claimed by the applicant is now filled, and therefore a mandamus will not be granted. Even in a case where there are two candidates at an election, and the one who has the minority of votes is admitted, the Court will not grant a mandamus to admit the one who had the majority, but will leave him to bring a *quo warranto*—*The King v. Beedle* (1). That remedy must be resorted to here. But the applicant had ceased to be a councillor, and was not eligible. By 5 & 6 Will. 4. c. 76. s. 28. no person shall be qualified to be elected a councillor who shall not be entitled to be on the burgess list of such borough. Now, no question can be raised here as to the party's title to be on the list, because, in point of fact, he is not on it, and he has neglected the mode pointed out in section 17, by which his name might have been restored. This, therefore, differs from the case of *The King v. Tripp* (2), where the question of eligibility was raised, but the party's name was on the list.

[COLERIDGE, J.—In *The King v. Chitty* (3), the party was an uncertificated bankrupt at the time of his election, yet it was held, that the 52nd section did not apply to him, and therefore that he was not ineligible.]

That section applies to the continuance of the qualification, whereas, under the 28th section, the party must be qualified as there pointed out.

Bingham, contra.—It is not denied that the applicant is duly qualified to be on the burgess list, but his name has been omitted

(1) 3 Ad. & El. 467.

(2) The case of *The King v. Tripp* was an application for an information in the nature of a *quo warranto* against Mr. Tripp for exercising the office of Mayor of Bristol, not being qualified. He was elected a councillor in 1835, and afterwards was chosen to be mayor. It was objected, that he was not an occupier, and not qualified to be on the burgess list, and therefore was not eligible to the office of mayor. It was answered that he was an occupier, or, if not, that he was on the burgess list after the revision by the barristers in 1835, and therefore was eligible. This Court, in last Michaelmas term, made the rule absolute for the writ, saying, that they were points of great nicety, and required to be determined solemnly.

(3) 1 Nev. & P. 78; s. c. ante, p. 12.

through the neglect of the overseers; and through the delay at the printer's, he had not the due opportunity of availing himself of the mode of correcting the error. Still, however, he is at liberty to come forward and prove his title to be on the list. It is argued, that the burgess list is to be conclusive, and that as his name does not appear there, he cannot be allowed to shew that he is entitled. That cannot be the law. Indeed, the decision of this Court, in *The King v. Tripp*, affords a strong argument to the contrary, which is also strengthened by the 6 & 7 Will. 4. c. 104. It is contended, that the writ ought not to have been directed to the corporation, because they have done nothing wrong; but there is no other person to whom it can be directed. Then, it is said, that this is not the right mode of proceeding, and that a *quo warranto* is the proper course; but there is no authority which shews that a party must adopt this latter mode.

WILLIAMS, J.—It is not necessary to enter into the question which is raised on the 28th section, as to the effect of the omission of the name of the applicant from the burgess list, because it appears that the office is now full. The argument is, that the applicant has not been displaced, but is still an existing town councillor. If that be so, the mandamus is unnecessary.

COLERIDGE, J.—This remedy is wholly or in part misconceived. If all that had been done by the mayor had been a nullity, and the corporation had declared it void, I admit, according to the rule laid down in *The King v. the Mayor of Colchester* (4), though there might have been a *de facto* election, yet no other person would have been elected, and in the office. In such a case a mandamus would lie. But I cannot say that what has been done in this case is so clearly colourable and void that a mandamus should issue. If it were considered that the act of the mayor was void, and that Dry was not a member of the council, and Towle still continued a member, all that could be required would be a mandamus to the council to allow Towle to take his seat in their meetings,

and perhaps this would not be necessary. Assuming, however, that the election was not colourable and void, but that Dry *de facto* fills the office, there must be a *quo warranto*, and not a mandamus. The title to an office which is full, can only be tried in a *quo warranto*—*The King v. the Mayor of Colchester*. In *The King v. the Mayor of York* (5), a mandamus was granted, because it appeared that the party had not been really admitted, and that it was only required for the purpose of completing his title. It does, therefore, but confirm our decision. *The King v. Beedle* is also an authority to the same effect. We are, however, ready now to grant a *quo warranto* if it be applied for; but this rule must be
Discharged, with costs.

1837. } THE KING & THE INHABITANTS
Jan. 25. } OF WITHERNWICK.

Order of Removal—Notice of Appeal.

An order of removal of a man, his wife and children, which omitted to state the names and ages of his children, was appealed from, but the statement of the ground of appeal did not contain any objection to the order on account of that omission:—Held, that the Sessions could not entertain it, and that this Court could not quash the order as a nullity when brought up by certiorari on a case granted by the Sessions.

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 54.]

1837. } THE KING v. JOHN GEORGE.
Jan. 25. }

Poor-rate—Ground of Appeal.

The mere fact of an omission by the overseers to rate a particular occupier of land, without proof of any specific injury, is not a sufficient grievance to warrant an appeal by that occupier against a poor-rate.

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 34.]

(5) 5 Term Rep. 600.

(4) 2 Term Rep. 259.

1837. }
Jan. 11. } THE KING v. J. C. SHEBBEARE.

Corporation—Officer—Election—Resignation of Councillor.

There being a vacancy in the office of town clerk, in the borough of B, G. L., one of the councillors before the passing of the 6 & 7 Will. 4. c. 104, tendered his resignation of his office of councillor to the council, who refused to accept it, on the ground that he could not, under the 5 & 6 Will. 4. c. 76, resign. At a subsequent meeting of the council, held for the purpose of electing a town clerk, G. L. and J. C. S. were nominated as candidates; but the mayor, considering that G. L. was incapable of being elected, refused to submit his name to the council, and declared that J. C. S. was elected to the office:—Held, that he was bound to submit both names to the council; and, therefore, that J. S. C. was not duly elected.

Whether a councillor elected under the 5 & 6 Will. 4. c. 76. could resign his office before the 5 & 6 Will. 4. c. 104—quære.

A rule nisi had been obtained for an information in the nature of a *quo warranto* against the defendant, to know by what authority he claimed to exercise the office of town clerk of the borough of Basingstoke; against which, cause was shewn on this day. It appeared from the affidavits on both sides, that, on the 27th of February, 1836, Mr. Lewis, the town clerk, died, and thereupon Mr. George Lamb and the defendant became candidates for his office. Mr. Lamb was at that time one of the town council, having been elected in the December previous, and having two years to serve the office. On the 29th of February he executed a deed resigning and disclaiming the office, which he caused to be delivered to the mayor and council. The affidavits were at variance as to whether the mayor actually put the question to the council at their meeting; but a resolution was entered on their minutes that they were not justified in accepting his tendered resignation. On the 7th of March a meeting of the council took place for the election of a new town clerk, when it was proposed that the question as to the acceptance of Mr. Lamb's resignation should be again put to the meeting, but the mayor

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refused to do so, considering that it was already settled. The two candidates were then nominated by their respective friends, and an adjournment was moved by Mr. Lamb's friend, but the motion was lost. The mayor refused to put up Mr. Lamb's name as a candidate, but declared Mr. Shebbeare to have been elected, and he had accordingly since acted as town clerk. A bye-law had been made on the 1st of February in pursuance of the 5 & 6 Will. 4. c. 72. s. 51, imposing a fine of 25l. on any councillor who refused to accept the office, which had been approved of by the secretary of state.

The Attorney General and R. V. Richards now shewed cause.—Lamb, being a councillor, could not resign the office at the time when he executed the deed of resignation. It is true, that, before the 5 & 6 Will. 4. c. 76, a member of a corporation could resign his office; and it was frequently done, especially where a corporator was required to give testimony for the corporation: he disclaimed for the occasion, and was re-elected after the trial was over. But that act repeals all the laws and customs of corporations at variance with it; and it is expressly required by section 31, that a councillor should serve for two or three years. Hence the power of resignation was taken away, and a clause was expressly introduced to allow members of the corporation to be witnesses. And the 5 & 6 Will. 4. c. 104. s. 8. confirms this view, for it authorizes councillors to resign on payment of a fine; and if the resignation could have been available, it ought to have been made to the burgesses, and not to the council. If, then, Lamb's resignation was void, he was ineligible at the time of the election, and it was not the duty of the mayor to submit his name to the meeting.

Sir W. W. Follett.—First, the resignation was valid. This is not a new corporation, but it retains all the privileges and customs not expressly repealed. Now, by the old law, a member of a corporation might always resign. He might be compellable to pay a fine to the corporate body as the price of their acceptance of the resignation; but if they did accept it, it was always available. All the alteration which has been made is, that, on payment of the fine, a councillor can resign now without the

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consent of the corporate body. Then it is said, that the resignation ought to have been to the burgesses. It is true the town council are not the electors, but they constitute the body who are to act for the burgesses. In *The King v. Majorem Rippon* (1) it is laid down, that a resignation of a corporate office may be by parol, and that aldermen of London, who are elected by the freemen, may resign by letters sent to the mayor and aldermen. So in the case of the borough of Norwich.

[COLERIDGE, J.—Who is it in law that accepts the resignation?]

The corporate body, not the electors.

[COLERIDGE, J.—Does not the principle require, that the person who elects should also be the party to accept the resignation? The two instances cited may depend upon the local usage.]

Secondly, be that as it may, the question as to the acceptance of the resignation ought to have been put to the meeting. Upon the affidavits, it appears that that was not put. Thirdly, the mayor ought to have put it to the meeting to say whether they would elect Mr. Lamb or Mr. Shebbeare; whether the former was eligible or not, his name ought to have been submitted to the meeting.

LORD DENMAN, C.J.—That is a sufficient objection. The names of the two candidates ought to have been submitted to the meeting for their choice, and the mayor was not justified in refusing to do so.

Per Curiam—

Rule absolute (2).

1837. } SHAW v. ROBERTS AND
Jan. 11. } OTHERS.

Insurance against Fire—Variance of Risk—Construction of Conditions.

An insurance against fire was effected on a granary with a kiln for drying corn attached, and the third condition indorsed on the policy stated, that unless the trades carried on on the insured premises were accurately described, and if a kiln or any process of fire-

heat were used and not noticed in the policy, the policy should be void; and the sixth condition stated that if the risk to which the insured premises was exposed should be by any means increased, notice should be given to the office, and allowed by indorsement on the policy, otherwise the insurance to be void. A vessel laden with a cargo of bark having sunk near the premises of the insured, he allowed the bark to be dried at his kiln, gratis, and in consequence of the fire at the kiln during this process, the premises were burnt down. It was found by the jury, that the trade of drying bark is more dangerous than that of drying corn:—Held, first, that the user of the kiln for a different purpose than that intended at the time when the policy was made, was not an inaccurate description within the third condition; secondly, that this gratuitous use of the kiln by a third person, was not such an alteration of the business and increase of the risk as required to be notified to the office within the sixth condition; thirdly, that there was no warranty that nothing but corn should be dried in the kiln; fourthly, that there was no negligence on the part of the insured, which would vacate the policy.

Assumpsit against the directors of the Norwich Union Fire Insurance Society, on a policy of insurance against fire.

The defendants pleaded non assumpsit; and at the trial, before Lord Denman, C.J. at Guildhall, at the sittings after Trinity term, 1835, it appeared that the policy was for "1,400*l.* on a granary divided in the middle by a party-wall, with a counting-house at the west, and all under one roof, brick and slate. And also a kiln for drying corn in and attached to the outward walls of the granary, and communicating therewith by one door. The kiln is built entirely of brick, and iron and tile, except the spars of the roof, and inside plastering. 1,000*l.* on grain, pulse, seed, and utensils, interest in trade on commission or his own property in the said divided granary. 100*l.* on a warehouse near, but separate, wood, and covered with pantiles. All in the occupation of the assured, and situate in the Boal, near the river Ouse, in Lynn." By indorsement on the policy, the 1,400*l.* was divided into 1,350*l.* on the granary and counting-house, and 50*l.* on the kiln adjoining; and the following, amongst

(1) 1 Lord Raym. 563.

(2) Mr. Shebbeare afterwards disclaimed.

other conditions, were also indorsed thereon:—

“Thirdly. Persons insuring will forfeit their right to the sums insured by the policies unless the buildings insured, or containing the goods insured, be accurately described, the trades carried on therein specified, and the nature of the property correctly stated, so that it may be placed under proper classes, and charged at the appropriate rates of premium; and if a building contain any stove or oven used in the process of manufacture, kiln, furnace, or steam-engine, or any process of fire-heat be carried on therein, other than the ordinary risk of common fires in private houses, the same must be noticed in the policy, or it will be void in respect to such buildings and the goods therein.”

“Sixthly. If any alteration or addition be made in or to the building or covering of any premises insured, or in which any insured property is contained, or the risk of fire to which such building is exposed, be by any means increased, or if any furniture or goods be removed into other premises, such alteration, addition, increase of risk, or removal, must be immediately notified, and allowed by indorsement on the policy, the indorsement being duly made and signed by one of the society's partners or agents, otherwise the insurance as to such buildings or goods will be void.”

It further appeared, that the kiln mentioned in the policy had been used for drying corn until the year 1832, when a lighter laden with bark having accidentally sunk near the premises insured, the plaintiff gratuitously allowed the owner of the bark to dry it in his kiln. In consequence of this the kiln took fire, and the whole of the property insured by the policy was consumed. No greater fire than usual had been kept; but evidence was given that kilns for drying bark, and for drying corn, were differently constructed; and that kilns for drying bark were insured at a higher premium than kilns for drying corn. His Lordship submitted to the jury three questions:—first, whether corn-drying and bark-drying were different trades; secondly, whether the carrying on of the former was more hazardous than the latter; and, thirdly, whether the loss happened from using the kiln to dry bark; and his

Lordship stated his opinion to be, that if the business of bark-drying was different from the one expressed in the policy, the office would be discharged. The jury found these three questions in the affirmative; and the Lord Chief Justice then directed a verdict to be entered for the defendant; giving the plaintiff leave to move to set that verdict aside, and enter a verdict for the whole sum insured, or such part thereof as the Court might think fit. A rule *nisi* for that purpose having been subsequently obtained, in Michaelmas term,

Sir F. Pollock, Sir W. W. Follett, and Wightman, shewed cause.—The jury have found that the business of drying bark is more dangerous than that of drying corn, and therefore the contract entered into with the office when a corn-kiln only was insured, has not been kept. That contract is to be collected from the policy, and the conditions indorsed upon it; and the third condition requires, that if in any kiln a process of fire-heat be carried on in the premises insured, it must be noticed, consequently the carrying on of a different and more dangerous process by the kiln than that described vitiates the policy. If one user, for the purpose of drying bark, were not sufficient to avoid the policy, the assured might go on *ad infinitum*; but it amounts to a misdescription, as fatal in a policy of this kind, as it would be in a marine policy. There was, therefore, a misrepresentation by the plaintiff in the premises he has insured.

[PATTERSON, J.—How can this be said to be a misrepresentation, when the plaintiff, at the time of insuring the property, only intended to insure a corn-kiln?]

Strictly, perhaps, it is not a misrepresentation, but it is a variance, which lets in all the risk that would be caused by a misrepresentation. If a party, who at the time of insuring, describes correctly the trade he carries on, be allowed to carry on a different trade, without vitiating the policy, he may insure for one business, and then carry on another much more hazardous. It is on the increased hazard that a variance avoids the policy; for on the faith of the description given, the office insures; and the insured have no right to vary from the description they have given, and the terms of the contract they them-

selves proposed. The application of this principle will produce no hardship, for the sixth condition allows of alterations of business, if notice be given to the office, and allowed by them; and the plaintiff did not comply with this condition. The mention of the corn-kiln in the policy is mere description, as the third and sixth conditions, taken together, amount to a warranty that corn only shall be dried at the kiln. Besides, the assured has been guilty of such gross negligence as not to entitle him to recover.

The Attorney General and Kelly, in support of the rule.—As this was an insurance against fire, and by fire the loss was occasioned, *prima facie* the plaintiff is entitled to recover; and the verdict must be entered for him, unless gross misconduct can be shewn on his part. If the policy contain a warranty on the part of the insured, that the business of drying corn only shall be carried on, undoubtedly, the insured, upon the facts of this case, has no right to recover. But it does not; for the third condition merely says, that the representation made at the time of effecting the policy shall be correct; and its object is to fix the amount of premium; and the trade to be carried on has been truly stated. If, indeed, the plaintiff had taken up the trade or business of drying bark, and intended constantly to use the kiln for that purpose, an indorsement to that effect on the policy might have been necessary. But a trade is something done for profit; and a single act of gratuitously allowing a party to dry bark, cannot be considered as carrying on the trade of drying bark. This condition, therefore, can only apply to a permanent alteration in the business carried on at the time of effecting the policy.

[PATTERSON, J.—In *Dobson v. Sotheby* (1) a policy of insurance was effected upon a barn. The policy was stated to be on premises where no fire was kept, and no hazardous goods were deposited. A fire was occasioned by the introduction of a tar barrel, for the purpose of repairing the premises, and the premises were burnt down: it was held, that the words of the policy applied to the habitual use of fire.]

As to the objection, that the plaintiff

cannot recover, as the loss was occasioned by his negligence, *Busk v. the Royal Exchange Assurance Company* (2), *Walker v. Maitland* (3), and *Bishop v. Pentland* (4) establish, that although the loss may have been occasioned remotely by the negligence of the insured or his servants, yet the insured has a right to recover. In this case, however, there was no gross negligence, but at the utmost a want of caution; and the policy is not vacated thereby.

Cur. adv. vult.

LORD DENMAN, C.J. on this day delivered the judgment of the Court.—This was an action upon a policy of insurance against fire. There were two subjects of insurance of certain buildings, including a dwelling-house, and also a kiln for drying corn, attached to the outward wall of the granary and communicating by one door, built of brick and iron entirely. Both were destroyed by the fire. The policy was subject to the usual conditions, amongst which the third provided, "that if there were any misrepresentation in the description of the premises, the policy should be void;" and the sixth, "that if any alteration were made, either in the buildings or the business carried on therein, notice should be given to the insurers, an additional premium, if required, paid, and an indorsement made on the policy, otherwise the policy should be void." It appeared in evidence, that the kiln had been constantly used for the purpose of drying corn only; but that in the year 1832 a vessel laden with bark having been sunk in the river near the premises, and the bark wetted, the plaintiff had allowed the bark to be dried in his kiln as a favour to the owner of it; no notice was given to the insurers; no greater fire than usual had been made; but, in the course of drying the bark, the kiln took fire, and both the kiln and the other premises were burned down. The jury found, that corn-drying and bark-drying are different trades; that the latter is more dangerous than the former, and that the loss happened from the use of the kiln in drying the bark. A verdict was entered

(2) 2 B. & Ald. 73.

(3) 5 B. & Ald. 171.

(4) 7 B. & C. 219; s. c. 6 Law J. Rep. K.B. 6.

(1) 1 M. & M. 90.

for the defendants, with leave to the plaintiff to move to enter a verdict for him, either for the whole amount of the loss or the value of the kiln. The third and sixth conditions were relied on in argument by the defendants, and it was contended, that the facts here shew either a misdescription of the kiln within the third condition, or a change of business within the sixth. The two conditions together were also said to amount to a warranty that nothing but corn should ever be dried in the kiln; and what has occurred was likened to a deviation in the case of a marine insurance. It was proved at the trial, that a much higher premium was regularly exacted by insurance offices for a bark-kiln than a malt-kiln. The argument therefore was, that the premises were not truly described in the policy, or that the trade carried on there had been altered at the time of the fire, without notice to the insurance office. We are, however, of opinion, that neither of the conditions applies to this case. The third condition points to the description of the premises given at the time of insuring, and that description was in this instance perfectly correct. Nothing which occurred afterwards, not even a change of business, could bring the case within that condition which was fully performed when the risk first attached. The sixth condition points at an alteration of business as something permanent and habitual; and if the plaintiff had either dropped his business of corn-drying and taken up that of bark-drying, or added the latter to the former, no doubt the case would have been within that condition. Perhaps if he had made any charge for drying this bark, it might have been a question for the jury whether he had done so as a matter of business, and whether he had not thereby, although it was the first instance of bark-drying, made an alteration in his business within the meaning of that condition; but according to the evidence, we are clearly of opinion, that no such question arose for the consideration of the jury, and that this single act of kindness was no breach of the sixth condition. The case of *Dobson v. Sotheby* was decided by Lord Tenterden upon the same principle, and is an authority nearly in point upon this part of the case. No clause in this policy amounts to an ex-

press warranty that nothing but corn should ever be dried in the kiln, and there are no facts or rule of legal construction from which an implied warranty can be raised. Neither does the principle on which a deviation puts an end to a marine insurance, viz. that the risk insured against is not the same as that incurred, and that the insured have no right to vary it, apply to the present case; this policy, by the sixth condition, expressly provides for such alterations or deviations as the parties deem material. For the reasons already given, we think that the facts of this case do not bring it within that condition, and anything short of that cannot be considered as an alteration or deviation under this contract. One argument more remains to be noticed, viz. that the loss here arose from the plaintiff's own negligent act, in allowing the kiln to be used for a purpose to which it was not adapted. There is no doubt that one of the objects of insurance against fire is to guard against the negligence of servants and others; and therefore the simple fact of negligence has never been held to constitute a defence: but it is argued, that there is a distinction between the negligence of servants or strangers and that of the assured himself. We do not see any ground for such a distinction, and are of opinion, that in the absence of all fraud the proximate cause of the loss only is to be looked to. For these reasons we are of opinion that the rule must be made absolute to enter a verdict for the plaintiff for the amount of the whole loss, it having been, produced by causes which do not prevent the policy from attaching.

Rule absolute.

1837. } THE KING v. THE INHABITANTS
Jan. 25. } OF WALTHAMSTOW.

Poor Law—Settlement of Step-children
—4 & 5 Will. 4. c. 76.

Although a woman's legitimate children are, by the 4 & 5 Will. 4. c. 76. s. 57. made part of her second husband's family on her second marriage, they are not removable to the place of his settlement.

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 52.]

1837. }
Jan. 12. } HAYWARD v. PHILLIPS.

Arbitration — Award, Setting aside — Waiver.

*In covenant for rent in arrear, for non-repair, for not painting, and for not repairing after notice, the defendant pleaded, that the lease was obtained by fraud, and performance of the several covenants; a verdict was taken for the plaintiff on the first issue, (as to the fraud,) and damages assessed on the first breach, (for non-payment of rent,) at 10*l.*, subject to the award of an arbitrator, to whom the cause and all matters in difference between the parties was referred, to order what he should think fit to be done by the parties, and with liberty to amend the record, the issue not having been perfected on one of the pleas. The arbitrator directed that the verdict entered on the first issue should stand, and assessed the damages on the several breaches at 249*l.* in addition to the 10*l.* found on the first breach, for which sum he directed the verdict to be entered for the plaintiff:—Held, that as the amount of damages was fixed by the order of reference, and the arbitrator had no power given him to enter a verdict upon the other breaches, he had exceeded his authority, and therefore that the award was bad.*

An award directed the defendant to pay the plaintiff a certain sum of money, and the plaintiff to lay out a certain sum of money on premises which the defendant held as lessee of the plaintiff. The plaintiff, after waiting some time, laid out the money on the premises with the knowledge of the defendant, and agreed to abstain from enforcing the award against the defendant for a week, at the request of the attorney for the latter:—Held, that there was no waiver, by the defendant, of any objections to the award.

Where a cause and all matters in difference are referred, a motion may be made to set aside the award at any time during the next term after the publication of the award.

Covenant. The declaration alleged several breaches of a covenant in a lease; first, that on the 25th of March 1835, the defendant was in arrear for one quarter's rent, 10*l.*;—second, that defendant did not repair;—third, that the defendant did not paint;—fourth, that he did not repair after

notice; and the plaintiff alleged special damage by reason of the breach of the covenant to repair.

Plea—To the whole declaration, that the lease was obtained by fraud, covin, and misrepresentation: and to the several breaches, performance.

At the trial, before Lord Denman, C.J., at the sittings in Middlesex, after Michaelmas term, 1835, as it appeared that the record was not properly made up, the issue on the fourth plea not being perfected, the cause and all matters in difference were referred, by an order of Nisi Prius, which ordered, "that the jury find a verdict for the plaintiff on the first issue, and damages assessed on the first breach 10*l.* and costs 40*s.*, subject to the award of A. B. to whom this cause and all matters in difference between the said parties are hereby referred, to order and determine what he shall think fit to be done by the said parties respecting the matters in dispute; and also to amend the record, and to direct what should be done between the parties, except the cancellation of the lease." The arbitrator, after reciting that the only matter in difference between the parties, besides the said cause, which was submitted to him, was a claim by the plaintiff against the defendant of 20*l.* for half a year's rent from the 25th of March 1835, to the 29th of September 1835, and that he had amended the record, proceeded to award, that the verdict already entered up for the plaintiff on the first issue should stand; and that the assessment of 10*l.* damages on the first breach in the declaration should also stand; and, that the defendant did not repair the said premises in manner and form, &c.; and assessed the damages which the plaintiff had sustained by reason thereof, at the sum of 249*l.* 3*s.*; and awarded that the defendant did not paint the said premises in manner and form, &c.; and awarded the damage which the plaintiff had sustained by reason thereof at 1*s.*; and awarded that the defendant did not repair the said premises within the space of three calendar months after notice in manner and form, &c.; and awarded the damages which the plaintiff had sustained by reason thereof at the sum of 1*s.*; for which said several sums of 10*l.*, 249*l.* 3*s.*, 1*s.*, and 1*s.*, amounting altogether to the

sum of 259*l.* 5*s.*, the verdict was to be for the plaintiff over and above his costs. The defendant was further ordered to pay the sum of 20*l.* on a day named to the plaintiff; and the plaintiff was ordered within the space of three calendar months, to lay out in repairs upon the premises, the sum of 198*l.* 6*s.*, and the defendant was ordered to pay the costs of the reference and award.

The arbitrator delivered his award on the 23rd of January 1836, in Hilary term, which ended the 1st of February. On the 28th of January, the plaintiff agreed with a builder to do the repairs which he was directed to do under the award, and they were accordingly commenced, and notice thereof was given to the defendant's attorney. They were subsequently completed by the plaintiff. On the 1st of February, notice to tax costs was given to the defendant's attorney, who on the 2nd of February attended the taxation, when judgment was signed on the verdict directed to be entered by the award. The defendant's attorney requested the plaintiff's attorney not to issue execution, but to give the defendant a week's indulgence for payment of the amount of the verdict and judgment; which was agreed to, provided the defendant would waive any personal demand upon him for the sum of 20*l.* mentioned in the award. The defendant's attorney replied that this was a reasonable demand, and that he had no doubt it would be acceded to by the defendant, and he took away a memorandum which had been drawn up to that effect, and which he promised to return. On the 9th of February, the defendant took out a summons to stay proceedings until the 4th day of Easter term, to enable the defendant to move to set aside the award. On the 16th of February, Patteson, J., before whom the summons was heard, ordered that all proceedings should be stayed on condition of the defendant bringing into court, within one week, a certain sum, the plaintiff being at liberty to proceed, if it were not paid within that time. It was not paid, but on the 18th of February, the defendant took out a summons for a month's further time, which the learned Judge discharged.

In Easter term last,

Sir W. W. Follett obtained a rule nisi for setting aside the award, on the grounds

that the arbitrator had exceeded his authority, first, in awarding a larger amount of damages than he had power to award by the order of reference; secondly, in awarding damages to the amount of 249*l.* 3*s.* on the second breach; and thirdly, in directing a sum of money to be laid out in repairs. The rule was drawn up upon reading the affidavit of the defendant, and the paper writing thereto annexed; and the affidavit of the defendant stated that the paper writing was a true copy of the award.

Sir J. Campbell and Jervis, now shewed cause.—First, the rule has been obtained upon reading the paper writing annexed, without stating it to be a copy of the award, which is not sufficient—*Sherry v. Oke* (1). Secondly, the application to this Court is too late, as the award was published nine days before the end of Hilary term. According to *Ramsthorpe v. Arnold* (2), a reference, like the present, not being under the 8 & 9 Will. 3. c. 15, the application should have been made within the period allowed for moving for a new trial. Thirdly, the defendant has waived the objection, by allowing the plaintiff to go on making all the repairs, without intimating any intention to dispute the award. Fourthly, the award is objected to, because no verdict was taken at Nisi Prius for the sum the arbitrator has given; but, the first issue between the parties was on fraud and covin, on which no damages could be assessed, and the parties intended that the arbitrator should enter a verdict on all the issues. This is to be collected from the submission; and if the arbitrator had no power to assess damages on all the issues, it would have been unnecessary to give him the power to amend. The cases in which it has been held that an arbitrator cannot award a greater sum than that for which the verdict is taken, are all distinguishable. In *Pren-tice v. Reed* (3), the verdict was taken on the whole issue, and the amount only was referred; and in *Pearce v. Cameron* (4), the verdict was taken for the damages in the declaration, subject to a reference. In *Bonner v. Charlton* (5), the cause itself was

(1) 3 Dowl. P.C. 349.

(2) 6 B. & C. 629; a. c. 5 Law J. Rep. K.B. 270.

(3) 1 Taunt. 151.

(4) 1 Mau. & Selw. 675.

(5) 5 East, 139.

not referred, but only the amount; and it was held, that the arbitrator had not power to give damages beyond the verdict. Here, however, the arbitrator was empowered to order and determine what he should think fit; and he might have directed one of the parties to give a warrant of attorney to confess judgment; *à fortiori*, therefore, had he authority to direct a verdict to be entered.

Sir W. W. Follett, *contrà*.—The decision in *Sherry v. Okes* was founded on this, that there was no affidavit to verify the award at all, or to shew that the paper writing mentioned in the rule was connected with the award; but here the affidavit states the paper writing to be a copy of the award;—secondly, the dictum of Lord Tenterden, in *Ramsthorpe v. Arnold*, has not been followed in practice; *Macarthur v. Campbell* (6), and *Allenby v. Proudlock* (7) shew, that the statute is the proper guide. Then, the award cannot be supported. When a verdict is taken at Nisi Prius, the arbitrator has not power to go beyond that verdict; and if a verdict is not taken, he has not power to order one to be entered. In *Prentice v. Reed*, the cause and all matters in difference were referred, and the arbitrator was to direct what should be paid to the plaintiff; but it was held, notwithstanding, that he could not award a larger sum than that for which the verdict was taken. In like manner in *Pearse v. Cameron*, though the reference was of all matters in difference, it was held, that the arbitrator had not power to go beyond the amount of the verdict. Another objection to the present award is, that the arbitrator was not authorized to enter a verdict at all on the other breaches.

[COLERIDGE, J.—The arbitrator had power to direct money to be paid: why should not the ordering of the verdict to be entered be an indirect mode of doing that?]

Cartwright v. Blackworth (8) is to that effect, but that case was overruled in *Donlan v. Brett* (9), which decides also

that an arbitrator has no power to order a verdict to be entered, unless authorized by the order of reference; and *Hutchinson v. Blackwell* (10) is to the same effect.

[COLERIDGE, J.—You admit the award is good in part—namely, as to the verdict for 10*l.*?]

The award, if bad in one substantial part, is bad for the whole. If two substantial matters are referred, and the arbitrator only decides on one, it is not an award of the matters in difference, and therefore cannot be supported, as a party only consents to refer in order to have a settlement of the matters in difference. Here, the arbitrator has directed a verdict to be entered and repairs to be done. Execution could not have been set aside, because the judgment would appear perfectly regular. According to *M'Arthur v. Campbell*, the parties need not wait till execution is taken out upon an award; but a motion may be made at once to set it aside. With respect to the waiver, there is no pretence for it, as it does not appear at all that the defendant acquiesced in it, or that the attorney of the defendant had any power to make the waiver.

LORD DENMAN, C.J.—It clearly appears that the arbitrator had no power given him by the order of reference to enter a verdict on the other breaches; and, therefore, the case is brought within the decision in *Donlan v. Brett*.

LITLEDALE, J.—In *Bonner v. Charlton*, where the verdict was taken for 30*l.* subject to a reference, the Court held, that the arbitrator had power to assess the damages within that amount, but not to exceed it; and the clear principle is, that the parties having limited the discretion of the arbitrator, he has no power to exceed the authority given him. As to the time within which a motion on an award, not within the statute, should be made, I quite agree, that when a cause and all matters in difference are referred, the motion may be made at any time within the next term. No doubt, if an award is published, and the party against whom it is made do not move to set it aside within the first four days of term, the other party may sign judgment.

(10) 8 Bing. 331; s. c. 1 Law J. Rep. (N.S.) C.P. 98.

(6) 5 B. & Ad. 518; s. c. 4 Law J. Rep. (N.S.) K.B. 25.

(7) 4 Dowl. P.C. 54.

(8) 1 Dowl. P.C. 489.

(9) 2 Ad. & El. 344; s. c. 4 Law J. Rep. (N.S.) K.B. 55.

WILLIAMS, J.—If the order of reference limits the arbitrator to a certain sum, or does not authorize him to enter a verdict, he exceeds his authority, if he either gives a larger sum, or directs that a verdict shall be entered.

COLERIDGE, J.—I thought at first that the order of reference gave the arbitrator power to direct a verdict to be entered, but as it appears it does not, the authority of *Donlan v. Brett* is conclusive; nor can it be considered an indirect mode of ordering money to be paid by the defendant to the plaintiff. The occasions on which the motion to disturb an award should be made within the first four days of the next term are, where a verdict is taken at Nisi Prius, and the arbitrator is put merely into the place of the jury. As to the waiver, which it is contended was made by the defendant, to any defects in the award, I do not think that has been at all made out. The application by the attorney for time, when costs were being taxed and execution about to be taken out, he giving no intimation that he was about to move to disturb the award, certainly does not amount to a waiver, especially as it does not at all appear that the defendant was a party to the transaction.

Rule absolute.

1837. }
Jan. 17. } **HODGKINSON v. MAYER.**

Attorney, Uncertificated—Penalty.

An attorney who has been admitted an attorney of the Court of King's Bench, is not liable to a penalty under the 12 Geo. 2. c. 13, for practising in the County Court during the time that he had neglected to take out his certificate.

This was an action of debt for penalties under the 12 Geo. 2. c. 13. s. 17, tried before Lord Denman, C.J., at the Staffordshire Assizes, in the summer of 1835. The first count of the declaration alleged, that within twelve months before the commencement of the suit, the defendant commenced an action of trespass on the case, wherein one S. A. was the plaintiff, and the present plaintiff was the defendant, in the County Court of Stafford, the

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defendant not being then legally admitted an attorney or solicitor, according to the 2 Geo. 2. c. 23, *contra formam statuti*. The second count charged him with suing out a summons in the same suit from the same court. The defendant pleaded, that he was, at the time of the committing of the said supposed offence, legally admitted an attorney of the Court of King's Bench, according to the 2 Geo. 2. c. 23.

It was admitted on the trial, that the defendant was duly admitted an attorney of the Court of King's Bench in the year 1827, and that he had then taken out his certificate, but had omitted to do so in 1834, during which year he commenced proceedings on behalf of one James Adams, in the County Court at Stafford. It was objected, that the action was not maintainable, but the Lord Chief Justice refused to nonsuit the plaintiff, and directed the jury to find a verdict for the plaintiff, giving the defendant leave to move to enter a nonsuit. In Michaelmas term, 1835,

Sir W. W. Follett obtained a rule accordingly; against which, cause was now shewn by—

Ludlow, Serj.—This action is brought on the 12 Geo. 2. c. 13. s. 7, which prohibits persons from acting as attorneys in the County Court, who have not been legally admitted according to the 2 Geo. 2. c. 23, under a penalty of 20*l.* Now the question turns upon the effect of the statute 37 Geo. 3. c. 90. s. 31. That avoids the admission, expressly enacting, that by the neglect to take out a certificate, the admission shall become null and void. If so, the defendant's plea is not supported; and it cannot be said that at the time when he sued out the process in the County Court, he was admitted an attorney of the Court of King's Bench. He had neglected to take out his certificate, and, therefore, before he could practise, it was incumbent upon him to be re-admitted. Then *Ex parte Flint* (1) shews that the issuing of the summons in this case was a practising in the County Court within the meaning of the statute. This rule was obtained on the authority of *Cross v. Kays* (2), *Jones*

(1) 1 B. & C. 254; s. c. 1 Law J. Rep. K.B. 111.

(2) 6 Term Rep. 663.

v. Stevens (3), and *Ex parte Hodgson and Ross* (4), but they are all distinguishable. *Cross v. Kaye* did not proceed upon this statute, but upon the 25 Geo. 3. c. 80, and was an action for a penalty for practising in the County Court without a certificate; and the Court held that it did not apply to the practising in that court. That statute, however, did not render the admission void. *Jones v. Stevens* only decided, that it was no excuse in an action for a libel on an attorney, to shew that he had neglected to take out his certificate; and *Ex parte Hodgson and Ross* was a case upon the construction of the 22 Geo. 2. c. 46, the provisions and the language of which are wholly distinguishable from those of the statute of the 12 Geo. 2. c. 13.

Sir W. W. Follett, in support of the rule.—When the 12 Geo. 2. c. 13. was passed, no stamp duty was payable by the attorney, and it only required that a party who practised in the County Court should have gone through the same ordeal as an attorney was required to undergo, who practised in the Court of King's Bench. Why then should a mere revenue statute, subsequently passed, relate back to it, and be incorporated with it? Now the statute 21 Geo. 3. c. 80. first made the regulations respecting the certificate, and imposed the penalty of 50*l.* for acting without one, and the 37 Geo. 3. c. 90. s. 31, made the admission null and void, and also imposed a penalty of 50*l.*

[*COLERIDGE, J.*—Do those acts impose any penalty for acting in the County Court without a certificate?]

The certificate is required for practising in any of the superior courts at Westminster, or in any court of record holding pleas, where the debt shall amount to 40*l.* and upwards. The argument on the other side, therefore, is, that an attorney who, confining his practice to the County Court, is not bound by the statute to take out a certificate, is nevertheless subject to the penalty imposed by the 12 Geo. 2. c. 13, and loses the benefit of his admission. The real effect of this neglect is, that he must obtain an order of the Court to be re-admitted; his name is not expunged, though he becomes

incapable of practising. Upon a rule of court for his re-admission, he is sufficiently entitled to practise,—per Lord Tenterden, C.J. in *Coren v. Sharpe* (5). So the case of *Ex parte Hodgson and Ross* determined, even in a case of fraud, that an attorney who was uncertificated, was not an unqualified person, so as to subject a party to be struck off the roll, who allowed him to practise in his name. The penalty imposed by the 12 Geo. 2. c. 13, on a person practising in the County Court, who has not been admitted, according to the argument on the other side, is to be incurred merely for neglecting to take out a certificate.

LORD DENMAN, C.J.—I think the case of *Ex parte Hodgson and Ross* is a distinct authority for the defendant. Indeed, it is stronger than the present. The penalty was not incurred.

WILLIAMS, J.—I agree with my Lord in the authority of the case cited, which goes farther than the present, for no certificate is necessary for an attorney to practise in the County Court. It would be a hard thing to say that a party should be liable to a penalty for not doing what he is not required to do.

COLERIDGE, J. concurred.

Rule for entering a nonsuit, absolute (6).

1837. }
Jan. 17. } THE KING *v.* KOOPS.

Evidence—Proof of Practice in Insolvent Debtors Court.

On an indictment for perjury, committed in an affidavit used in the Insolvent Debtors Court, a witness was called to prove the practice of that court, which rendered the affidavit necessary. He produced a printed copy of certain rules, which he had received from the office of the Insolvent Debtors Court, but which he had not compared with the original rules hanging up in that court, and he had no actual knowledge of the practice independently of that paper:—Held, that this was not sufficient evidence of that practice.

(3) 11 Price, 235.

(4) 3 Ad. & El. 224; s. c. 4 Law J. Rep. (N.S.) K.B. 264.

(5) 1 B. & Ad. 386.

(6) See *Bowler v. Brown*, 3 Ad. & El. 116.

This was an indictment against the defendant for perjury, alleged to have been committed by him in an affidavit, filed by him in the Insolvent Debtors Court in London, to which he had pleaded not guilty.

At the trial, before Lord Denman, C.J. at the sittings after Trinity term, 1835, it appeared that the defendant, in 1833, was a prisoner for debt, and petitioned the Insolvent Debtors Court for his discharge in July 1834. The 7 Geo. 4. c. 57. s. 10. allows any person in prison for debt to apply for his discharge at any time within the space of fourteen days after the commencement of his imprisonment, and afterwards, if the Court shall think it reasonable to permit the same. It was alleged, that that Court had made an order directing that every application after the fourteen days should be supported by an affidavit of the prisoner, stating certain matters, and requiring that he should exhibit an account of his estate and effects, to be verified by the affidavit. Such an affidavit had been made by the defendant, and the perjury was assigned upon certain allegations contained therein. To prove the order and practice of the Insolvent Debtors Court, Mr. Sturges, an officer of the court, was called, who stated the practice of that court in this respect, from a printed copy of the order, which he produced. He said, that there was no original signed by the commissioners of which he was cognizant, though there was a paper of the rules hung up in a room adjoining the court by their authority. He had not compared the printed copy, which he produced, with that paper, but he believed that the former was a correct copy, and was a true statement of the practice, though he only knew the practice from that paper. This evidence was objected to, but was admitted by his Lordship, and the defendant was convicted.

In Michaelmas term, 1835—

Humfrey had obtained a rule *nisi* for a new trial, on the ground that this evidence was improperly admitted; or to arrest the judgment, on the ground that the Court had no power to make such an order; and that, for a false description of property in the schedule, which was the real charge in the present case, the proper remedy is an

indictment for a specific misdemeanour, and not for perjury,—citing *The King v. Moody* (1). Against this rule cause was now shewn by—

Erle and Moody.—The evidence in this case was properly admitted. The practice of the Insolvent Court is a matter of fact, which may be proved by oral testimony, and by the information of persons who are conversant with that practice. The law of foreign countries is proved by oral evidence—*Ganer v. Lady Lanesborough* (2), *Buchanan v. Rucker* (3); though, where the law is in writing, a copy of that writing has been required to be produced—*Boethinck v. Schneider* (4).

[LORD DENMAN, C.J.—Though that be allowed in the case of the practice of the foreign courts, is it the same as to the practice of inferior courts?]

[COLERIDGE, J. referred to *Lacon v. Higgins* (5).]

In *Beaurain v. Sir William Scott* (6), parol evidence was given by witnesses of the practice in the Ecclesiastical courts. Then it cannot be necessary to call the commissioners to prove what is the practice of their court. Such a doctrine would be most inconvenient.

[COLERIDGE, J.—In *Dicas v. Lord Brougham* (7), a former Chancellor was called to prove what was the practice of the Court of Chancery.]

Lord Eldon indeed was called, but he had ceased to be Chancellor at the time. But the indictment charges that the facts stated in the affidavit were material; it is enough therefore to shew, that the defendant deposed to them falsely, and the practice of the Court is immaterial.

[LORD DENMAN, C.J.—The statement of those facts cannot be material, unless the practice of the Court requires the affidavit which contains them.]

The very making of the affidavit by the defendant is evidence, that by the practice of the Insolvent Debtors Court such an affidavit is required; and it is incumbent

(1) 5 C. & P. 23; s. c. 1 M. & Rob. 128.

(2) Peake's N.P.C. 17.

(3) 1 Campb. 63.

(4) 3 Esp. 58.

(5) 3 Stark. N.P.C. 178.

(6) 3 Campb. 388.

(7) 6 Car. & Pay. 249.

upon the defendant to shew that it was unnecessary.

[LORD DENMAN, C.J.—No; it lies upon you to shew that it was required.]

(The argument on the other point is omitted, as no judgment was given upon it.)

Humfrey, in support of the rule.—The evidence was improperly received. Sturges, the witness, knew nothing of the practice independently of the rule which he produced. He failed in identifying that rule, and then he was asked generally as to his knowledge of the practice. The paper which he produced he had not compared with the original copy of the rules, and the original was not produced.

(Here he was stopped by the Court.)

LORD DENMAN, C.J.—There was no jurisdiction which authorized the administering of this oath, unless the practice of the Court required this affidavit. It is said, however, that it is not necessary to refer to the practice of the Court, because the general provision of the statute implies it. That is too much to be implied from the language used. Then the practice of the Court was not properly proved. A clerk produced a printed copy of the rules of the Court, but they were not authenticated. There ought to have been some tracing of the copy to the original, and the witness knew nothing but from this document. Without, therefore, looking at the other objection, the foundation of the jurisdiction fails.

WILLIAMS, J.—The assumption on the part of the prosecution is a begging of the whole question. It is said, that this was a proceeding before a court having authority to administer the oath, and therefore it must be taken that this was in a judicial proceeding. If the act of parliament, or the practice of the Court had been shewn to require them, it would have been so; but that was not done. The witness did not vouch any knowledge of the practice from himself, and therefore could not prove the practice independently of the rule. That rule, however, was a printed document, which he could not authenticate. No authority is shewn for the affidavit.

COLERIDGE, J.—The defendant had petitioned the Insolvent Debtors Court to be

discharged, and had made an affidavit to support his application. It was therefore incumbent upon the prosecutor to shew that that affidavit was requisite. Then the question is, whether the practice of the Court has been sufficiently proved? Now, the practice of the Court must be unwritten or written. The former exists in the breast of the Court, but may be proved by the evidence of witnesses who are acquainted with it. The witness who was called did not know it. He referred for his knowledge to a printed rule, and was unable to say, whether that was the practice or not. If the practice of the Court be written, it ought to be proved by the original document, or an examined copy; and that proof was not given in the present case. Therefore, though an officer who knew the practice of the Court might have proved it, the witness who was called did not do so.

Rule absolute.

1837. }

Jan. 24. }

HAYWARD v. HASWELL.

Landlord and Tenant—Agreement for a Lease.

An agreement, whereby C. P. H. agreed to grant a lease at the time after mentioned, of certain premises for a term of fifty-nine and a quarter years, at a certain rent, payable quarterly; and also agreed to erect, with the approbation of the surveyor of the Merchant Tailors' Company, certain buildings, on the ground intended to be demised; and whereby C. H. agreed to accept a lease when tendered to her by the said C. P. H., and erect certain other buildings; it being also agreed between the parties, that the lease should be granted by the said C. P. H. immediately after he had obtained his leave of the same premises, under an agreement with the Merchant Tailors' Company, and should contain, on the part of the lessee, like covenants to those contained in the original lease to him, and such other covenants as are usual and common in like leases:—Held, not to amount to a demise.

Replevin. Avowry for two years' rent under a demise.

Plea—Non tenet.

At the trial, before Lord Denman, C.J., at the sittings in London, after Michaelmas term, 1886, it appeared that the plaintiff occupied the premises under the following agreement:—"C. P. H., in consideration of the agreements hereinafter mentioned, on the part of the said C. H., agrees to grant at the time hereinafter mentioned, unto the said C. H., a lease of all that piece, &c., with the messuage or tenement, workshops and buildings, except such of them as are to be pulled down, as is hereinafter provided for; and also of the dwelling-house, workshops, &c. hereinafter agreed to be erected and built on the site thereof, with their appurtenances, &c. as the same now are, and have been for many years past, in the possession of the said C. H., for the term of fifty-nine years, and one quarter of another year, wanting ten days, from the 25th of March last, at the rent of 12*l.* 10*s.* for the first half year of the said term, payable in equal portions on the 24th of June and the 29th of September next, and at the yearly rent of 60*l.* for the remainder of the said term, payable quarterly. And for the consideration aforesaid, the said C. P. H. further agrees to and with the said C. H., that he, the said C. P. H. shall and will, within the space of four calendar months from the date hereof, at his own proper costs and charges, under the inspection, and to the satisfaction and approbation of the surveyors for the time being of the Merchant Tailors' Company, erect, build, or finish, fit for habitation, in a good and workmanlike manner, on the before-mentioned piece of ground, a dwelling-house and workshop, according to a certain specification and plans annexed. And the said C. H., in consideration of the costs and charges, &c. agrees that she shall and will accept and take the said lease, and execute a counterpart thereof, when tendered to her for that purpose; and also, that she will, within the like period of four months, erect, build, and finish on the said piece of ground, all such other erections and buildings in addition to those hereinbefore agreed to be erected and built by the said C. P. H., as are required to be erected and built under and by virtue of certain articles of agreement, bearing date the 5th of October last, and made between the Merchant Tailors' Company

of the first part, the Archdeacon of London of the second part, and the said C. P. H. of the third part, and in conformity therewith; and that the erection to be so respectively erected and built by the said C. P. H. and C. H., when finished, shall be of the aggregate value of 800*l.* And it is hereby agreed and declared by and between the parties hereto, that the lease hereby intended to be granted, shall be granted immediately after the said C. P. H. shall obtain his lease of the said premises, under the before-mentioned agreement of the 5th of October last, and which he shall obtain with all convenient speed at his own cost and charges, and shall contain on the part of the lessee, like covenants, provisoes, and agreements to those to be contained in the original lease of the said premises, to be granted to the said C. P. H., as aforesaid, and such other covenants as are usual and common in like leases. And that the said C. H. shall and will well and truly pay the rent hereby agreed to be paid on the days and in the manner aforesaid, as if the lease hereby intended to be granted had been executed and performed, and that all and every the stipulations to which the said C. P. H. is subject by the agreement under which he holds the said premises, except such as he is bound to perform by virtue or in pursuance of these presents; also to indemnify C. P. H. from loss by reason of non-performance, and to pay and reimburse C. P. H. the expenses of these presents, and of preparing the agreement and counterpart of and between the company and C. P. H., and the lease and counterpart to be executed by him to the said C. H., by virtue of these presents." Then followed a proviso for avoiding the agreement, and for a penalty for non-performance.

His Lordship, being of opinion that this instrument did not empower the defendant to distrain, directed a verdict for the plaintiff, but gave the defendant leave to move to enter a verdict for him for 60*l.*, the value of the goods taken.

In Hilary term, 1886,

Godson obtained a rule accordingly; against which, cause was now shewn by—

Gurney.—First, it has not been shewn that the plaintiff occupied at all under this instrument, and she had been in possession

long before it was executed; therefore, whatever be its effect, this distress was illegal. Secondly, it was not a demise of the premises, but only an agreement for a lease. Certainly, the mere contemplation of a future lease will not prevent it from operating as a demise; but where there is a stipulation that the future lease shall contain usual covenants, it has been held that the instrument cannot of itself be deemed to be a lease—*Morgan v. Bissell* (1); still more, when it is, as here, such covenants as are usual and common in like leases. In *Doe d. Pearson v. Ries* (2), Tindal, C.J. says, that "in all the cases in which such a stipulation has been held to render the agreement containing it nugatory, the terms of the future lease have been unascertained at the time of entering into the agreement." The terms have not been ascertained in the present case. Again, it is provided, that the lease shall be granted as soon as the defendant shall have obtained his lease under the agreement of the 5th of October, from the Merchant Tailors' Company; so that at the very time he had no power to grant the lease. *Doe d. Coore v. Clare* (3), and *Regnart v. Porter* (4), are authorities against construing this as a lease. So also is *Hope v. Booth* (5). *Pinero v. Judson* (6) will be cited on the other side; but there it was expressly stipulated, that until the future lease was executed, the party should hold the premises on the terms specified. There is no such stipulation here. Then one part of the premises to be demised is to be built upon by the lessor. That is an objection to the construing this to be a lease; but the principal one is the inconvenience which would result from a party being held to have granted a lease of the land, to which, at the time, he had no title. This is noticed in *Roe d. Jackson v. Asburner* (7).

Godson, in support of the rule.—First, it appears from the instrument that the plaintiff was to occupy under it after its exe-

cution. Secondly, this instrument was a lease. It is said, that the covenants and terms of the future lease were not ascertained; but it is provided that they shall be such as are contained in the lease from the Merchant Tailors' Company to the defendant; and, therefore, were ascertainable, as in *Doe d. Pearson v. Ries*, where there was a reference to a particular lease. The rule of construction laid down by Lord Ellenborough in *Poole v. Bentley* (8), is, that the intention of the parties declared by the words of the instrument, must govern the construction. Here there can be no doubt that the parties intended to execute a demise. *Pinero v. Judson* is exactly similar to this case, and there the instrument was held to be a lease; and *Warman v. Faithful* (9) is also in point. In *Morgan v. Bissell* the amount of the rent was not fixed. In *Doe d. Coore v. Clare*, it was uncertain whether the licence of the lord to the lease could be procured. Here, however, there are words of present demise: the time of the commencement of the term is specified; the possession is given up to the tenant; the length of the term, namely, fifty-nine and a quarter years, the amount of the rent, and the days of payment, are all shewn.

Gurney, in reply, was stopped by the Court.

LORD DENMAN, C.J.—It cannot be held that this is a lease, where the party who agrees to grant it had no power at the time to do so.

Per Curiam—

Judgment for the plaintiff.

1837. { THE KING v. THE MAYOR, AL-
Jan. 27. { DERMEN, AND BURGESSES
OF BRIDGEWATER.

Municipal Corporation Act—Office—Compensation—Mandamus.

A person who has filled the office of town clerk and clerk of the peace of a borough, and, as incident thereto, has acted as clerk to the Justices of such borough, previous to

- (1) 3 Taunt. 65.
- (2) 8 Bing. 182; s. c. 1 Law J. Rep. (N.S.) C.P. 73.
- (3) 2 Term Rep. 739.
- (4) 7 Bing. 451; s. c. 9 Law J. Rep. C.P. 168.
- (5) 1 B. & Ad. 498; s. c. 9 Law J. Rep. K.B. 21.
- (6) 6 Bing. 206; s. c. 8 Law J. Rep. C.P. 18.
- (7) 5 Term Rep. 163.

- (8) 12 East, 170.
- (9) 5 B. & Ad. 1042; s. c. 3 Law J. Rep. (N.S.) K.B. 114.

the passing of 5 & 6 Will. 4. c. 76, (the *Municipal Corporation Act*.) is entitled to a compensation under section 66 of that statute, for the loss of the fees and emoluments of the latter situation, as the word "office" in that section is not to be construed in its strictly legal sense, but, with reference to section 37, in its general sense, as equivalent to "situation or employment."

A mandamus lies to compel a corporation to put the corporation seal to a bond awarded by the Lords of the Treasury, securing an annuity as a compensation for removing from such office.

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 78.]

1837. }
Jan. 28. } SPENCER v. NEWTON.

Arrest—Privilege—Arbitration.

A plaintiff came from Yorkshire to London, to attend a meeting before an arbitrator, on the 6th of January. It took place on the 7th, when it was objected, that he had obtained the Judge's order for the reference surreptitiously, and that the opposite party would apply to the Court to set it aside; and thereupon the arbitrator adjourned the meeting until the 15th of February, to allow the motion to be made. The party then went to his inn in the city, and remained until the 16th of January, not having means sooner to return to his home, and waiting to see if any motion were made in the court. No motion having been made within the first four days of term, he was proceeding to take his place on the 16th, to return to Yorkshire, when he was arrested:—Held, that he was not privileged from arrest.

The defendant having been arrested on mesne process, at the suit of the plaintiff, and also detained on a *ca. sa.* at the suit of Mr. Lane, an attorney, applied to be discharged out of custody, upon affidavits which disclosed the following circumstances:—He was the plaintiff in an arbitration which was pending before an arbitrator in London, and had come from his residence in Yorkshire to attend a meeting on the 6th of January. At that meeting, which took place on the 7th,

Lane attended as a witness for the plaintiff, but an attorney, whose name was on the record as the defendant's attorney, appeared before the arbitrator, and protested against his proceeding with the reference, stating, that the Judge's order, referring the cause, had been surreptitiously obtained, and that a motion would be made at the beginning of the ensuing term to set it aside. The arbitrator, thereupon adjourned the meeting until the 15th of February, to enable the defendant to make such motion in the course of Hilary term; and Mr. Newton, the plaintiff, having consulted with his attorney, resolved to wait in town for a few days, to see the result of the application, and to meet and answer it. He was staying at an inn in the city, and returned there, and was taken ill, and was in want of pecuniary means to discharge his bill at the inn and to return to his residence, until the 16th, when he took his place in the mail, and he was arrested at the suit of the plaintiff, on his way from Lincoln's Inn Hall to the mail coach office.

The Attorney General obtained a rule *nisi* for his discharge, on the ground that he was privileged from arrest at the time.

From the affidavits, in opposition to the rule, it appeared, that Mr. Newton was a student of Lincoln's Inn, and had kept his term by dining in hall on the 15th of January.

Cause was now shewn by—

Sir F. Pollock on behalf of Spencer; and *Kelly* on behalf of Lane.—It is true, that a witness attending upon an arbitration is privileged from arrest while so attending—*Spence v. Stuart* (1), and *Ricketts v. Gurney* (2); but no case of privilege is made out here. The applicant was not a witness in the arbitration, and was not bound to attend; the subpoena, which the witness must obey, forms the real foundation for the privilege: here, there was nothing of the kind. But assuming that, being a party, he was privileged in attending the arbitration, that privilege only lasted during the time of the meeting: it cannot be contended, that he was privileged during the period between the first and second meeting. The utmost limit

(1) 3 East, 89. See also *Rishton v. Nisbett*, 1 Mo. & Rob. 347.

(2) 7 Price, 699.

which the law affords according to the authorities, is the remainder of the day on which the party has been examined, or perhaps the next day; and the law also gives a latitude to the party, so as not to be very strict in requiring him to go straight home; for in one case, the Court held a party privileged who stayed to dine with the attorney at an inn. *Lightfoot v. Cameron* (3), and *Anonymous* (4). In *Randall v. Gurney* (5), where a party had come to attend an arbitration as a witness, at a time unreasonably early, before the appointed meeting, this Court held that he was not privileged. Here, the time which the defendant took for his return was clearly unreasonable. His illness and want of means afford no grounds of privilege; for it is established by many cases, that the poverty of the defendant is no reason for his being discharged out of custody. Besides, it appears that the party did not come to London merely to attend the arbitration; he came in fact to keep his term at the inn of court, and did not attempt to return until he had kept it.

The Attorney General, in support of the rule.—There is no distinction between *Spencer* and *Lane*: if the arrest cannot be sustained at the suit of the former, it cannot at the suit of the latter. The question, therefore, is, whether the defendant was privileged from *Spencer's* arrest. Now, the law does not protect parties and witnesses upon any measurement of hours and days, but they are privileged until they can, by using reasonable diligence, return to their place of abode. If a party be delayed by storms or floods, or inevitable accidents, or the want of conveyance, the protection still continues—*Stokes v. White* (6). So, if illness prevent him from returning, he is privileged from arrest so long as he is prevented thereby. Here, the defendant was prevented by illness, and the want of means from going home before the time when he did attempt to set off. In *Spence v. Stuart*, the privilege was allowed to the witness attending the arbitrator. And in *Ricketts v. Gurney*, the Court of Exchequer discharged a witness

from custody, on the same facts as were shewn in *Randall v. Gurney*, where the Court of King's Bench refused to interfere, because they considered, that the party had only used his summons to the arbitration as a pretence. There is no such pretence in this case.

PATTESON, J.*—I quite agree with the observation, that this Court is not bound by the calculation of hours and days, but must look to see whether the party has returned in a reasonable time, or has come with a *bond fide* intention of attending upon the cause. If the Court be satisfied on that point, whether he be a party or a witness, he is protected from arrest during such time. This case altogether depends upon the notice of the motion in the Exchequer, which had been given to the defendant, for he would not have been justified in remaining in London during the period of the adjournment. It is said, that it was impossible for him to go back; but that impossibility arose from his want of means alone, and this Court cannot take notice of such an excuse, nor act upon it. The question then is, whether, when, on the meeting before the arbitrator, it was stated, that the defendant had obtained a Judge's order surreptitiously, and the arbitrator adjourned the meeting to enable the party to move the Court to set it aside, the defendant was entitled to be protected during the time he remained in London. Now, this meeting was on the 6th of January, and term began on the 11th; and it is argued, that he was entitled to wait until the motion was made. It was not necessary that the motion should be made within the first four days of the term, and I do not know that the opposite party was bound to select one of them; but he ought to have made it within a reasonable time. The defendant waited and saw his attorney, and found that no motion would be made; and he then took his place to return. The question is, did that notice entitle him to stay so long? There is no case like the present. *Ricketts v. Gurney*, in the Exchequer, only amounts to a decision, that the party did not deviate from his course of journeying to the place of meeting. In other cases it has been held,

(3) 2 W. Black. 1113.
 (4) Gilb. 508; s. c. 2 Stra. 906.
 (5) 3 B. & Ald. 252.
 (6) 1 Cr. M. & R. 223; s. c. 3 Law J. Rep. (N.S.) 321.

* Lord Deaman, C.J. was not in court.

that a short time may be allowed to a party before he starts on his route. The case most like the present is that where the party was waiting for the hearing of his cause, though it was not in the paper. There is a case in Chancery, where a suitor went before the time of his examination to see the interrogatories, and was held not to have been privileged, because he went too soon—*Gibbs v. Phillipson* (8). There is also another case in Chancery, where there was an adjournment of a case to a later hour of the day. Here, no motion having actually been made in court, the question is, whether the defendant was justified in waiting eight days to see whether any would be made. If we were to hold that he was, we should carry the time far beyond any former case. The rule must be discharged.

WILLIAMS, J.—I shall only add one word, as to the defendant's waiting in London, upon the suggestion that the other party would suspend the proceedings before the arbitrator. Everybody is aware that an arbitration differs from other proceedings, and that there would have been no necessity on the part of the defendant to shew cause *instantly*. He might also have shewn cause on affidavits, and no meeting on the reference could have taken place without notice to him, whether he was at home or in London. I am at a loss to discover the benefit which he could derive from waiting for the application to the Court. This is the only point in the case; for as to his illness, that is not made out on these affidavits, sufficiently to enable the Court to act upon it. It appears he was well enough to attend Lincoln's Inn Hall.

COLLIERIDGE, J.—I am quite of the same opinion. The illness is not made out, and if the want of means were a sufficient excuse for the delay, we should have different laws applicable to the same matter, but depending on the state of a man's circumstances.

Rule discharged.

(8) 1 Russ. & Myl. 19; s. c. 8 Law J. Rep. Chanc. 46.

1837. } THE KING v. HENLEY-UPON-THAMES.

Settlement—Renting a Tenement—59 Geo. 3. c. 50.

An upper granary forming an entire floor over another granary, in a yard belonging to a dwelling-house, both granaries adjoining to and under the same roof with a stable, but detached from the dwelling-house—Held, not to be a separate and distinct building, within the 59 Geo. 3. c. 50, though there was no internal communication from one granary to the other, nor between the granary and the stable, but the only means of access was by a moveable ladder from the yard.

So also a granary forming an entire floor over a stable, without any internal communication between them, and the access being by means of a moveable ladder from the outside—Held, not to be a separate and distinct building.

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 76.]

1837. } THE KING v. OCTAVIUS MASHITT.

Quo Warranto—Information—Duty of Relator—Meaning of the word "Inhabitants."

A party who seeks to disturb another elected to an office, on the ground that he had not a majority of votes, must shew the qualification of the electors, and that another candidate had the majority of those duly qualified, before the Court will grant a quo warranto information.

The word "inhabitant" has no legal definite meaning, but its signification varies according to the subject-matter to which it is applied.

A rule nisi had been obtained for an information in the nature of a *quo warranto*, against the defendant, to know by what authority he claimed to be Justice of the Peace for the liberty, lordship, or manor of Havering atte Bower, in the county of Essex, upon affidavits which set forth, that by a charter dated July 15, 5 Edw. 4, which recited, that the said lordship or

manor was of ancient demesne, and that all real and mixed actions concerning the lands there were immemorially accustomed to be pleaded in the court of the said manor before the steward and suitors of the said court for the time being, and that having heard by the lamentable complaints of the *tenants and inhabitants* of the said manor, how, out of the said lordship in other courts than in the court before the said steward and suitors, they were troubled and molested, to the no small loss and grievance of them the said *inhabitants and tenants*, the said king had granted to the said tenants and inhabitants, that they should not be forced or bound to answer before any other Justices, &c., or to be sued in any other court than in that before the steward and suitors. The charter then granted a court for the trial of all actions to be held before the steward and suitors, and then continued, "And his said Majesty furthermore of his more abundant grace, did grant unto the aforesaid *tenants and inhabitants*, and to their successors, that the steward of the said manor for the time being, so long as he should continue in the said office, and one of the discreetest and honestest tenants or inhabitants aforesaid, to be from time to time chosen by them, the tenants and inhabitants, and their successors, should be for his said Majesty, and his heirs, Justices of the Peace, and keepers of his peace, to be kept within the said manor of Havering aforesaid." A charter, dated March 27, 1 Mary, confirming this charter of Edward 4; another of Queen Elizabeth, dated June 18, in the 30th year of her reign, by which she incorporated the tenants and inhabitants of the lordship or manor of Havering atte Bower; and, lastly, a charter, dated April 4, 2 James 1, confirming all the previous charters, were set out. The affidavits then stated, that, in 1818, the Commissioners of Woods and Forests sold the manor to Hugh M'Intosh, Esq., and that Digby Neave, who had been elected Justice of the Peace for the manor in 1825, having resigned, a court of ancient demesne was held on Thursday the 11th of Feb. 1836, pursuant to public notice, to elect a Justice of Peace in his place. At that court there were two candidates, the defendant, Octavius Mashiter, Esq., an inhabitant of

the manor, and J. H. Younge, Esq., also an inhabitant of the manor. They were both nominated and proposed, and, on a show of hands, the election was in favour of the latter. A poll was demanded, and ordered to take place on the 15th and 16th of February. It took place accordingly. At the polling, several persons claimed to vote as *inhabitants* within the manor; but they were objected to, on the ground that they were not householders, and the Court received them only as tenders. When the poll closed, the numbers were, for Mashiter 455, and 48 tenders: for Younge 341, and 170 tenders. The court was adjourned to the 23rd, and then the tendered votes were rejected, and Mr. Mashiter was declared duly elected. He was afterwards sworn in; and had since acted as Justice of the Peace. The present application was at the relation of Mr. Younge, who claimed to have been duly elected. According to his affidavit, there was no instance of any previous poll having taken place in the manor; but several entries were set out, which recorded former elections of Justices of the Peace, to which entries there were many signatures of the electors, and it was sworn, that many of those persons had not been householders. No scrutiny appeared to have taken place on those occasions.

Sir W. W. Follett (Barstow was with him) now shewed cause.—The question turns upon the meaning of the word "*inhabitants*," in the charter of Edward 4. The manor being of ancient demesne, it may be contended, from the nature of the privileges granted, that "*inhabitants*" must be construed to mean inhabitants being tenants, as in *Fearon v. Webb* (1); or; at all events, "*inhabitants*" must be construed to be occupiers within the manor. The word "*inhabitants*," in ancient charters, is never explained by mere inhabitancy. No decision in the books gives to the word any full and definite meaning; but it is to be construed always *secundum subjectam materiam*. *Sir E. Coke, 2 Inst.* 702, commenting on the statute of bridges, says, that "the word '*inhabitant*' is the largest word of the kind; for although a man be dwelling in a house in a foreign county, riding, city, or town corporate,"

yet if he hath lands or tenements in his own possession and manurance, in the county, riding, city, or town corporate, where the decayed bridge is, he is an inhabitant, both where his person dwelleth, and where he hath lands or tenements in his own possession, within this statute." That was a statute throwing a pecuniary burden on the inhabitants of a county; and the obvious exposition of the word there is, a person having property in his possession in the county. But in *The King v. Adlard* (2), a non-resident occupier was held not liable to serve as constable, as an inhabitant. In many old deeds, a power of electing the clergyman of the parish has been given to "the parishioners and inhabitants," as in *The Attorney General v. Parker* (3); but inhabitants have never been held to include any but occupiers, the lowest class of whom are householders; and the limitation has been so applied, that it includes householders only bearing parochial burdens; *The Attorney General v. Forster* (4). The contemporaneous exposition of the word "inhabitants," at the time of Edward the Fourth's charter, may be found in the class of persons by whom so many public officers at that time were chosen, namely, in freeholders, by whom only, the coroners of a county, members of the House of Commons, &c., were chosen. There is no case, in which the word "inhabitants" has ever been held to include more than occupiers.

[LITTLEDALE, J.—Suppose the Crown had granted a charter to the inhabitants of the parish of A, who would be the parties to take?]

The occupiers within the parish. When a grant of that kind has been held to extend to occupiers, it has often been restricted to occupiers paying scot and lot. But the relator ought to shew what the meaning of the word is. Before he is entitled to his *quo warranto*, he must make out who the inhabitants within the manor are, and that he has a majority of such inhabitants. He has sworn that several persons claimed to vote, all of whom, he believed, were inhabitants of the manor,

though not householders therein. Does the relator mean, by the word "inhabitants," all who have resided in the manor for a year, or for a month? or would he include persons who came into the manor the night before the election, servants and children, for they are all inhabitants? So are beggars within the manor; and if the relator's claim can be established, a beggar may be a Justice of the Peace; for no other qualification is required from the Justice than from the electors. There is in fact no legal meaning to the word "inhabitants;" and whether it means occupiers within the manor, resident occupiers, or residents only, the relator ought to have shewn himself to be elected by the majority of one of such classes, before he can apply to this Court.

Thesiger, contra.—No doubt, it is necessary to shew what kind of inhabitancy in this manor entitles persons to the benefits of the charter, but the affidavits clearly shew that the contest is, whether the inhabitants need be householders or not; and the question is, whether such a qualification attaches to the term. Only four instances have been recorded of elections of Justices of the Peace, and it is sworn that the court of ancient demesne, where the elections are held on all such occasions, was always open to all inhabitants. Lord Eldon, in *The Attorney General v. Forster*, said of the word "inhabitants," "No words are more capable of a larger or more limited interpretation; that is, no words are more capable of being acted upon by usage. And in *The Attorney General v. Parker*, Lord Hardwicke said:—"Inhabitants is a still larger word (than parishioners), and takes in housekeepers, though not rated to the poor; it takes in also persons who are not housekeepers, as, for instance, such who have gained a settlement, and by that means become inhabitants;" and he adds, "In the construction of ancient grants and deeds, there is no better way of construing them than by usage, and *contemporanea expositio* is the best way to go by." The usage here, as far as it goes, shews, that the full sense of the word has always been given to it; and the observations of Lawrence, J. in *Withnell v. Gartham* (5), are to the

(2) 4 B. & C. 772; s. c. 7 D. & R. 340.

(3) 3 Atk. 576; s. c. 1 Ves. sen. 43.

(4) 10 Ves. 335.

(5) 6 Term Rep. 398.

same effect. It is submitted here, that the residents within the manor of Havering are entitled to construe it in the full sense.

[COLERIDGE, J.—What do you contend is the full sense to be given to the word “inhabitant”?]]

Every in-dweller; every one who comes into the manor *animo morandi*, as in the case of the borough of Preston formerly, and *The King v. Woolpit* (6).

[LITLEDALE, J.—You would include then under the term, women, children, and servants.]]

That might not be wrong, as the jurisdiction given in the charter extends over servants. In *The Attorney General v. Parker*, *The Attorney General v. Forster*, and *The Attorney General v. Newcombe* (7), which are different stages of the Clerkenwell case, a usage was shewn to limit the meaning of the word, which the Court felt bound to give effect to. It is evident that all the provisions in the charter were not intended to apply to tenants in ancient demeane only, as they are calculated for the benefit of the whole population. Anciently, before the grant of courts leet, all tenants and resiants were obliged to do service at the sheriff's tourn; and Lord Coke says, 2 *Inst.* 71, “It hath appeared before, that of ancient time the sheriff had two great courts, viz. the tourn and the county court: afterwards, for the ease of the people, and especially of the husbandmen, that each of them might the better follow their business in their several degrees, this court here spoken of, viz. view of frankpledge, or leet, was by the king divided and derived from the tourn, and granted to the lords, to have the view of the tenants and resiants within their manors, &c., so as the tenants and resiants should have the same justice that they had before in the tourn done unto them at their own doors, without any charge or loss of time.” So, it is contended here, the court given by the charter was intended to give the same advantage to the tenants and inhabitants, as the court leet to tenants and resiants. It is said, there is no case in which the full sense has been

given to the word, but it has been held, that if the queen by her charter were to grant land to the good men of Islington, that would make them a corporation. In *Co. Litt.* 3, a, it is said the parishioners or inhabitants of Dale are not capable to purchase lands, but goods they are. In *Russell v. the Men of Devon* (8), an action on the case was brought against the men dwelling in the county of Devon: and Lord Coke, 4 *Inst.* 297, says expressly, “And concerning claims, it is specially to be observed, that by the forest law, a grant made of privilege within the forest to all the inhabitants, being freeholders within the forest, or such other commonalties not incorporated, is good.” In all these cases, these general words appeared to be understood, and to be thought capable of a legal construction.

LORD DENMAN, C. J.—I confess that I was rather alarmed at some of the consequences which, at first sight, appeared to be likely to arise from making this rule absolute; but still I am not prepared to say, that I should have felt myself bound to put an exclusive meaning on the word “inhabitants,” or to say, that it must necessarily mean an occupier. But it seems to me, that that defect which early in the argument we pointed out to *Mr. Theiger*, as affecting his case, has not been removed. We must see, before we grant a *quo warranto* against a man who *prima facie* appears to have been duly elected, some good ground on which it is clear that the person who applies to the Court has some right to remove him from his office. The applicant has certainly not satisfied us upon this point. What he says, is, that he was duly elected by a majority of persons who had a right to vote, though they were not householders. It is not enough for him to say this. He ought to shew that he has a majority of good legal voters. He does nothing of the sort. He says, the 218 persons, of whom the majority voted for him, were inhabitants of the manor or lordship, though not householders. He does not shew that as inhabitants not being householders, they were entitled to vote. Now, the word “inhabitants” is

(6) 4 Ad. & El. 205; a. c. 5 Law J. Rep. (N.S.) M.C. 14.

(7) 14 Ves. 1.

(8) 2 Term Rep. 667.

a word of such uncertain legal meaning, that the party bringing before us a claim founded upon that word, should put a legal construction upon it, and shew by facts that the construction he puts is the right one. That has not been done in the present case; and there is, therefore, no question brought before us on which we can properly adjudicate. Although Mr. Justice Lawrence has said, in a case in which it was not important to consider the question, that the word "inhabitants" may receive a full legal meaning, still, I think, that he did not intend to say, and did not say, what that meaning was. The case in which that learned Judge so expressed himself, is, therefore, not applicable to the present. The other case referred to, *Russell v. the Men of Devon*, was a suit by an individual against the inhabitants of the county of Devon, for an injury arising to him from their non-repair of a bridge. Lord Kenyon referred to the case in *Dyer* (9), and said, "I do not say, that the inhabitants of a county or hundred may not be incorporated to some purposes; as, if the king were to grant lands to them, rendering rent, like the grant to the good men of the town of Islington." That observation, however, is not at all applicable to the present case, nor is the case to which Lord Kenyon there refers; for there can be no doubt that the proposition supposed to be laid down in that case by Lord Chief Justice Bromeley, is good law. All these cases shew only this, that none of the learned Judges have thought themselves called on to form or express any very distinct idea of what the legal meaning of the word "inhabitants" is.

LITTLEDALE, J.—I have great difficulty in saying, what meaning can be given to the word "inhabitants," so as to bring it within any strict legal definition. It seems to me to have a different meaning in different cases. In some, it merely implies personal residence, as in the inhabitants of a parish, claiming to have a way over a field to a church; any person who was in the parish at the time would have a right to use the way in going to church. The word, therefore, must be taken according to the subject-matter. In some cases it is

explained by usage. In others, by the construction necessarily to be put upon other parts of a charter. I cannot say, that there is any universal legal meaning of the term "inhabitants." The applicant is, therefore, bound to shew what description of persons he insists to be, as inhabitants, entitled to vote. He has not done this, and I do not think that he has made out any ground for our interference.

WILLIAMS, J.—I am of the same opinion. We ought not to put the applicant in the course of disturbing the defendant in the possession of his office, unless there is some good ground for believing that he has not been properly elected to it. The applicant ought to have made out this ground to our satisfaction; and he might have done so in one of two ways, either by establishing by authorities, that the word "inhabitants" has a certain definite meaning, or by shewing facts to prove, that the persons who tendered their votes for him were inhabitants, within the usual acceptation of that term, and were entitled as such to vote at this election, so that then we might have come to some conclusion on the matter. Now, it seems to me, that the word has no ascertained legal meaning, and the facts I have referred to, have not been proved; so that we have no ground for saying, that this person seeking to impeach the election, had a good majority to entitle himself to be elected.

COLERIDGE, J.—It is quite clear that the party who is applying for this rule is bound to establish a clear *prima facie* case of his right to this office. That has not been done here. All that the affidavits state is, that he had for him a majority of persons believed to be inhabitants, but not householders, and who were objected to on that account. It is said, that in this application, he has made use of a term which is not restrained by legal construction, by the context of the charter, or by usage; and which, it is therefore contended, must have a full legal meaning. If that were so, the applicant might go on to make out his case; but I think that he has not made out that that term is not so restrained. We must see in what instruments it is used, in order to know its meaning; for it means one thing in one place, and a different thing in another. It has no distinct legal meaning

(9) Anonymous, *Dyer*, 100, a.

attached to it. The foundation, therefore, of this application, fails altogether. Then, it is said, that we are to look at the context of this charter; but still the same objection occurs. It is said, that every person who comes into the manor *animo morandi*, is an "inhabitant," and that the Court must so understand the term. But even if that were so, the applicant ought to go on and say, that he has a majority of the persons in the manor *animo morandi*, desirous of voting for him. If he had put this upon his affidavit, the other side would have had an opportunity of answering it; but he has not done so. But this charter is not clear upon this point, as to that being the right construction. This rule, therefore, cannot be made absolute upon the principles which, it is conceded, must govern the Court in the application of its summary power, in cases like the present.

Rule discharged (10).

1837. } THE KING v. THE GOVERNORS
Jan. 30. } OF SANDFORD.

Election—Meaning of the term "Inhabitants"—Mandamus.

A usage for the governors of a corporation to nominate a chaplain, to perform divine service in the vill of S., and to give notice to the inhabitants to meet at a future day, and to assent or dissent to the nomination so made, is not inconsistent with a charter of Edw. 6, granting to the governors of the corporation the right of nominating and appointing unâ cum assensu majoris partis inhabitancium.

In 1741, a decree by the Lord Chancellor declared the right of voting to be in the inhabitants only paying rates and assessments, and the usage since that decree had been in accordance with it. An election having been made by such inhabitants, at which the votes of non-rated inhabitants were tendered and refused, the Court refused to grant a mandamus for a new election, as the parties applying for it did not shew that the term "inhabitants" had any other signification.

A charter of Edw. 6, after reciting that as well for the increase of divine worship

and the better preservation and governance of the goods, chattels, and hereditaments of the parish church of Crediton, in the county of Devon, then being and thereafter happening to be, and for the instructing of children, as also for other causes, &c., granted to the inhabitants of the said parish, that from thenceforth there should be within the same parish, of the inhabitants of the same for the time being, twelve governors of the hereditaments and goods of the church of Crediton, of the which governors three should be always of the village or hamlet of Sandford. The charter then incorporated these governors, and granted to them a perpetual succession and a common seal; and, after setting forth various duties, proceeded as follows: "Et volumus, ac per præsentès declaramus et ordinamus, quod illi tres dictorum duodecim gubernatorum qui ex parte villatæ de Sampford prædictæ de tempore in tempus fuerint unâ cum assensu majoris partis inhabitancium ejusdem villatæ de Sampford nominabunt et appointuabunt ac nominare et appointuare valeant et possint unum capellanum ad divina servicia ac sacramenta et sacramentalia ministrandum in capellâ de Sampford prædictâ pro inhabitantibus villatæ et hameletti de Sampford prædictæ et per illos tres dictorum duodecim gubernatorum qui ex parte villatæ et hameletti de Sampford prædictâ unâ cum assensu prædictæ majoris partis inhabitancium ejusdem villatæ et hameletti de Sampford, de tempore in tempus pro rationabili causâ expellatur et amoveatur, et alius ejus loco per eos ponatur."

Upon the death of the Rev. Hugh Bent, the last chaplain of the village or hamlet of Sandford, the three present governors, Sir H. P. Davie, Bart., W. Harris, and E. Tremlett, without the assent of the major part of the inhabitants of Sandford, nominated the Rev. Charles Gregory to be the chaplain of Sandford, and caused a notice to be fixed on the door of Sandford church, stating that they had so nominated him, and requiring the inhabitants of the said vill to meet in the chapel on Sunday, the 26th of June inst., immediately after the evening service, in order that they, or the major part of them, who should be present at such meeting, might assent or dissent to such nomination.

(10) See the next case.

At the appointed day, one of the governors took the chair, and the resident rate-payers were called upon by name, and gave in their assent or dissent. An attorney, on behalf of certain inhabitants, tendered the votes of five non-rated inhabitants, and also five non-resident rate-payers; but the votes of these classes were refused. The numbers were declared to be, assents thirty-nine, dissents thirty-two, leaving a majority of seven in favour of the Rev. Charles Gregory. In Michaelmas term last—

Sir F. Pollock obtained a rule *nisi* for a mandamus to the three governors, commanding them, with the assent of the inhabitants of the said vill or hamlet, to nominate and appoint a chaplain. Affidavits in answer to the rule, were made by the clerk to the governors, the three governors, the vestry clerk, and several old inhabitants, who stated, that none but inhabitant rate-payers had ever been called upon to assent or dissent, and that the custom and usage was always understood to be for the three governors to nominate, and for the inhabitants paying rates to assent or dissent. It appeared by the charters, that the churchwardens of the hamlet of Sandford were to be chosen by the inhabitants, in the same manner as the churchwardens of the parish of Crediton; and it was sworn that the usage had been for none but inhabitants paying scot and lot to vote for chapelwardens. Several decrees of the Lord Chancellor, made in proceedings in the Court of Chancery, from the year 1730 to 1741, in a suit touching the election of the chaplain of Sandford, were also set forth. A decree of the 25th of July 1737, made on the rehearing of a cause, by Lord Hardwicke (1), declared that neither of the candidates for the office of chaplain, Blackall or Lang, the former of whom had been elected by two of the governors and a minority of the inhabitants, and the latter by one of the governors and a majority of the inhabitants, were duly nominated and appointed; and ordered, that the said three governors "should proceed to nominate a chaplain, and thereupon give notice to the inhabitants, to meet on the Sunday se'nnight after such nomination,

to assent or dissent to such nomination." By another decree of the 20th of January 1741 (2), the Lord Chancellor ordered and declared, that no notice having been given to one of the governors, the nomination and appointment of a chaplain by the other two, was null and void; and his Lordship thereupon ordered the governors of Sandford to proceed to nominate a chaplain, with the assent of the major part of the inhabitants, according to the charter and the decree of 1737; and decreed further, "that the right of assenting or dissenting to such nomination was only in the inhabitants of the said hamlet, paying the rates and assessments for the poor and the chapel within the said hamlet." A decree of the 27th of July 1741 (3), recited that in pursuance of the above decrees, the said governors did proceed to nominate a chaplain, and two out of the three concurred in nominating William Barter as chaplain, but the other governor refusing to concur, the two governors gave notice in writing to the inhabitants to meet to assent or dissent to such nomination; and that in pursuance of such notice, "all or much the greatest part of the inhabitants within the said hamlet of Sandford, who were payers or owners or occupiers of lands charged to the rates and assessments of Sandford," did meet and assent to the nomination of Barter, and that not one inhabitant present dissented; and the decree declared, that Barter was duly nominated and appointed, and that he should be admitted.

Sir W. W. Follett and *M. Smith*, now shewed cause.—*The King v. Mashiter* (4) decides the present case. No definite meaning was there given by the parties applying for the rule, to the term "inhabitants." Neither is it given here. There is no suggestion of the mode in which the election should take place. It is necessary to consider two points only; first, what is the best mode of construing this charter; and secondly, what is the meaning of the

(2) In a supplemental suit between *Sir J. Chichester, Bart., Reed, and Tremlett, the Governors, and The Attorney General*.

(3) *The Attorney General v. Twelve Governors, Davis and others*, reported 2 Atk. 212.

(4) *Ante*, 121.

(1) In a suit of *The Attorney General at the relation of Bremridge and other Inhabitants v. John Davis and others, governors*.

word "inhabitants." As to the first, usage is the best exposition of the terms of ancient charters; and, it appears that the usage has always been for the inhabitants only paying rates to vote for chapelwardens; for the three governors to nominate a chaplain; and then for the rated inhabitants to meet and assent to or dissent from such nomination. This mode of nomination is consistent with the terms of the charter. The governors and the inhabitants are distinct constituent bodies; and the words of the charter are not that the governors and inhabitants shall nominate and appoint; but that the governors, *together with the assent* of the inhabitants, shall do so. The proper construction, therefore, is, that one body shall nominate, and *with the assent* of the other body, shall appoint; and the usage in conformity with this has been confirmed by the decree of the Court of Chancery. Lord Hardwicke decided that the right of voting was in the inhabitants paying rates and assessments; and he refers to that decision in *The Attorney General v. Parker* (5), and the same construction has been put on the word "inhabitants," in other cases. Then, *The King v. Adlard* (6) and other cases shew, that an inhabitant, in cases of this kind, means an occupier; and it is clear that the word "inhabitants" must receive some restriction. The question, as to the claim of the non-resident rate-payers, does not arise upon the present election. It distinctly appears that only five of such persons were present at the election, whose votes were refused; and Mr. Gregory's majority being seven, those persons, if they had all voted against him, could not have turned the election; and Lord Eldon, Chancellor, said, in *The Attorney General v. Foster* (7), "the mere absence of persons not making any inquiry nor attending to vote, was not an objection that ought to destroy the election."

Sir F. Pollock and Rogers, contra.—The terms of the charter clearly indicate that the inhabitants are to have an equal share in the election with the governors; and as the governors are to nominate and appoint *una cum assensu inhabitancium*, it is also

clear, that there is to be a unity of persons and of times, when and by whom the nomination and appointment are to be made, and that the inhabitants are to take an equal share in the nomination as well as in the appointment. A usage, therefore, which gives the nomination to the governors, and the mere power to dissent to the inhabitants, is directly contrary to the words of the charter, and cannot be supported. But, in this case, there is no old usage, for Lord Hardwicke, in his mention of the case, in 1 *Ves. sen.* p. 43, expressly says, "that there was no proof of any usage." No doubt the usage has been in conformity with Lord Hardwicke's advice since that time; but as the points now raised were not then brought before the Court, any opinion expressed by Lord Hardwicke as to the mode of election, by the governors nominating and the inhabitants assenting or dissenting, or as to the meaning of "inhabitants," was extra-judicial. The question in the first suit was, whether an election by a majority of governors and a majority of the inhabitants was sufficient; and, in the second, whether a nomination by two of the governors only, where the third had not notice, was good. It also appears how the usage has sprung up, and that it had not a legal origin. Again, as the object of the grant was to provide for the performance of divine service for the inhabitants at large, it cannot be contended, that inhabitants only paying scot and lot were to partake of this benefit. Besides, the charter was granted fifty years before the 43 Eliz., and there is no instance in which "inhabitants" occurring in a charter previous to that statute, which originated parochial rates, has been limited to rate-payers. The result of the decisions on charters of this date and earlier is, that "inhabitant" means every independent person boiling his own pot, being a *paterfamilias*, having his room or other lodging to himself, though not a householder. In *Faulkner v. Elgar* (8), the opinion of the Court seems to have been, that where there was a custom for the parishioners of a parish to elect a perpetual curate, it was not competent for the parishioners to limit the right of voting to those parishioners only who had paid

(5) 3 Ark. 576; a. c. 1 Ves. 43.

(6) 7 D. & R. 340; a. c. 4 B. & C. 772.

(7) 10 Ves. 346.

(8) 4 B. & C. 449; a. c. 6 D. & R. 547.

church-rates; and it would seem from *Arnold v. the Bishop of Bath* (9), that an ancient custom for the parishioners, in vestry assembled, to elect a curate, is not supported by evidence of a custom of a right to elect by those parishioners only who have paid church-rates. Those cases proceed upon the principle, that no usage can overcome a right established by custom; *a fortiori*, therefore, where the right is contained in a charter.

LORD DENMAN, C.J.—In this case, the Court is required to issue a mandamus, directing the governors to elect a chaplain for the parish of Sandford, on the ground that the election which has taken place is void. But before this can be done, the Court must see clearly that the election was void. One objection made is, that the nomination is required by the charter to be made with the assent of the inhabitants; and that that has not been the case here. The words relied upon are, *unà cum assensu majoris partis inhabitancium*; and it is insisted that these words mean, that the inhabitants shall act with the governors in nominating as well as assenting to the appointment of the chaplain to be chosen. I confess I am not of that opinion, and I see no objection whatever to the mode which has been adopted in the parish. If the inhabitants do not assent to the party nominated by the governors, they must make a fresh nomination, and no election can take place without the assent of the parish. The assent being given, then the three governors do nominate and appoint, together with the assent of the major part of the inhabitants, in the very words of the charter. As to the right of voting claimed by the inhabitants, we have decided, this term (10), that the word “inhabitants” in a charter must receive its explanation from circumstances—namely, either from the context with which it is found, or from the usage which has gone along with it. The usage here has been to confine it to inhabitant rate-payers. It is said, indeed, this limitation could not be in accordance with the meaning of the charter, because poor-rates were not imposed on parishioners till many years

afterwards, by the 43 Eliz.; but I do not know that such is the case, or that compulsory relief to the poor was first imposed by that statute, and I rather apprehend it would be found that there were parochial burdens of this kind on inhabitants before that statute (11). It is then said, that there is no evidence of usage, but I think there clearly is. There is Lord Hardwicke’s express decision on the point; and Lord Eldon seems to have concurred, in another case, in this opinion; and I think it must now be taken, that the point which he decided was at issue, and that it was established to his satisfaction by facts brought before him.

WILLIAMS, J.—I do not see anything in the expression “*unà cum*,” &c. that at all makes it necessary for the nomination by the governors, and the assent by the inhabitants to go on *pari passu*. If any usage were set up, that the two bodies should do it together, there might be some foundation for this construction—but the usage is the other way. The words of the charter, therefore, stand alone, and a nomination by the governors, with the assent given afterwards by the inhabitants, concur in making an election by the whole (*unà cum*) together, completely within the words of the charter.

Rule discharged.

1837. } THE KING v. THE INHABITANTS
Jan. 25. } OF CLOSWORTH.

Settlement by Foreign Apprenticeship—Evidence.

An indenture of apprenticeship was made in Newfoundland, by an English sailor, who thereby agreed to serve on board his master’s ship:—Held, that a settlement was gained by a service and inhabitancy in England for forty days under that indenture.

Held also, that the party relying on the indenture, was not bound to prove that it was valid by the law of Newfoundland.

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 71.]

(11) See 1 Black. Com. 359; Burn’s History of the Poor Laws, cap. 4; and 1 Nol. P.L. 5.

(9) 2 M. & P. 559; s. c. 7 Law J. Rep. C.P. 120.

(10) The King v. Mashiter, ante, 121.

1837. } THE KING v. THE INHABITANTS
Jan. 25. } OF RITTENDEN.

Poor Law—Settlement by Hiring and Service—4 & 5 Will. 4. c. 76.

A pauper, who had served from June 1833 to Michaelmas, under monthly hirings, was hired at Michaelmas for a year, and served the whole period. The 4 & 5 Will. 4. c. 76. was passed on the 14th of August 1834:—Held, that though a settlement would have been gained previous to that act by such service, it was defeated by the 65th section; the contract for the year's hiring not having been completed at the time of the passing of the act.

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 77.]

1837. }
Jan. 12. } THE KING v. GARDNER.

Act of Parliament—Compensation Clauses—Costs.

A compensation clause in a railway act, enacted, that the value was to be settled by a jury; and that in case the jury should give a greater sum than had been offered by the company, "all the costs of summoning the jury and the expenses of witnesses," should be defrayed by the company; but if the jury should give the same or a less sum than had been offered, one moiety of the said costs and expenses was to be defrayed by the party to whom the lands belonged: and a subsequent clause enacted, that the party with whom the company should have any dispute, should enter into a bond to pay his "proportion of the costs and expenses of summoning and returning such jury, and taking such verdict, and of the summoning and attendance of witnesses," in case any part of such costs should fall upon him: Held, that the words "the costs of taking such verdict," did not mean the costs of trial; and that the fees of counsel and the costs of the attorney respecting the preparing for and attendance at the trial, could not be allowed.

The North Union Railway Company requiring certain lands belonging to R. T. Norreys, Esq., served him with notice to that effect. Negotiations for the purchase

commenced, but in consequence of the company thinking Mr. Norreys' claim exorbitant, they were broken off, and no tender or offer of any sum was made by the company. An inquisition to determine the value of the land was taken under the statute 4 Will. 4. c. 25. (1) before the defendant, as one of the coroners for the county of Lancaster; and a bill of costs of Norreys' attorney for conducting the inquisition, including the fee of counsel, the expenses of certain surveys that had been made, and the expenses of the attorney in preparing the brief, attending the inquisition, and negotiating with the company, amounting to 346l. 7s. 4d., was delivered to the defendant for his allowance. He disallowed all those items, and allowed only the expense of the summoning and attendance of the jurors and witnesses, and so much of the expense of the surveys as was incurred with a view to the trial, amounting altogether to 63l. 5s. A rule nisi had been obtained for a mandamus to the defendant to review his taxation. Against which—

Cowling now shewed cause.—The right to costs depends upon the construction of the 71st and 72nd sections of this act (2).

(1) Intituled, 'An Act for Uniting the Wigan Branch Railway Company, and the Preston and Wigan Railway Company.' Section 66 enacts, "that in case differences shall arise between the company and parties as to the lands to be taken, the value shall be settled by a jury; and it is provided, that in all cases where there shall be an inquiry, the person claiming compensation shall always be deemed to be plaintiff, and entitled to the same rights and privileges as plaintiffs in actions at law are entitled to."

(2) Section 71. enacts, "That in every case in which the verdict of a jury shall be given for a greater sum than shall have been previously offered by the said company, for the purchase of any lands to be used or taken by them for the purposes of this act, or as compensation or satisfaction for any damage or loss which may happen or arise in the execution of any of the powers hereby granted, all the costs of summoning such jury, and the expenses of witnesses, shall be defrayed by the said company; and such costs and expenses shall be settled and determined by the said sheriff, under-sheriff, coroner, or other person as aforesaid; and in case such costs and expenses shall be settled and determined by the said sheriff, under-sheriff, coroner, or other person as aforesaid; and in case such costs and expenses shall not be paid, to the party entitled to receive the same, within ten days after the same shall have been demanded, then the same shall and may be levied and recovered by distress and sale of any goods or

The 71st section limits the costs to be defrayed by the company to the costs of summoning the jury, and the expenses of witnesses, and cannot be controuled by the 72nd section, which only explains the words used in the former, and shews, that the expenses of summoning the jury and wit-

chettels of the said company, under a warrant to be issued for that purpose by any Justice of the Peace for the county or place where such inquisition shall be held, not interested in the matter in question; which warrant such Justice is hereby authorized and required to issue under his hand and seal, on application made to him for that purpose by any party entitled to receive such costs and expenses; but, if the verdict of the jury shall be given for the same or a less sum than shall have been previously offered by the said company, one moiety of the said costs and expenses shall be defrayed by the party with whom the said company shall have such controversy or dispute, and the remainder shall be defrayed by the said company; and the former moiety of such costs and expenses having been ascertained and settled in manner hereinbefore mentioned, shall and may be deducted out of the money adjudged to be paid to such other party as so much money advanced to and for his use, and the payment or tender of the remainder of the money so adjudged shall be deemed and taken, to all intents and purposes, to be a good payment or tender in satisfaction of the whole thereof: Provided always, that in cases in which, by reason of absence in foreign parts, or from any other cause or disability not hereinbefore provided for, any person shall have been prevented from treating and agreeing as aforesaid, the whole of such charges and expenses shall be borne and paid by the said company."

Section 72. enacts, "That all parties with whom the said company shall have any dispute, shall, at their own costs, before the said company shall be obliged to issue their warrant for the summoning of such jury, enter into a bond, with two sufficient sureties, to the said company, in a penalty of 100*l.*, to prosecute their complaint, and to bear and pay their proportion of the costs and expenses of summoning and returning such jury, and taking such verdict, and of the summoning and attendance of witnesses, in case any part of such costs and expenses shall fall upon them; or, in case the said company shall have thought fit to issue such warrant, without such bond having been previously entered into, it shall be lawful for the said company, in the said notice of the time and place at which such jury are to be returned as aforesaid, to serve as aforesaid, to give notice that a bond in the said penalty of 100*l.*, with two sufficient sureties, conditioned to bear and pay their proportion of the costs and expenses aforesaid, will be required to be entered into by the said parties to the said company before the said inquiry is commenced; and thereupon, unless such bond be given, the said parties so in dispute with the said company shall not be allowed to be heard, or to produce any witnesses at, or to take any part or share in the said inquiry."

nesses shall not be limited to the summons alone, but shall include also their attendance at the trial. The words, "the costs of taking such verdict," cannot mean the costs of trial; for then it would have been unnecessary to specify the expenses of witnesses, which are implied in the term "costs of trial." In *The King v. the Justices of the City of York* (3), the words used in the act were "the costs of the inquest," which were held to mean the costs of trial; but those words are very different from "the costs of taking such verdict."

The Court here called upon—

Coltman, *contrâ*.—It may be collected from the 72nd section, that the costs to be defrayed by the losing party are to be one half of the total of the costs incurred; the case is, therefore, very similar to *The King v. the Justices of the City of York*: and, indeed, "the costs of taking the verdict" and the "costs of the inquest," are expressions very difficult to be distinguished. A liberal construction is put upon the language of acts of parliament giving costs: "the costs of the writ purchased," in the statute of Gloster (4), have been expounded to give the whole costs of the suit. Besides, section 66 enacts, that in all cases where there is an inquiry before a jury, the person claiming compensation shall have the same rights as a plaintiff in an action at law, and one of the rights of a plaintiff at law is to have full costs if he is successful.

LORD DENMAN, C.J.—I feel no difficulty in saying, that if the words at all permitted the allowance of counsel's fees and charges for the attendance of attornies, I should be inclined to give effect to them. But, there are no such words in the act. The 72nd section speaks only of the proportion of the costs and expenses of the summoning and returning of such jury, and taking such verdict, and of the summoning of witnesses in case any such part of the expenses should fall on them. With much regret, therefore, I come to the conclusion, that this rule cannot be made absolute. In the case of *The King v. the Justices of the City of York*, the Court did not strain the words at all. The costs of the inquisition included those

(3) 1 Ad. & El. 828.

(4) 6 Edw. 1. s. 1. s. 2.

of the trial, so that we are not departing from the rule declared in that case, when we say, that these costs cannot be allowed. The act here declares, that the persons claiming compensation shall be considered plaintiffs, and shall have the same advantages as plaintiffs: that enactment only refers to the mode of conducting the trial, and not to the costs, for the party claiming compensation may have some costs even in some cases where he does not succeed, which is certainly not the case of an ordinary plaintiff. But, there is no provision here for giving him all the costs now claimed. It seems to me, that, in this respect, the public are not protected, as they ought to be.

LITTLEDALE, J.—I entirely concur with my Lord. There is not any uniform rule as to what is the right in a plaintiff to recover costs. I lament that we must draw a distinction between this case and one where the words were nearly similar.—[His Lordship here read the words in *The King v. the Justices of the City of York*.]—Nothing is said here of notice and of precepts, but merely of summoning the jury, and of summoning the witnesses. Nor is anything said of the expenses of the witnesses when summoned, nor of the costs of the inquiry. I do not doubt that the costs of the counsel's fees, and of the attorney's attendance, ought, in justice, to be allowed, but the words of the act do not sanction the allowance of them.

WILLIAMS, J.—If there had been any generality of expression, on which alone the question turned, I should have been disposed to allow the costs as now contended for. But it is impossible to do so, for there is such an enumeration, in the 71st section, as leaves no doubt of what was the meaning of the legislature in this particular act of parliament. The 72nd section speaks of the costs of taking such verdict, which at first sight seems a very general enactment; but that does not stand by itself, but is coupled with the former section, in which there is a complete exposition of what was the meaning of the legislature. There is no generality of expression in this act on which we could rely with safety for giving the costs now required.

COLERIDGE, J.—The expression, "costs

of taking such verdict," is said to mean all the costs of the trial. It might, perhaps, be so, according to the ordinary rules of construction. But, it does not bear that meaning in this statute, for there are other words which expressly limit and define the object of the act, and do not leave us at liberty to imply anything from these general expressions alone. Then we have been pressed with the authority of *The King v. the Justices of the City of York*. But there is a considerable distinction between the two cases. That distinction has already been fully pointed out.

Rule discharged.

1837.
Jan. 30.

} THE KING v. THE POOR LAW
COMMISSIONERS FOR ENGLAND AND WALES.

Poor Law Amendment Act, — 4 & 5 Will. 4. c. 76—Election of Guardians.

The Poor Law Commissioners have no power to direct a parish which is governed as to the management of the poor by a local act, and also by section 2 of 2 Will. 4. c. 60, (Sir John Hobhouse's Act,) to elect guardians of the poor, under section 39 of the Poor Law Amendment Act,—(Dissentiente, Williams, J.)

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 41.]

1837.
Jan. 23.

} DOE d. GRATREX AND AN-
OTHER v. HOMFRAY.

Devise—Legal Estate, where given to Trustees.

A testator gave certain lands to his son in fee, and all other his freehold estates, to the use and intent that certain persons should receive and take the rents, issues, and profits, and pay them to his son for his life, and after his death he gave the same to the heirs of the body of his said son:—Held, that the legal estate in the lands so devised for life was in the trustees, and not in the son.

Ejectment to recover a house and lands at Llantsainfraed, in the county of Brecon, which came on for trial before Patteson, J. at the Summer Assizes for Brecon, in

1835, when the lessors of the plaintiff claimed under the will of John Jones, who died in 1826. The will was dated the 30th of July 1825, and was as follows:—

"I give and devise all those my farms, messuages or tenements, and premises, called or known by the names of, &c., situate in the parish of Langainarch, in the county of Brecon, and now in the several occupations of, &c., unto my son, James Jones, to hold to my said son, James Jones, his heirs and assigns for ever, and all other my freehold estates situate in the several parishes of, &c., in the said county of Brecon, with their respective purtenances thereunto belonging, and every part thereof, *to the use and intent*, that the Rev. Richard Davies, Archdeacon of Brecon, and Walter Lewis, of Trevecca, in the county of Brecon, minister of the Gospel, their executors, administrators, or the executors, administrators, of the survivor of them, *shall and may receive and take the rents, issues, and profits of the above-mentioned estates, and pay the same to my son, James Jones, for and during the term of his natural life; and from and immediately after his decease, then I give and devise the same and every part thereof, to the heirs of the body of my said son, James Jones, lawfully to be begotten; and in default of such issue, then I give and devise the same, and every part thereof to my daughter, Catherine Jones, and the heirs of her body, lawfully to be begotten; and in default of such heirs, then I give and devise the same, and every part thereof, unto my son, John Jones, his heirs and assigns for ever.*" The trustees appointed by the will disclaimed, and executed a deed of disclaimer. A bill was filed in Chancery, and the present lessors of the plaintiff were appointed trustees to carry the trusts of the will into effect.

It was objected at the trial, that the legal estate was not in the trustees, but in James Jones, and the learned Judge was requested to nonsuit, but his Lordship refused to do so, reserving the point. In Michaelmas term following—

J. Evans obtained a rule *nisi*, citing *Silvester v. Wilson* (1), and *Doe d. Leicester v.*

Biggs (2), and *Co. Lit.* 290, b, 249, Butl. note.

Chilton now shewed cause.—The trustees did take the legal estate in this property. The rule of law is clear, that if the trustees are to suffer the *cestui que trust* to take the rents and profits, the use is executed in him and he has the legal estate; whereas, if they are to take the rents and profits, and merely to pay them over to him, they have the legal estate. See note to *Jeffreson v. Morton* (3), *Garth v. Baldwin* (4), *Robinson v. Grey* (5). Here the trustees are to take the rents and profits, and to pay them over to James Jones for his life. The testator too did give other estates at once to the devisee, but here he has interposed the trustees. *Doe d. Leicester v. Biggs* was cited on the other side, but there, after the direction to the trustees, to pay the rents to the *cestui que trust*, there was a direction to permit and suffer her to take them, and this was held to operate as a revocation of the prior devise. There is no such provision in the present will.

J. Evans, *contra*.—The defendant takes under James Jones, the *cestui que trust*, and he had the legal estate. It is said, that it was not in the trustees. That is not so. There is no devise here to them, nor indeed to any one, and, consequently, the present case is not within the admitted rule, which points out the distinction between directions to pay to the *cestui que trust*, and where they are to permit him to take the rents. It has never been applied to a case where there has been no devise of the estate to the trustees. Besides, no necessity is shewn for the trustees to take the legal estate.

LORD DENMAN, C. J.—As Mr. Justice Patteson's attention has been called to this will, and he was present when the rule *nisi* was obtained, we will consult him.

Cur. adv. vult.

On this day the judgment of the Court was delivered by—

LORD DENMAN, C. J.—In this case, we are of opinion, that the devise gives the legal estate to the trustees. We do not

(2) 2 Taunt. 109.

(3) 2 Saund. 11, d.

(4) 2 Ves. 646.

(5) 9 East, 1.

(1) 2 Term Rep. 244.

think that there is any difference on account of the contingency which succeeds the direction to the trustees to pay over the rents to the son. *Doe d. Leicester v. Biggs* is not an authority governing the present case. The will there did not direct the trustees to do anything. Here, there is a direction to them to pay the rents, which they could not do without having the power to receive them. Mr. Justice Pateson was of this opinion at the trial.

Rule discharged.

1837. } AYLING AND MARY ANN, HIS
Jan. 24. } WIFE, v. WHICHER.

Trover—Baron and Feme.

A woman advanced money on certain furniture and stock in trade, which was assigned to her by a deed, to which an inventory was annexed, the possession not being given up. It was provided, that if the money and the interest due on it were repaid on a certain day, or earlier upon a notice in writing, the deed was to be void. Before that time arrived she married:—Held, that she was not improperly joined in an action of trover to recover the inventory, which was alleged to have been converted after the marriage.

Trover. The declaration alleged, that by an indenture, made the 29th of October 1834, before the marriage of the plaintiffs, between one George Lemon and the plaintiff Mary Ann, George Lemon bargained and sold to the said Mary Ann, all his furniture, stock in trade, &c. belonging to the Ship Inn, in Tower Street, Chichester, enumerated in an inventory annexed, as a security for payment of 95*l.*, on the 29th of Oct., 1837, or earlier, upon notice in writing from the said Mary Ann, and interest thereon, payable quarterly, provided that if the interest was duly paid, and also the said sum of 95*l.*, when due, or when called in, the indenture should be void: it was averred, that the plaintiffs had not become possessed of the goods, but were on the 24th of July 1835, lawfully possessed of the indenture and inventory, as of their own property, and casually lost the inventory, and alleged a conversion afterwards by the defendant to the plaintiffs' da-

mage. The defendant demurred specially, on the ground that, as it appeared the conversion was subsequent to the marriage, the action ought to have been brought in the name of the husband alone, and his wife ought not to have been joined with him in the action.

Gale, in support of the demurrer.—

The rule of law, as to the right of the husband and wife to join in an action of trover, is laid down in 2 *Saund.* 47 n. (i), that when a conversion takes place after marriage, the husband and wife may join, or the husband may sue alone; but that where it is alleged, that they were both possessed of the goods, it cannot be averred that they were afterwards converted to their damage. See also *Bac. Abr.* 'Detinue,' (A.) Here, the goods have really vested in the husband, for they had vested in the wife before her marriage; and, therefore, after that event, they belonged to him—*Co. Litt.* 300; *Com. Dig.* 'Baron & Feme,' (E, 3.) There was nothing required to be done by the husband to vest this property in him; it was not in action so as to require appropriation by him, as in *Wildman v. Wildman* (1), and *Nash v. Nash* (2). If the plaintiffs be right in thus joining in the action, those goods would survive to the wife, which can hardly be contended. The only cases where husband and wife can join, are where the action is brought for a personal injury to her, or where the right would survive to her. Then, if the goods have vested in the husband, and he ought to have sued alone, the inventory stands in the same state, for it is only incidental to the goods.

Peacock, contra.—There are many cases in which the husband may sue alone or jointly with his wife; and this is one. If the goods were not reduced into possession by the husband, they would survive to the wife, and the inventory would go with them to her, and not to his executors. It is like the case of a bond to the wife, in which the husband and wife must join in the action, and if the bond be taken away during the coverture, the right of action would survive to the wife. The present declaration shews the nature of her interest in the inventory;

(1) 7 Ves. 174.

(2) 2 Madd. 153.

there had been a mortgage of the goods to her; and it is averred, that the plaintiffs have not obtained possession of the goods, consequently the husband had not reduced them into possession; and then it is alleged that the inventory has been lost. In *Purden v. Jackson* (3), the Vice Chancellor in his judgment states, that a wife's choses in action and personal property not reduced into possession could not be assigned by the husband. Here, there is an interest remaining in the wife, which will survive to her. In *Batmore v. Graves* (4), it is laid down, that where there is a bailment of goods, and the conversion is after the marriage, the husband may sue in trover, either jointly or alone; and in *Com. Dig.* 'Baron & Feme,' (X,) many cases are shewn in which the husband and wife may join. Then the property in the goods passed by the bill of sale, though there was no possession of them given up—*Martindale v. Booth* (5).

Gale, in reply.—If the mortgage deed partook of the nature of the goods, it ought not to have been alleged, that the plaintiffs were not possessed of it.

LORD DENMAN, C.J.—It appears to me, that this is one of the cases in which the husband and wife may join in the action, or the husband may sue alone. I cannot say, in this case, that the goods have been reduced into possession by the husband. At the time when the right to possess these goods will become vested, the money advanced may be paid off, so that the goods may never belong to the plaintiffs. The wife's interest, therefore, must continue until that time arrives, and would survive to her. She has, therefore, a right to sue in the meantime.

WILLIAMS, J. concurred.

COLERIDGE, J.—The true test is, not to inquire whether the husband might sue alone, but whether the wife has such an interest in the subject-matter of the action, that it would survive to her. In the latter event she may join in the action. That would be the case here. During the payment of the interest, the interest in the goods would not vest in the mortgagee. It is not necessary

in regard to a husband's right to his wife's personal chattels, that she should reduce them into possession. But this deed contemplates that, under certain circumstances, the property in the goods should not pass. Those circumstances might last during the whole of the coverture, and might extend beyond it. The right, therefore, would survive, and the wife may be joined in the action.

Judgment for the plaintiffs.

1837. } THE KING v. THE INHABITANTS
Jan. 31. } OF BERKSWELL.

Settlement—Renting a Tenement—1 Will. 4. c. 18.

After the passing of the 1 Will. 4. c. 18, a pauper hired two separate dwelling-houses under the same roof, together with three acres of land, at an entire rent of 14l. a year. He occupied one house and the land, and underlet the other house for 4l. a year:—Held, that he did not gain a settlement by renting a tenement, as he did not exclusively occupy the whole subject-matter of the taking.

[For the report of the above case, see 6 Law J. Rep. (n.s.) M. C. p. 35, nom. *The King v. Balsall.*]

1837. } DOE dem. THRELFALL AND
Jan. 26. } ANOTHER v. SELLERS.

Ejectment—Insolvent Debtor—Evidence—Proof of Assignment.

The assignment from an insolvent debtor, discharged under the 53 Geo. 3. c. 102, to the provisional assignee, cannot be proved in the mode prescribed by the 7 Geo. 4. c. 57. s. 76.

Ejectment for land at Uttoxeter, in Staffordshire, brought by Threlfall, the assignee of an insolvent debtor. At the trial, before Lord Denman, C.J., at the Summer Assizes for the county of Stafford, in 1835, a certified copy of the assignment from the insolvent to the provisional assignee was put in, under the seal of the Insolvent Debtors Court. It was objected, that this was not sufficient proof of the assignment, as the insolvent was

(3) 1 Russ. 1; s.c. 4 Law J. Rep. Chanc. 1.

(4) 1 Vent. 261.

(5) 3 B. & Ad. 498; s.c. 1 Law J. Rep. (n.s.) K.B. 166.

discharged in 1816, when the 53 Geo. 3. c. 102. was in force; but his Lordship admitted the evidence, giving the defendant leave to move to enter a nonsuit. In the ensuing term;—

Maule obtained a rule accordingly; against which—

R. V. Richards and *Busby* now shewed cause.—The evidence in the present case was sufficient. The insolvent was discharged under the authority of the 53 Geo. 3. c. 102, which expired in 1819, and the 1 Geo. 4. c. 119. was passed, and subsequently repealed by the 7 Geo. 4. c. 57; and there is no doubt that the evidence which was offered would have been sufficient, if the discharge had taken place under the latter act, or under the 1 Geo. 4. c. 119, according to *Doe dem. Phillips v. Evans* (1). According to the 7 Geo. 4. c. 57. s. 76, a copy of the proceedings, purporting to be signed by the officer in whose custody they shall be, and sealed with the seal of the Court, is to be admitted as evidence in all courts. It is said, that that provision does not extend to proceedings under the 53 Geo. 3. c. 102. The 54 Geo. 3. c. 23. s. 13, indeed, gave power to the Court to appoint a provisional assignee, to whom the insolvent debtor's property was to be assigned, and the insolvent in this case was discharged under the powers given by the 53 Geo. 3. c. 102. s. 10. The 1 Geo. 4. c. 119. s. 36. authorizes the Court appointed under it to do all such acts and make such orders respecting insolvent debtors discharged, or the provisional assignee appointed by the former Court, as the latter could have done; and

by section 37, all the records are to be delivered over to the officers appointed by the second statute; and section 45 enacts, "that a true copy of the proceedings, signed by the proper officer and certified by him to be a true copy, is to be admitted in evidence;"—that must be taken to apply to proceedings under the 53 Geo. 3. c. 102. as well as those under the 1 Geo. 4. c. 119. The 7 Geo. 4. c. 57. s. 89. enacts, that all the records, &c., received under the authority of the Insolvent Debtors Court, (which was continued by that act,) shall be deemed to be records of the Court so thereby continued. The provisional assignment must, therefore, be treated as a record of the present Insolvent Debtors Court, and was properly proved by a certified copy under the seal of the Court.

Maule, in support of the rule.—This was an assignment to a provisional assignee under the 54 Geo. 3. c. 23, which merely authorizes that assignment to him, without making it a record, or other proceeding of the Court. The 1 Geo. 4. c. 119. s. 4, however, provides, that this assignment shall be filed of record. There is, consequently, a distinction between the present case and *Doe dem. Phillips v. Evans*. But the propriety of that decision may be questioned; for it does not appear to have been noticed, that the 76th section of 7 Geo. 4. c. 57, by the use of the words "such prisoner," relates to the prisoners discharged under that act.

LORD DENMAN, C.J.—We are all satisfied that the distinction which has been pointed out, is correct, and cannot be got over. The rule for entering a nonsuit must be—

Absolute.

(1) 1 Cr. & M. 450; s. c. 2 Law J. Rep. (N.S.) Exch. 179.

[On the last day of this term, THOMAS PEAKE, JUN., Esq., Barrister-at-Law, after a long indisposition, died at the house of his father, Mr. Serjeant Peake, in Torrington Square. In consequence of Mr. Peake's illness, some of the preceding Reports are supplied by two of his friends at the Bar.]

CASES ARGUED AND DETERMINED

IN THE

Court of King's Bench.

REPORTED BY W. GOLDEN LUMLEY, ESQ.

BARRISTER-AT-LAW.

EASTER TERM, 7 WILL. IV.

1837. }
April 19. } COX v. PAINTER.

Amendment at Nisi Prius—Date of Writ.

The record of Nisi Prius did not contain the date of the writ :—Held, that the Judge was warranted in supplying the omission after the jury were sworn.

Trespass for breaking and entering the plaintiff's house, and expelling him.

Plea—Not guilty.

At the trial, before Parke, B., at the last Berkshire Assizes, after the evidence in the case had been closed on both sides, it appeared, that the Nisi Prius record did not contain the date when the writ was sued out. The learned Judge said, that the proceedings were irregular, and the record defective;—and the defect was material, because he could not tell the jury how to estimate the damages. He allowed, however, the writ to be put in by the plaintiff, and then amended the record by insertion of the date, on payment of costs by the plaintiff, saying, he had done so once before at Liverpool; but gave the defendant's counsel leave to move to enter a nonsuit. The plaintiff having recovered a verdict,—

NEW SERIES, VI.—K.B.

J. J. Williams now moved pursuant to leave. He contended, that the record was defective, not being in the form required in the schedule to the rule Hilary term, 4 Will. 4. No. 2. By that form, the date of the issuing of the writ is to be inserted in the record, and if it be a material omission, as it certainly was, the Judge at Nisi Prius could not amend it by supplying the omission. In *John v. Currie* (1), in trespass for taking mirrors and handkerchiefs, the defendant in his justification having omitted to include the handkerchiefs, Parke, B. said, "he had no authority to order an amendment." The date was important, to shew that the action was not commenced before the cause of action accrued.

[LITLEDALE, J.—Why could not that be shewn by other evidence?]

It is submitted, that, now, the record is the only evidence of that fact.

[LITLEDALE, J.—There is a proviso in the rule, that in case of non-compliance, the Court or a Judge may give leave to amend. The only doubt I feel, is from the fact of the jury having been sworn in this case.]

(1) 6 Car. & Pay. 618.

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LORD DENMAN, C.J.—If the learned Judge was wrong in amending, yet the production of the writ shewed that the action was commenced in time. But as it is provided, that a Judge may give leave to amend, and it is not said at what time, I do not see why he should not amend when he sees there would otherwise be a failure of justice. The case cited is quite different from the present. There was nothing to amend by there.

Per Curiam—

Rule refused.

1837. }
April 20. } CLARE V. MAYNARD.

Warranty—What recoverable as special damage.

Where a declaration on a breach of warranty on the sale of a horse alleged, by way of special damage, that the purchaser resold the horse at an advanced price, and was afterwards compelled to take it back and return the money:—Held, that the plaintiff was not entitled to recover the difference between the purchase-money, and the advance at which he sold it, as it was not alleged that he had expended any money, so as to increase the value of the horse in the interval.

Quære—Whether it could have been recovered, if there had been any such averment and proof thereof.

The declaration stated, that the defendant sold a horse to the plaintiff for a certain price, to wit, 45*l.*, under a warranty that he was sound, free from vice, and quiet in harness; whereas, it was not sound, and became and was useless to the plaintiff; and that the plaintiff had necessarily incurred a great charge and expense in causing the horse to be examined, and in the feeding, keeping, and taking care of the horse, and incidental thereto; and it was averred, that the plaintiff, before he discovered the unsoundness, sold the horse under a warranty to one W. Collins, for 55*l.*, and was afterwards obliged to repay that sum, and also three guineas, for the expenses of the said W. C. in the examining, feeding, keeping, and taking care of the said horse, and incidental thereto, and in and about the returning of him; and

that the plaintiff was afterwards obliged to sell the horse, and the produce of the sale amounted to 17*l.* 14*s.* 6*d.* And the plaintiff, by reason of the premises, hath lost all the benefit, profit, and advantage which he would have derived from reselling the same.

*Plea—*Payment into court of 39*l.* 2*s.*, in satisfaction of the damages.

*Replication—*Damages *ultra*.

At the trial, before Lord Denman, C.J., the plaintiff sought to recover the amount of the feed and keep of the horse, of certain law expenses which he had incurred with his attorney, including an opinion by counsel upon his case, the expenses of an examination and certificate of a veterinary surgeon, and the difference between the produce of the sale, and the price at which he had sold it to Mr. Collins. The defendant had paid into court a sum to cover the expenses of the keep by the plaintiff and by Mr. C. the difference between 45*l.*, the original price of the horse, and the produce of the sale, and the expense of the service of a notice of the unsoundness. His Lordship held, that the plaintiff could not recover either the law expenses or the veterinary surgeon's certificate, and told the jury that the proper measure of damages was the difference between the price which the horse was sold for at the auction, and the sum it would have been worth at the time when the plaintiff bought it, supposing it to have been sound, which was not proved to exceed 46*l.* The jury returned a verdict for the defendant; and now—

M. D. Hill moved for a new trial, on the ground of a misdirection.—The plaintiff was entitled to recover the damage which he had sustained by the breach of the warranty. He had sold the horse for an increased price, and that must be considered to have been the remuneration to him for the capital which he had expended in the purchase, and the expense of bringing him from the place where he was purchased, to the place where he was resold. The plaintiff has, in truth, sustained a loss of 10*l.*, through the breach of warranty, and is entitled to recover it.

LORD DENMAN, C.J.—The declaration stated, by way of special damage, that the horse had been sold to Collins at an ad-

vanced price. If that had been claimed at the trial, I should have told the jury to say, whether the price given by Collins satisfied them that that was the value of the horse when sold by the defendant, according to the case of *Cox v. Walker* (1), in this court. But the claim was given up. The damage is now stated in this way: the plaintiff says he is entitled to this, as money laid out by him, because he has received that sum from Mr. Collins. Certain expenses were allowed: but 5*l.* more is now claimed, making up the sum of 10*l.*, over and above the price of the horse. This mode of claiming the damage cannot be allowed. It is, in effect, a claim for the loss of the bargain. The real question in the cause was, whether the plaintiff was entitled to recover the costs of the attorney's bill, which I thought he was not.

PATTERSON, J.—The question, whether or not a party who lays out money on an article which he has purchased on a warranty, with the intention of improving it, can recover it in an action for a breach of warranty, after he has sold it, and been obliged to take it back, does not really arise in this case. The declaration only claims, by way of special damage, the difference between the sale to the plaintiff and the purchase by Collins. That allegation, without any statement that the plaintiff had laid out any money to increase the value, can only mean the loss of the bargain. It is admitted that there was no evidence of there having been any money expended on the horse. It seems to me, that the verdict is right. How far money which is laid out, may be recovered, need not be determined.

COLERIDGE, J.—This verdict ought not to be disturbed. I found myself on the circumstances of this case. It is admitted that the horse was worth 45*l.*, when it was bought. Certain expenses were incurred, and there was a resale at an advanced price. It is not alleged that that was in consequence of any money laid out upon it by the plaintiff. He has recovered for the costs of the keep, and the loss by the sale at the auction; so that the present claim is no-

thing more than a seeking to recover for the loss of the bargain, which, it is conceded, cannot be done (2).

Rule refused.

1837. }
April 25. } TOMLINSON v. GELL.

Statute of Frauds—Guarantee for the Debt of another.

An agreement between a defendant in a suit in equity, and the plaintiff's solicitor, with the consent of the plaintiff, that the suit shall be determined, and the defendant shall pay the costs of the solicitor, who does not undertake to release his own client, is an engagement for the debt of another within the 29 Car. 2. c. 3. s. 4, and requires a note in writing.

The declaration stated, that certain differences and disputes had arisen between one William Buxton and Anne his wife, and the defendant, as executors of a certain person deceased; and a suit had been commenced on behalf of the said W. B. and his wife, in the Court of Chancery, against the defendant, to compel an account, and that the plaintiff had been retained and employed as the attorney and solicitor for the said W. B. and A, in the said suit, and certain costs and charges had become due to the said plaintiff, in the course of the said suit, to a large amount, to wit, to the amount of 30*l.*, and the said plaintiff was about further to prosecute the said suit and proceedings on behalf of the said W. B. and Anne his wife, for the recovery of the sums claimed by them, and of their costs; and thereupon, in consideration of the premises, and for the purpose of putting an end to all differences and disputes between the said W. B. and Anne his wife, and the said defendant, it was agreed between the plaintiff and the defendant, with the consent of the said W. B. and A, that all further proceedings in the said suit should be stayed and discontinued, and that the defendant should pay to the plaintiff the costs and charges which had become due to him as such at-

(1) Not yet reported, standing for judgment.

(2) See *Walker v. Moore*, 10 B. & C. 416; s. c. 8 Law J. Rep. K.B. 159.

torney and solicitor. The declaration then alleged a promise, in the terms of this agreement, to pay the plaintiff's costs, and stated that the suit had long since been determined. Breach, non-payment of the said sum of 30*l.*, or of any part of it.

Plea—That the defendant's undertaking was a special promise to answer for the debt of another; and there was no memorandum in writing, as required by the Statute of Frauds. Demurrer thereto.

Kelly, in support of the demurrer.—This is not a case to which the Statute of Frauds applies. The suit, which had been commenced against the defendant was determined on an undertaking and promise by him to pay the plaintiff's costs. He thereby incurred a direct liability, and did not become merely a surety for the debt of another. There was also a sufficient consideration for his promise, since the suit was put an end to, which determination of the suit was a sufficient consideration for the defendant's promise to pay the costs. That is a new consideration, and the real foundation for the defendant's promise—*Williams v. Leper* (1).

[*LORD DENMAN, C.J.*—What right has the present plaintiff given up?]

He has lost the security of the suit itself. If there had been a decree for the plaintiffs, he would have had a lien thereon for his costs.

[*COLERIDGE, J.*—Here Mr. and Mrs. Buxton still continue liable to the plaintiff for their costs, and it must be taken that they have not been released. In the case cited, it was said that the goods were the security, and the lien was given up.]

The suit is the plaintiff's debtor; he looks to that for payment of his costs; and when that suit was ended, he lost his security.—He referred to *Lilley v. Hays* (2), and *Bampton v. Paulin* (3).

Platt, contrà.—This was not a direct promise by the defendant. Mr. and Mrs. B, the original debtors, were not released, but still continue liable to the plaintiff. That being the case, the defendant is only a surety for their debt. It cannot be

put higher than a promise to pay in consideration of forbearance.—(Here he was stopped.)

LORD DENMAN, C.J.—I think it very doubtful whether there was any consideration at all for this promise, for I cannot see what was given up by the plaintiff. His clients in the Chancery suit are still liable to him, and the defendant is not in any better situation, in consequence of his promise. If there be a consideration, it can only be the undertaking to pay the debt of another. Now, it appears that there was an unliquidated debt due from the defendant; a suit in Chancery had been brought, and the event of that suit was uncertain. It is given up, upon the defendant agreeing to pay the costs due to the solicitor, who had been employed on the other side. That, in fact, was a debt owed by the plaintiffs in the suit, to the present plaintiff, which the defendant took upon himself, and the agreement, not being in writing, is invalid.

LITLEDALE, J.—The case appears to me to be this. The plaintiffs in equity, having some claim against the defendant, commenced a suit against him. The parties then agree to put an end to it, the defendant paying the costs of the plaintiffs. The determination of the suit would be a sufficient consideration for the defendant's promise to pay these costs. However, the attorney is anxious to have the costs secured to him; and it not making much difference, whether the defendant paid them to the plaintiffs in the equity suit, or to their attorney, he promised to pay them to him. Therefore, the attorney is, in some respects, a party to the agreement, and identified with the plaintiffs in equity. Nevertheless, it does appear to me, that this was the debt of a third person within the Statute of Frauds. The plaintiff had a claim on Buxton for the costs. They had been incurred for him, and the defendant undertook to pay them. This is not quite a common case. Generally, the defendant who is sued, is an entire stranger to both parties. Here, the attorney was a party to the arrangement. Still it was a debt due from Buxton to him.

PATTESON, J.—The question here arises on the Statute of Frauds, whether the de-

(1) 3 Burr. 1886; a. c. 2 Wils. 308. See also *Thomas v. Williams*, 10 B. & C. 664; a. c. 8 Law J. Rep. K.B. 314.

(2) 1 N. & P. 26; a. c. ante, p. 5.

(3) 4 Bing. 264; a. c. 5 Law J. Rep. C.P. 168.

defendant's undertaking to pay the plaintiffs' costs ought to have been in writing. Now, it is clear it was the debt of another person, because the plaintiff would have had no right to sue the defendant in the Chancery suit for his costs. If the decree had been for the plaintiff's clients, and they had been entitled to receive any money under it, he would have deducted his costs as a debt due from them to him; and there is nothing alleged, which shews that that debt is not still due from his own clients, or that he has given them up, and taken the defendant for his paymaster. It is said, however, that this is a direct liability, because a new consideration has intervened. It does not, however, appear to me, that there has been any such new consideration as would take it out of the statute. That occurs in cases where some benefit is acquired by a party independently of the original act, or where there is a relinquishment of some advantage by the party to whom the promise is made. Here, no new consideration is created, as in *Goodman v. Chase* (4), where the debt was satisfied by the discharge of the debtor by the plaintiff's consent; and the Court held that case not to be within the statute, because, under the circumstances, it appeared that the debt was gone. It cannot be said that a party undertakes to answer for the debt of another, when the debt itself is extinguished.

COLERIDGE, J.—It is unnecessary to say whether the consideration would have been sufficient, supposing there had been a note in writing. The question is, whether this was an undertaking for the debt of another within the statute. It is argued, that the debt is not due from any other person than the defendant. But when the declaration is looked at, it will appear that that argument cannot be sustained. It states a retainer of the plaintiff by Buxton and wife; a debt is therefore due from them, and it is not shewn to have been discharged. As it appears to be still subsisting, the defendant's promise is an engagement for the debt of another.

Judgment for the defendant.

(4) 1 B. & Ald. 297.

1837. } TAYLOR v. YOUNG AND
April 25. } OTHERS.

Landlord and Tenant—Demise—Evidence.

A party signed an instrument, by which he agreed to take certain premises, at a fixed yearly rent, commencing at a specified time, and which was directed to the landlords of the premises, who did not execute it; but it was proved, that he was put into possession; that certain fixtures belonging to the landlords were appraised to him, and that he was in possession at the expiration of a year:—Held, that there was evidence from which the jury might infer a demise from year to year.

Replevin for taking goods.

Avowry, that one W. Barnes was tenant of the premises, under a demise by Young and Fothergill, two of the defendants, at the yearly rent of 60*l.*, payable quarterly, and that 12*l.* 10*s.*, a quarter's rent, was in arrear.

Plea in bar, that William Barnes did not hold as tenant of Young and Fothergill, under the said demise.

At the trial, before Vaughan, J., at the last Kingston Assizes, it was proved, that the goods were distrained on an inn, called the Griffin, in the Borough, of which the defendants were the landlords. In March 1835, William Barnes signed this memorandum:—

"Griffin, Church Street, Southwark.

"Gentlemen,—I hereby agree to take your house, situate as above, at the yearly rent of 60*l.*, commencing from Christmas day now last past, payable quarterly, to pay all taxes, land, sewer, parliamentary, and parochial. I further agree to quit and yield up quiet and peaceable possession of the above-named house and premises, (together with the licences, properly assigned to you, or any person you may appoint,) upon receiving three months' notice in writing, without reference to any particular quarter of the year.

"William Barnes.

"Messrs. Young & Bainbridge."

He was put into possession, and it was proved, that a regular appraisement was made to him from the landlord, of the fixtures and other effects, and he was shewn to have been in possession in June

1836. No connexion existed between the plaintiff and the defendants, but he had taken Barnes's interest from him. It was contended, that as Barnes only had signed the agreement, there was no evidence of the demise; but the learned Judge left it to the jury to say, whether, taking all the circumstances together, there was not evidence of a demise from year to year; and the jury found a verdict for the defendants.

Channell, on a former day in this term, moved for a rule for a new trial, and renewed the objection. He contended, that there was nothing to create a tenancy from year to year, such as the actual payment of rent or allowance in account. The only facts were the execution, by Barnes alone, of the agreement, and his possession of the premises—*Clayton v. Burtenshaw* (1) is in point.

Cur. adv. vult.

Afterwards on this day,—

LORD DENMAN, C.J. said, that there was no ground for granting a rule.

Rule refused.

1837. } THE KING v. THE INHABITANTS
April 26. } OF EXMINSTER.

Poor—Settlement by Apprenticeship—Error in Indorsement of Acceptance—Notice of Assignment.

Where a parish apprentice named Elizabeth Matthews, was assigned by her master Thomas Melhuish, and an acceptance by her new master, of the said Elizabeth Melhuish, was indorsed on the assignment, pursuant to the 32 Geo. 3. c. 57:—Held, that it sufficiently appeared, that this was an acceptance of the same apprentice.

Where a parish apprentice is assigned from one parish to a master in another parish, it is not necessary to give notice of such assignment to the overseers of the latter parish, according to the 56 Geo. 3. c. 139.

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 82.]

(1) 5 B. & C. 41; n. c. 7 D. & R. 800.

1837. }
May 5. } DAVIS v. CHAPMAN, ESQ.

Practice.—Bill of Particulars—Escape.

In an action commenced against the marshal of the King's Bench, for an escape, he is entitled to a particular of the escape or escapes complained of, with a specification of times and places.

This was an action for an escape, against the marshal, and the writ was served on the 25rd of February; a summons was taken out, returnable before the Lord Chief Justice, who afterwards made an order, that the plaintiff should deliver an account in writing, of the particulars of the alleged escape or escapes, for which this action was brought, specifying the time and place, and that in the meantime all further proceedings should be stayed, the defendant undertaking to plead issuably. On a former day in this term,—

Mansel had obtained a rule nisi in the Bail Court, to rescind this order; against which, cause was now shewn by—

The Attorney General.—This is the common order usually obtained by the marshal in cases of escape, and it is a very reasonable one. The marshal does not know what act is relied on, or what may be the nature of the escape complained of. But the Court have already determined that such an order is valid—*Webster v. Jones* (1).

Mansel.—Since that case was decided, the new rules have come into operation, by which the plaintiff is tied up to one count. It will, therefore, be a great hardship on him, if he is to be confined to any fixed days and times, in the terms of the present order. The plaintiff will be defeated if he make any default in his particulars.

Per Curiam.—If there be more than one escape, there will be no difficulty in the plaintiff having different counts. But this order cannot be rescinded. It is in its correct form. If the plaintiff does know the time and place of the escape, he ought to communicate it. Indeed, he must give the particulars in the best manner he can;

(1) 7 D. & R. 774.

and if the defendant be not satisfied with them, he must apply for further particulars, and the plaintiff will have an opportunity of answering this application. At present, there is no necessity for modifying the terms of the order.

Rule discharged, with costs.

1837. { IRBOTSON, BART., AND POL-
May 6. { LARD, V. FENTON.
IRBOTSON, BART., AND BACON,
V. FENTON.

Outlawry—Terms of Reversal—Interest.

Where an outlawry after final judgment is reversed on motion, for error, it is not the practice of the Court to impose upon the defendant the terms of paying interest on the judgment.

The first was an action of debt on a bond for 4,000*l.* The second was on a covenant to pay 1,000*l.*, in which a verdict had been recovered for 486*l.* 18*s.* Final judgment was signed on the 26th of November 1835. Proceedings were taken to outlaw the defendant in both actions, which were completed on the 24th of November 1836, when a special writ of *capias ulagatum* was issued in each cause. In March last, a summons was taken out by the defendant's agents to reverse the outlawry, (on what ground did not appear by the affidavits,) and the plaintiffs' attorney was willing to consent to the reversal, on payment of the principal and interest to the day of payment, on the sums so found to be due, together with the costs. The defendant's attorney objected to the payment of interest; and Lord Denman, C.J., before whom the parties attended at chambers, made an order, that on payment of the principal and costs, as taxed on the final judgments, and the costs of the outlawry to the plaintiffs, and on payment of the interest into court, the proceedings in the outlawry should be reversed. The Master computed the interest at 17*l.* 12*s.* and 34*l.* 10*s.* 4*d.*, which sums were paid into court. A rule had been obtained by the plaintiffs to have these two sums paid out to them; against which—

Cresswell now shewed cause.—The in-

terest cannot be claimed in this case. Outlawry is only a mode of compelling a party to come into court, and do what he has been ordered by the Court to perform. If it proceeds upon a default of appearance, the party must appear before he can reverse the outlawry, and if bail be required, he must put in bail. If it proceed in execution, the party must pay the debt and the costs. It is for his default in payment of the judgment debt that he is outlawed. The defendant has done that; he has paid the judgment debt and the costs. There is no ground for calling upon him to pay interest on the judgment. On writs of error, indeed, interest is payable when the judgment is affirmed.

[LITTLEDALE, J.—That is by the statutes 3 Hen. 7. c. 10, and 19 Hen. 7. c. 20.]

But there is no instance where such terms as these have been imposed, when an outlawry is reversed. It is only necessary for the party to appear, in order to have the outlawry reversed.

[COLBRIDGE, J.—Is not the reversal for error, on motion, discretionary with the Court?]

[PATTERSON, J.—There is no act of parliament which gives a party a right to reverse his outlawry, except there be some error in the proceedings.]

The 4 & 5 Will. 3. c. 18. s. 3. authorizes the appearance of the party, who shall have been outlawed in court by his attorney.

[PATTERSON, J.—That is only where the party himself could have appeared in court.]

The Court must have the power by its general authority. But the practice has never been to require interest on the judgment.

Bayley, contra.—The reversal of outlawry on motion is a matter of indulgence; and, therefore, the Court can impose terms. The defendant may be driven to his writ of error, if he will not consent to do what is equitable. Then is it not equitable that he should pay the interest? He ought not to be allowed to gain any advantage by his own delay. In a court of equity, a judgment carries interest—*Brown v. Barkham* (1), and even in an action on a foreign

(1) 1 P. Wms. 652.

judgment, interest has been given as damages by a jury—*Bann v. Dalzel* (2).

LORD DENMAN, C.J.—I am of opinion, that the plaintiffs ought to have their costs; but the practice is otherwise. The defendant is in the same situation as though he were now applying to the Court to be relieved; and the practice is inveterate, that on motion to reverse an outlawry for error—and we must take it to have been erroneous in this case—it would be improper to impose such terms as are now asked for.

LITLEDAL, J.—I think the Court would depart from its usual course, if, in the exercise of its discretion, the interest were allowed in the present case. If the practice of the Court be considered, it will be seen, that the allowance of interest has depended upon the nature of the proceeding. Where a writ of error is brought, the statutes provide, that the party shall recover his costs and damages for the delay, and the damages there are interpreted to be the interest. Here, there has been a judgment, and the exigent could only be on a *ca. sa.* If, before the outlawry were complete, the party had appeared, he would only have been required to satisfy the judgment. Here, then, as I am satisfied that the outlawry must be erroneous, and therefore, if a writ of error had been brought, it would have been reversed, and as the practice is to reverse an outlawry which is erroneous, without imposing these terms, I do not think we can require the interest to be paid.

PATTESON, J.—We cannot introduce a new practice. The course has been to reverse the judgment, both before and after final judgment, without requiring payment of the interest. Of course, before judgment, that term could not be imposed; because that would be prejudicing the question in the cause.

COLERIDGE, J. concurred.

Rule discharged.

(2) Moo. & Malk. 228.

1837. { WEDGE v. THE HON. MAURICE
FREDERICK FITZHARDING
BERKELEY.

Justice of the Peace—Notice of Action.

A Justice of the Peace, who, upon his own view, seizes property as stolen, under circumstances which do not raise a reasonable ground of suspicion, is, under the 24 Geo. 2. c. 44, entitled to a notice of action, at the suit of the party whose property is taken.

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 86.]

1837. { DUNN AND OTHERS, ASSIGNEES
OF ROBERT SHAW, A BANK-
RUPT, v. MASSEY AND OTHERS.

Bankruptcy—Mortgage—Title Deeds.

The 6 Geo. 4. c. 16. s. 70. does not give the assignees of a bankrupt the property in the title-deeds of an estate mortgaged by the bankrupt, on their tendering the principal and interest after the day of payment has elapsed.

Trover for title deeds belonging to the bankrupt; the first count alleging a conversion before, and the second after the bankruptcy.

Pleas—First, not guilty; second, denying the bankrupt's property in the deeds; and thirdly, denial of the title of the assignees.

At the trial, before Lord Denman, C. J., in London, at the Sittings after last term, it appeared, that the bankrupt had been a corn-merchant at Lynn, and was seised in fee of certain granaries and warehouses in that town, which in 1830 he mortgaged to a person named Allen. In 1832, they were burned down, but afterwards rebuilt by him. He borrowed money of Dunn, one of the plaintiffs, and charged it upon the same premises, but Dunn neglected to give any notice to Allen; and, in 1833, the bankrupt executed another mortgage in favour of the defendants, who were bankers at Lynn, and to whom he was largely indebted. Shortly afterwards he committed an act of bankruptcy, and the defendants paid off Allen's mortgage, and took an as-

signment of it to themselves. The assignees tendered to the defendants the amount of Allen's mortgage, and the interest due thereon, and demanded the deeds, but the defendants refused to deliver them up; and the question in the case submitted to the jury, was, whether the mortgage to the defendants was a voluntary preference or not, and they found that it was. But it was objected, that, as the legal estate was in Allen, the plaintiffs were not entitled to the deeds, and could not maintain this action. His Lordship, being of that opinion, nonsuited the plaintiffs, but gave them leave to move to enter a verdict for them, if the Court should think them entitled.

Sir F. Pollock now moved accordingly. The question turns on the construction of 6 Geo. 4. c. 16. s. 70 (1). The plaintiffs contend, that if, at any time, the assignees tender the amount of the principal and interest to the mortgagee, they are empowered to dispose of the estate, and therefore have a legal title to the deeds. Consequently, in this case, the nonsuit is wrong.

LITTLEDALE, J.—The legal estate is still in the mortgagee. In mortgage deeds, there is usually a proviso, that the estate shall not vest, if the money be repaid by a certain day. Then the estate is not absolutely parted with, but reverts to the mortgagee, if he pays the money on that day. The object of this clause is merely to put the assignees in the same situation as the bankrupt; they are, by this clause, enabled to pay the money on the day, or to tender it before the day, which perhaps the mortgagee might not have been entitled to do. The mortgagee might have refused to receive the money before the day, but he is

bound to take it if the assignees tender it. In either of those cases, the legal estate will revert to the assignees. Here, however, the day of payment was passed, and the legal estate is in the mortgagee, or, at all events, the title deeds are not the property of the assignees.

PATTERSON, J.—Independently of the 6 Geo. 4. c. 16. s. 70, this action is not maintainable. The assignees, after the day of payment in the mortgage deed had elapsed, could not have obtained the legal estate without a reconveyance. The effect of that section is, not to give them back the legal estate when it has been absolutely divested by the lapse of the time of payment; but, it gives them a power to interpose before the condition has been broken.

LORD DENMAN, C. J. and *COLBRIDGE J.* concurred.

Rule refused.

1837. } THE KING v. THE JUSTICES OF
Jan. 30. } BUCKINGHAMSHIRE.

Justices—Church Rate—Construction of Local Act.

An act for rebuilding Marlow Church authorized the church trustees to assess all houses, warehouses, shops, buildings, lands, tenements, and hereditaments, rated or rateable for the relief of the poor of that parish. The rectorial tithes and glebe had never been assessed to any church rate, but had been rated to the relief of the poor:—Held, that the trustees were justified in assessing these tithes and glebe under the words of this act.

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 89.]

1837. } KIERAN v. SANDARS.
April 20. }

Vendor and Vendee—Title of Purchaser—Trover—Pleading and Evidence.

Where a party sells goods to A. and makes out an invoice to him, and directs a warehouseman to transfer them to him, which he does, the vendor cannot afterwards set up the title of B, as a joint purchaser with A; and evidence of B's title is not admissible in an action of trover against the vendor, though

(1) Which enacts, "That if any bankrupt shall have granted, conveyed, assured, or pledged any real or personal estate, or deposited any deeds, such grant, conveyance, assurance, pledge, or deposit, being upon condition or power of redemption at a future day, by payment of money or otherwise, the assignees may, before the time of such performance of such condition, make tender or payment of money, or other performance according to such condition, as fully as the bankrupt might have done, and after such tender, payment, or performance, may sell or dispose of such real or personal estate for the benefit of the creditors as aforesaid."

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there be a plea alleging the joint property of A. and B, and issue thereon.

Trover for wheat, oats, and barley.

Pleas—First, not guilty ; — secondly, that the plaintiff was not lawfully possessed thereof, as of his own property ; — thirdly, that Luke Marsden and Thomas Holyland, assignees of John Marsden, were jointly interested with the plaintiff, as tenants in common of the said wheat, and that by the assignees, the defendant committed the conversion complained of, not being a destruction ; — fourthly, that the plaintiff delivered the wheat to the defendant and his co-partners, who are corn-factors and merchants, to be kept by them in their warehouse, at a weekly rent, and the defendant claimed to detain the wheat for rent due.

Replication to the third plea, that Luke Marsden and Thomas Holyland were not jointly and together interested in, and the owners of, the said wheat ; — to the fourth plea, *de injuriâ*.

At the trial, before Patteson, J., at the last Liverpool Assizes, it was proved, that the defendant Sandars, who was a corn-factor at Manchester, sold a quantity of wheat to the plaintiff, in February 1836. On the 18th of March, an invoice of the sale was delivered by the defendant to the plaintiff, together with an account of all charges due up to that time, and the same was paid for by the plaintiff. The wheat at the time was lying in a warehouse at Liverpool, and the warehouse-keepers having received notice from the defendant to do so, weighed it, and transferred it in their books to the account of the plaintiff, and debited him with the subsequent charges. In October, a claim was made by Mr. John Marsden, to the wheat, as being interested therein jointly with the plaintiff, and the defendant gave notice to the plaintiff of that claim. A correspondence took place, and in the meantime Marsden became bankrupt. The assignees appeared to have also made some claim, and the defendant ordered the warehouse-keeper at Liverpool not to allow the plaintiff to have the wheat. These facts being proved, the learned Judge held, that the defendant having sold the wheat to the plaintiff, and having ordered it to be trans-

ferred to him, could not say now that he was not the sole purchaser. He, therefore, refused to admit any evidence to prove the joint interest in Marsden, and directed a verdict to be entered for the plaintiff.

Alexander now moved for a new trial, contending, that as there was a direct issue raised on the pleadings of the title of Marsden, the defendant had a right to prove that title. That issue must be disposed of, and, therefore, the evidence was improperly rejected. *Wilson v. Hart* (1) and *Bywater v. Richardson* (2) establish that a contract may be explained, and it may be shewn who is the real party to it. If the conduct of the defendant were an estoppel, as the learned Judge held, it ought to have been replied.

[PATTESON, J.—This estoppel could not have been pleaded; it was merely evidence.]

Then, if there was a delivery of the wheat to the plaintiff by the defendant, the latter cannot be held liable to an action of trover. If there was not a delivery, then he has a lien for the subsequent charges, which have not been satisfied.

Per Curiam. — (LORD DENMAN, C.J., PATTESON, J., and COLERIDGE, J.)—The evidence was properly rejected. After the sale of the wheat by the defendant to the plaintiff, and the delivery of it, and transfer of the account to him in the books of the warehouseman, the defendant was not at liberty to set up that some other person was a joint purchaser with the plaintiff.

Rule refused.

1837. } TAYLOR AND OTHERS v. WIL-
April 22. } KINSON AND ANOTHER.

Costs—Bail—Amendment.

Where, after bail have been put in to the action, the declaration is amended by the addition of other causes of action, and the plaintiff recovers on the original and on the added causes of action, the bail are not liable to the costs of the latter, and it is the

(1) 7 Taunt. 295.

(2) 1 Ad. & El. 508; a. c. 3 Law J. Rep. (N.S.) K.B. 164.

duty of the plaintiff to procure a separation of the costs of the original and of the added causes of action, because, if there be one general taxation of the whole, he cannot recover the amount against the bail.

In this case, which is reported in 4 *Law J. Rep.* (N.S.) K.B. 259, the plaintiffs signed judgment for the amount of the recognizance, and an application had been made on behalf of the bail, that they should be discharged on payment of the damages recovered on the original causes of action, and a rule nisi obtained, against which—

Sir W. W. Follett now shewed cause.—The facts of this case have been several times before the Court, and it appears, that after the action had been commenced, and the defendants had been put in as bail, the declaration was amended by the insertion of new counts. The Court has already decided that they are liable on their recognizance for the damages in the action to the extent of those recognizances: there is no reason therefore why they should not be liable to the costs of that action. No doubt, if the plaintiff recover on the cause of action declared upon, the bail are liable for the costs. On the other hand, if the declaration be amended by the insertion of additional counts, and the plaintiff only recover upon them, the bail are not responsible for the costs at all—*Wheelwright v. Jutting* (1). Here the plaintiff has recovered on the original causes of action, and also on those which were added; the costs have been taxed generally on the whole declaration; and it is now contended, that the plaintiffs have no right to recover any of those costs. But there is no ground for the Court's depriving them of their costs. The defendants should have caused the costs on the different counts to be severed, if that could have been done; and then the plaintiffs might possibly have been restrained; but that has not been done.

The Attorney General, in support of the rule.—The judgment has been signed for the whole amount of the recognizance, and the Court are now called upon to limit the execution to the amount of the damages recovered on the original declaration. If the defendants are responsible for the costs

of the whole declaration, the judgment of the Court, which has been delivered in this case, is erroneous. But it is there intimated, that the defendants are not liable for the costs. The plaintiffs have taken the precaution of having a separate assessment of the damages; they ought, in like manner, to have had the costs severed. As the case now stands, the Court have no means of determining what are the costs upon each separate count, and it would be most unjust upon the bail to hold them liable for the costs incurred by the additional counts. Suppose the case of an arrest upon an affidavit of debt, made with reference to a bill of exchange, and the plaintiff afterwards adds a count on a warranty of a horse, or a policy of insurance, which are totally different causes of action, and necessarily create great additional costs, it never can be contended, that the bail are to be responsible for those costs. But it is said, that the costs may be severed. Then who ought to procure that to be done? It is clear the bail cannot, for they are not before the Master when he makes the taxation. It follows that the plaintiff must do it. Here, as it has not been done, the bail cannot be charged.

LORD DENMAN, C.J.—It seems to me that the plaintiffs have given judgment against themselves in this matter, by procuring the damages to be assessed separately on the different counts, but omitting to sever the costs. The bail are not liable for those costs.

LITLEDALZ, J.—The only question is, whether it was the duty of the plaintiffs to have the costs severed before the Master. The point must have happened over and over again. It is clear that the bail ought not to be liable for the whole of the costs; and it appears to me, that the plaintiffs ought to have severed the costs, and they have not done what they ought to have done. I do not say, whether this separation of the costs could now be made or not.

PATTON, J.—This rule must be made absolute. The onus of procuring the separation of the costs lay upon the plaintiffs.

COLERIDGE, J. concurred.

Rule absolute.

1837. }
 April 28. } SPENCER v. NEWTON.

*Affidavit of Debt—Waiver of Defect—
 Prisoner—Delivery of Declaration.*

An affidavit of debt in this form: "J. H. of, &c., manager of the Ripon Branch of the Yorkshire District Bank, maketh oath, &c., that A. N. is justly indebted unto J. S., of, &c., as one of the registered public officers of the said Yorkshire District Bank, for money lent by this deponent, as such manager as aforesaid, to the said A. N."—is defective, but not void.

A defendant, being arrested on the 16th of January, applied to the Court to be discharged on the ground of privilege; and on the 24th of January a rule, which he had obtained for that purpose, was discharged. On the 3rd of February, he applied to a Judge at chambers to be discharged, on the ground of an irregularity in the affidavit of debt, and, the Judge refusing to relieve him, he came to the Court in Easter term:—Held, that as his affidavits did not state when he first became acquainted with this defect, he had waived it, and his application to the Judge was too late.

A delivery of a declaration to the attorney of a defendant who is in custody, is irregular.

The defendant was arrested on the 16th of January last, on a *capias*, which issued on the following affidavit:—"John Harvey, of Ripon, in the county of York, manager of the Ripon Branch of the Yorkshire District Bank, maketh oath and saith, that A. N. is justly and truly indebted unto J. Spencer, of Plantation, in the county of the city of York, Esq., as one of the registered public officers of the said Yorkshire District Bank, in the sum of 50*l.*, for money lent by this deponent, as such manager as aforesaid, to the said A. N. at his request." On that arrest, the defendant applied to this Court to be discharged out of custody, on the ground that he was privileged, but the rule which he had obtained was discharged on the 24th of January. At that time no objection was taken to the sufficiency of the affidavit to hold to bail; but on the 3rd of February the defendant took out a summons before Patteson, J. to be discharged out of custody on the

ground, that the affidavit was defective; but his Lordship then thought it sufficient, and refused to make any order, and Littledale, J. subsequently refused to interfere. On the 16th of February, a copy of a declaration, was left at the office of an attorney, who had attended for the defendant on certain rules, and a rule to plead was obtained. Coleridge, J., on a summons before him, refused to set aside this rule, and judgment was signed for want of a plea. An application was made to the Lord Chief Justice at chambers, but he would not make any order, and execution had since been sued out against the defendant.

On a former day, in this term, the defendant, in person, obtained a rule *nisi* to set aside all the proceedings in this action, on the ground of the insufficiency of the affidavit of debt, and also for irregularity; against which, cause was shewn by—

Sir F. Pollock and Barstow.—First, the affidavit is sufficient. It is made by one of the officers of a bank, established under the 7 Geo. 4. c. 46, for money advanced by the manager of the bank.

[LORD DENMAN, C.J.—It does not appear that the Ripon Branch of the Yorkshire Bank is a bank within that statute.]

That may be inferred from the affidavit; and it is not suggested that it is not. There would have been no difficulty in ascertaining the fact, because, by the 7 Geo. 4. c. 46, the firm and name of the bank must have been registered at the Stamp Office, and by the schedule A, appended to that act, it appears that the names and descriptions of the public officers of the bank are also to be stated in the return which is registered. It might therefore have been easily ascertained whether or not Spencer was the manager of this bank.

[COLERIDGE, J.—Should it not have been stated, that he was the registered officer of a bank formed and registered under the act of parliament?]

It is a matter of difficulty to frame a proper affidavit. But why might not the deponent make oath that money was lent by him, for which the defendant is indebted to Spencer?

[LORD DENMAN, C.J.—It does not appear what right Spencer has to sue in this character.]

[PATTERSON, J.—I do not know, by this affidavit, that the manager of this bank had any right to lend this money.]

But, secondly, the application is too late. It ought to have been made in Hilary term, when the defendant was arrested. This objection was not taken until the 3rd of February. Then, as to the irregularity complained of in the delivery of the declaration, it is true, that in the ordinary case of a prisoner, a declaration must be delivered to him personally or to the turnkey—*Dent v. Halifax* (1); but that is not the case when he has actually employed an attorney, as he did in this case, for he appeared by attorney before the Judge.

[PATTERSON, J.—A person in prison can only appear by attorney before a Judge, but he does not thereby as a consequence make that person his general attorney.]

The defendant in person argued, that his first application to the Court was on a question of privilege (2), and his attention was not called to the defect in the affidavit until the 3rd of February, when he went before Patterson, J. at chambers. Therefore the Court would not hold that he had waived a defect, of which he had not been aware. This was not, however, a mere defect; the affidavit was a nullity, and therefore the objection could not be waived. The affidavit does not shew any title in the plaintiff to sue. It is not stated that it is a bank authorized by the statute, and even if it were, the 7 Geo. 4. c. 46. s. 9. does not vest the property of the bank in the registered public officer, though it enables his name to be used; whereas, in other statutes, the property itself is vested in the nominal party, as in the case of the Friendly Societies Act, 10 Geo. 4. c. 56. s. 21, by which all the property of the society is vested in the treasurer. (He was stopped by the Court from arguing the other point.)

LORD DENMAN, C. J.—We are all of opinion, that the service of the declaration is bad, and that that irregularity has not been waived. But the Court has been applied to to set aside all the proceedings, on the ground of the affidavit of debt being null and void; and if that be not the case,

all the proceedings after the service of the declaration. In the first place, this affidavit cannot be considered as a nullity, though it is defective. There is a difficulty in saying how it ought to be worded. It is contended, that, according to the language of the statute, it is a correct mode of making the affidavit. I am not of that opinion; though I cannot say that this is altogether a nullity. The words of the clause are [here his Lordship read the 7 Geo. 4. c. 46. s. 9. (3).] Now, there is

(3) Which enacts, "That all actions and suits against any person or persons who may be indebted to any such copartnership carrying on business under this act, and all proceedings at law or in equity under any commission of bankruptcy, and all other proceedings at law or in equity to be commenced or instituted for or on behalf of any such copartnership, against any person or persons, bodies politic or corporate, or others, whether members of such copartnership or otherwise, for recovering any debts or enforcing any claims or demands due to such copartnership, or relating to the concerns of such copartnership, shall be in the name of any one of the public officers nominated as aforesaid, for the time being, of such copartnership, as the nominal plaintiff or petitioner for and on behalf of such copartnership; and that all actions or suits, and proceedings at law or in equity, to be commenced or instituted by any person or persons, bodies politic or corporate, or others, whether members of such copartnership or otherwise, against such copartnership, shall be commenced, instituted, and prosecuted against any one or more of the public officers nominated as aforesaid for the time being, of such copartnership, as the nominal defendant for and on behalf of such copartnership; and that all indictments, informations, and prosecutions, by or on behalf of such copartnership, for any stealing or embezzlement of any money, goods, effects, bills, notes, securities, or other property of or belonging to such copartnership, or for any fraud, forgery, crime, or offence, committed against or with intent to injure or defraud such copartnership, shall be had, preferred, and carried on in the name of any one of the public officers nominated as aforesaid for the time being of such copartnership; and that in all indictments and informations to be had or preferred by or on behalf of such copartnership, against any person or persons whomsoever, notwithstanding such person or persons may happen to be a member or members of such copartnership, it shall be sufficient to state the money, goods, bills, effects, notes, securities, or other property of such copartnership, to be the money, &c. of any one of the public officers nominated as aforesaid for the time being of such copartnership; and that any forgery, fraud, crime, or other offence committed against or with intent to injure or defraud any such copartnership, shall, in such indictment or indictments, notwithstanding as aforesaid, be laid or stated to have been committed against or with intent to injure or defraud any one of the public officers

(1) 1 Taunt. 493.

(2) See ante, p. 119.

no proper connexion of the plaintiff with the bank shewn; neither is there a statement of any facts which could bring the bank within the provisions of this statute. Still it is only an irregularity, and is capable of being waived. The question then is, whether or not it has been waived. An application was made to the Court on the ground of privilege, which was unsuccessful; and the defendant now states, in the course of his argument, that his attention was confined to that point, and that he was not aware of this objection at the time. This does not, however, appear on his affidavit; and I think it ought to have appeared distinctly at what period he first became acquainted with this defect. As it does not, the irregularity has been waived. The irregularity of the service of the declaration was not waived; and as it was clearly irregular, the service of the declaration and subsequent proceedings must be set aside.

PATTESON, J.—I was certainly wrong in discharging the order, on the ground that this affidavit was sufficient. It is a defective affidavit; therefore, if the application was made to me in proper time, this application also is in proper time, as it is an appeal from my decision. The defendant first applied to me and my Brother Alderson, at chambers, to be discharged out of custody, on the ground of privilege, and from us he went to the Court upon that objection. The Court decided against him; and he ought to have informed us when he first became acquainted with this defect. He has not, however, done so by his affidavit, and therefore has not put himself in a situation to take the objection, which does not render the affidavit a mere nullity. On the other point, I think the service of the declaration was wrong. When a defendant is in prison, there cannot be a delivery of a declaration to his attor-

nominated as aforesaid for the time being of such copartnership; and any offender or offenders may thereupon be lawfully convicted; and that in all other allegations, indictments, informations, or proceedings of any kind whatsoever, in which it otherwise might or would have been necessary to state the names of the persons composing such copartnership, it shall be sufficient to state the name of any one of the public officers nominated as aforesaid for the time being of such copartnership."

ney, unless under very peculiar circumstances.

COLERIDGE, J. concurred.

Rule absolute, for setting aside the service of the declaration and subsequent proceedings; discharged as to the rest.

1837. } THE KING v. THE BIRMINGHAM
April 29. } AND STAFFORDSHIRE GAS-
LIGHT COMPANY.

Poor-rate—Value of Machinery.

A local act for regulating the poor of Birmingham, directed a survey and valuation to be made of all houses, lands, tenements, and hereditaments, within the parish, and the poor-rate to be made on that valuation:—Held, that the value of steam-engines and other fixed machinery, ought to have been taken into estimation in calculating the value of the buildings and premises to which they were attached.

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 92.]

1837. }
May 3. } FORD v. LECHE.

Sheriff—Special Bailiff—Agency.

A plaintiff sent a writ of capias to the under-sheriff, inclosed in a letter, wherein he requested that warrants might be granted to particular officers, whom he named, and to one of whom he said he would write in a day or two. One of the officers afterwards arrested the defendant on a writ, at the suit of another party, and let him go at large, on his finding bail to that action:—Held, that under these circumstances, the plaintiff had made the officers his special bailiffs, and that the sheriff was not answerable for the neglect of the officer to detain the party on the plaintiff's writ.

Case. The first count stated, that one E. W. Dickenson, on &c., was indebted to the plaintiff in a large sum, to wit, &c. upon a certain cause of action, and that the plaintiff sued an *alias testatum capias ad respondendum* out of the Court of King's Bench,

directed to the sheriff of Cheshire, by which he was commanded to take the said E. W. D., and safely keep him, which writ, indorsed for bail for 500*l.*, was afterwards delivered to the defendant, who was sheriff of Cheshire, to be executed in due form of law, by virtue of which writ the defendant afterwards took and arrested the said E. W. D., by his body, and detained him in his custody; yet the defendant, not regarding his duty, without the leave and licence of the plaintiff, voluntarily suffered the said E. W. D. to escape, so that he did not appear at the return day of the writ, whereby the plaintiff lost his means of recovering his debt. The second count was not material. The first plea, on which alone the question arose, was, not guilty.

At the trial, before the Lord Chief Baron, at the Liverpool Summer Assizes, in 1835, it was proved, that on the 5th of June 1832 a writ of *capias ad respondendum* was issued against Dickenson, at the suit of Rannie, and was delivered to the defendant, who was then sheriff of Cheshire. On the 7th of June, the plaintiff sued out an *alias capias* against Dickenson, and sent it in a letter by the post, from London, to the under-sheriff of Cheshire, which letter was in the following terms:—

“June 8, 1832.

“Myself *v.* Dickenson.

“Aldridge *v.* Same.

“Sir,—I enclose you writs herein, and shall feel obliged by your granting warrants hereon, directed to Mr. Bateman and Mr. Mee. I shall write to Mr. Bateman in a day or two.

“I am, &c.

“G. S. Förd.”

A warrant was given by the under-sheriff to Mee, and the writ at the suit of Rannie, on the 3rd of July; but it did not appear whether it was given to Bateman or not. On the 20th of August, Dickenson was arrested by Mee on Rannie's writ, but was not taken to prison, as he gave bail to the sheriff. No arrest was made on the plaintiff's writ, and it was not shewn that any communication was made by the plaintiff to the sheriff after the above letter. On these facts, the defendant contended, that he was not responsible for any neglect in Mee to make the arrest; and his Lordship,

being of that opinion, nonsuited the plaintiff. In the ensuing Michaelmas term,—

Alexander obtained a rule nisi to set that nonsuit aside; against which—

Cresswell, Wightman, and Tomlinson now shewed cause.—The nonsuit was right. The sheriff was not in default, and cannot be rendered responsible in this case. The letter of the plaintiff to the under-sheriff, in fact relieved the sheriff from all liability, because, by nominating his own bailiffs, the plaintiff took upon himself the consequences of their default. The plaintiff said, that he would write to Bateman; and the inference is, that he gave him express directions as to the arrest. The case is, therefore, within the authorities which hold the sheriff to be free from liability, on account of the neglect by the bailiffs nominated by the plaintiff to make the arrest—*Hamilton v. Dalsiel* (1), and *De Moranda v. Dunkin* (2). No doubt, if the arrest take place, and the party be delivered into the sheriff's hands, the agency of the officer is determined, and the sheriff is responsible for a subsequent escape—*Taylor v. Richardson* (3), but here there was no arrest at all. It is contended, that because the writ was in the sheriff's possession, at the time of the arrest at the suit of Rannie, there was in law an arrest on the former writ. But that doctrine cannot apply to a case where the plaintiff has nominated his own bailiffs. If Mee had had the warrant in his possession, and had neglected to arrest, the sheriff would not have been responsible. How can he be made so by the circumstance of Mee's not having it? *Benton v. Sutton* (4) has been cited; but it is not applicable.

Alexander and Bayley, contra.—The sheriff is responsible for this escape. In *Frost's case* (5), it is said to have been resolved, “that when a man is in the custody of the sheriff by process of law, and afterwards another writ is delivered to him to arrest the body of him who is in his custody presently, he is in his custody by force of the second writ, by judgment of law, although he do not actually arrest him;

(1) 2 W. Black. 952.

(2) 4 Term Rep. 119.

(3) 8 Term Rep. 505.

(4) 1 Bos. & Pul. 24.

(5) 5 Co. Rep. 89.

for to what purpose should he arrest him who is and was before in his custody? *Et lex non præcipit inutilia, quia inutilis labor stultus*; and the words of the *ca. sa.* are not only *quod capiat, &c.*, but *quod salvo custodiat, &c. ita quod habeat corpus, &c.* So that, although he cannot take him (whom he has) in his custody, yet he may safely keep him." See also *Jackson v. Humphreys* (6), and *Benton v. Sutton*, per Eyre, C.J. In the present case, therefore, when Dickenson was arrested at the suit of Rannie, he was, in contemplation of law, in custody at the suit of Ford, whose writ was then in the sheriff's possession. This is not a case where the plaintiff has, by his own conduct, released the sheriff from his responsibility. The cases which have been cited are distinguishable from the present. In *Hamilton v. Dalsiel*, the writ was not sent to the under-sheriff directly, but to some person who was the agent for the plaintiff himself; and in *De Moranda v. Dunkin*, the writ was sent to the sheriff himself to execute. Here, it was sent to the under-sheriff in the first instance. In *Porter v. Viner* (7), and in *Pallister v. Pallister* (8), the plaintiffs had interfered with the officer in the execution of the process; but nothing of that kind took place here. Here, the plaintiff did nothing more than request the under-sheriff to direct his warrant to particular officers; and did not thereby intend to constitute the latter special bailiffs, so as to render them his agents—*Balson v. Meggatt* (9).

LORD DENMAN, C.J.—The first question is, whether the plaintiff, in this action, did in effect appoint his own bailiff, and I do not think it can be doubted but that he did. The expression is, that warrants shall be granted, directed to Bateman and Mee, and that he shall write to Bateman in a day or two. It would require great ingenuity to make out more than this, that the sheriff is to be the plaintiff's agent for the purpose of directing the writs to those officers; and that supersedes the authority of the sheriff, and the plaintiff has made Bateman and Mee the persons who are to

execute the writ for him, and not the sheriff. On the 7th of June he sent the writ, one having come previously, on the 5th, from another plaintiff, and the defendant was arrested on the latter. No doubt, in some sense he was then in custody at the suit of the plaintiff, as the writ was in the sheriff's office, but was he in custody so as to render the sheriff liable for an escape? Can that be said when he is in the custody of the person whom the plaintiff has appointed? The escape took place before there had been any determination of the authority which the plaintiff had communicated to Mee and Bateman, and therefore the principle applies, that when an officer is appointed by the plaintiff, the sheriff is relieved from responsibility. This is not like the case of *Porter v. Viner*, or the case before my Brother Coleridge, (*Balson v. Meggatt*), where it was only considered, that, in point of fact, the expression by the attorney was not an appointment of a special bailiff by the plaintiff. Here the plaintiff dealt with the writ himself, and the direction to these two persons was his own act.

LITLEDALE, J.—I have no doubt that Mee and Bateman are to be considered as special bailiffs appointed by the plaintiff; and not only are they special bailiffs, but the effect of the letter was, that the under-sheriff was not bound to deliver the warrants to them until he heard from the plaintiff. His duty was suspended. The defendant was afterwards arrested at the suit of Rannie. At that moment, in point of law, he was arrested at the suit of the plaintiff. But he is not in actual custody until he is sent to gaol. It is said, that the sheriff ought not to have let him go out of custody, but to have detained him upon the plaintiff's writ: but it appears to me, that the sheriff ought not to be answerable for this, which, in point of law, is an escape, because the plaintiff having taken the management of the matter out of the hands of the sheriff, there was a suspension of all proceedings on the part of the under-sheriff.

PATTESON, J.—Our decision in this case will not throw any doubt or difficulty on the law, with respect to the duty or liability of the sheriff. If a man be in the custody of the sheriff, and another writ is lodged, he

(6) Salk. 273.

(7) 1 Chit. Rep. 613, n.

(8) Ibid. 614, n.

(9) 4 Dowl. P.C. 557.

is immediately in the custody of the sheriff on that writ, for the reason given in *Frost's case*, because the sheriff has him in custody without the intervention of any warrant or bailiff. If he has issued a warrant, and other writs come into his hand, he is bound to arrest on those also; and therefore the moment the officer has the person in his custody, the party is in custody on all the writs then in the sheriff's office. Why? Because it is the duty of the sheriff to arrest on all, and to give notice to his officer of the existence of those writs. All this is untouched by our present decision, which proceeds upon the ground of the plaintiff's having appointed a special bailiff; for, I have no doubt that there was an appointment of a special bailiff. The letter does not merely request that the warrants may be given to a particular officer, but the plaintiff says, he will himself communicate with Bateman. That is, in effect, a taking it out of the hands of the sheriff, and an appointment of his own officer. The case decided by my Brother Coleridge proceeded on the ground, that there was nothing more than a suggestion of the officer to be appointed, and not an appointment of a special bailiff. It is, after all, rather a question of evidence than of law. Assuming that there has been an appointment of a special bailiff, what is the effect? The sheriff is prevented from sending the writ to the same person who may be in the possession of the others, because, though in the present case it does happen that the bailiffs were the same, it might have been otherwise, and then the party could not have been taken, because the officer had not the warrant. Having a warrant in one action only, it may be doubtful whether he could detain on the ground that there are other writs. Perhaps he might detain for a reasonable time, in order to inquire whether there were other writs out against the party or not; but I give no opinion on this point. In all cases, where a special bailiff is appointed at the request of the plaintiff, the sheriff is discharged from responsibility for the acts of that bailiff. It is true, that if there be an arrest, and the prisoner is delivered over to the sheriff's custody, the sheriff becomes responsible afterwards; but that is not the present case. The

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party never was in the sheriff's custody; and the plaintiff is precluded from saying that he was.

COLERIDGE, J.—I should not have said anything in addition, but for the reference to the case of *Balson v. Meggatt*, which, however, is distinguishable from the present. I did not intend to go farther than the circumstances of that case warranted. It is known to be a common practice for attornies to have their own officers to whom they wish their writs to be delivered, but they never intend to relieve the sheriff from his responsibility, and I decided with reference to that practice. Now, looking at this letter, it is clear that Mee and Bateman were nominated by the plaintiff to be special bailiffs; and the rule is quite free from doubt, that so long as the agency of the special bailiff lasts, the sheriff is not answerable for his acts. And therefore the question is, whether the agency was actually at an end. I think it was not. It is said, that by the arrest on Rannie's writ, the defendant was in the sheriff's custody. No doubt, in the case of an actual arrest by the sheriff, or an arrest and delivery into the custody of the sheriff, the party is arrested on all the writs which may then be in the sheriff's office. Does that, however, apply to the present case? Suppose Bateman had actually arrested on the plaintiff's writ, his special agency would not have ceased; and this cannot be stronger than the case of an actual arrest. If, after the arrest, he had let him escape, the sheriff would not have been responsible, as the special agency would not have been at an end. Nothing would be harder than to hold the sheriff to be liable in such a case. He is desired to deliver the execution of the writ to a particular officer in whom he may have no confidence, and whom he would not otherwise have employed.

Rule discharged.

1837. } WEST, CLERK, v. TURNER,
April 27. } CLERK.

Clergy—Curate—57 Geo. 3. c. 99—Pleading.

Where a curate brings an action against his rector, for his stipend, the defendant may

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plead in bar, that the rector being non-resident, his stipend was appointed by the bishop, according to the 57 Geo. 3. c. 99. s. 53; that certain differences arose touching the stipend and the arrears; and that the action was brought for such arrears; and he need not state in his plea the nature of those differences.

Assumpsit for work and labour, and attendance of the plaintiff in preaching and celebrating divine service in the parochial church of Luckington, for the defendant, and at his request.

Plea—*Actio non*, because, before the doing of the said work, and before the said promise in the declaration mentioned in respect thereof, the defendant was rector of the rectory of the parish of Luckington, in the county of Wilts, and within the diocese and ecclesiastical jurisdiction of the Bishop of Salisbury; and held another benefice, with cure of souls, within the meaning of the 57 Geo. 3. c. 99, and did not duly reside in the said rectory, within the meaning of the said statute; and, thereupon, before any of the said work and labour of the plaintiff, to wit, on &c., the plaintiff then being duly admitted into the sacred orders of the church of England, procured from the Bishop of Salisbury, and the said bishop, in pursuance of the said statute, did give and grant to the plaintiff, licence and authority to perform the office of stipendiary curate in the said parish of L., in reading the common prayers, and performing other ecclesiastical duties; and the said bishop did, in the said licence, duly assign unto the plaintiff the yearly stipend of 80*l.*, to be paid quarterly, for serving the said cure, together with the surplice fees, and the use of the rectory-house and offices *sec. form. statuti*, and that the work and labour in the declaration mentioned, was done and bestowed by the plaintiff, for and at the request of the said defendant, as in the said declaration is mentioned, under and by virtue of the said licence, as such curate, and not otherwise; and that after the doing of the said work, *divers differences and disputes* arose, and are still depending between the plaintiff and defendant, touching and concerning the said stipend in the licence assigned, and the payment thereof, and of the arrears thereof, in respect of the said work,

labour, and attendance, and the said action is brought touching and concerning the said stipend, &c.; touching which premises the said disputes and differences have arisen, and are still depending as aforesaid, *contra formam statuti*. Verification. Conclusion—and therefore and by reason of the statute, &c., he prays judgment, &c., as aforesaid.

To this plea there was a special demurrer, assigning nine different causes of demurrer, afterwards mentioned in the argument.

Manning, this day, argued in support of the demurrer.—This case depends upon the 57 Geo. 3. c. 99. ss. 48, 53 (1), and 74 (2).

[PATTERSON, J.—It is confessed by the plea, that the work and labour was done by the plaintiff, at the request of the defendant; the latter must, therefore, have appointed the plaintiff to be his curate, and the case does not come within the 48th section.]

The plea is, however, bad. First, it is in effect a plea to the jurisdiction of the

(1) Which enacts, "That it shall be lawful for the bishop, and he is hereby required, subject to the several provisions and restrictions in this act contained, to appoint to every curate such salary as is allowed and specified in this act, and every licence to be granted to a stipendiary curate under this act shall contain and specify the amount of the salary allowed by the bishop to the curate, and such licence or any copy of the registry thereof, signed by the registrar of the diocese, or his deputy, shall be evidence of the amount of the salary, no appointed to any curate, in all courts of law or equity, and in case any difference shall arise between any rector or vicar, or person holding any benefice, and his curate, touching such stipend or allowance, or the payment thereof, or of the arrears thereof, the bishop on complaint to him made, may and shall summarily hear and determine the same; and in case of wilful neglect or refusal to pay such stipend, salary, or allowance of the arrears thereof, he shall be and is hereby empowered to proceed by monition and sequestration to sequester the profits of the benefice, for and until payment of such stipend or allowance of the arrears thereof."

(2) Which enacts, "That in every case in which jurisdiction is given to the bishop of the diocese, or any archbishop under the provisions of this act, and for the purposes thereof, and the enforcing the due execution of the provisions thereof, all other and concurrent jurisdiction in respect thereof, shall wholly cease, and no other jurisdiction in relation to the provision of this act, shall be used, exercised, or enforced, save and except such jurisdiction of the bishop and archbishop under this act, anything in any act or acts of parliament, or law or laws, or usages or custom to the contrary notwithstanding."

Court, and ought to have been pleaded in abatement; whereas, this is a plea in bar. Secondly, it is not shewn that the 74th section applies, because the defendant has not stated what was the nature of the differences.

[LORD DENMAN, C.J.—Has not the bishop jurisdiction in this case?]

That does not appear; he has a jurisdiction for certain purposes, as, for instance, to inquire into the differences; but if the defendant had set out what the differences were, the plaintiff might have replied, that there were no such differences, whereas he cannot do so now, because he does not know what the defendant means. He should have stated whether the differences were as to the reasonableness of the amount or the non-payment of the stipend, or any other matter. Thirdly, the plea admits a good cause of action, founded on a valid consideration, and sets up a collateral matter which does not defeat that cause of action. Fourthly, this plea admits that he made the contract mentioned in the declaration, but only shews that this is not the proper court to try the case in. It is provided in the 53rd section, that the licence shall be evidence of the amount of the curate's salary in all courts of law and equity, which contemplates cases where those courts will have jurisdiction. The defendant cannot plead such a plea; he does not traverse, neither does he confess and avoid. Fifthly, this plea, if available, amounts to the general issue, for, in effect, it denies the implied promise alleged in the declaration. Sixthly, as already noticed, the nature of the differences ought to have been stated. Seventhly, the plea is so framed, that the plaintiff cannot, by traversing any one fact, maintain his action.

[LORD DENMAN, C.J.—Suppose it had been pleaded that differences had arisen, and that they had been referred to an arbitrator, and that the time for his award had not arrived; would not that have been a good plea? It is very like the present case.]

Then the party would have known what the differences were. The 8th and 9th causes have already been referred to. The substantial objections are, that this plea is pleaded in bar, whereas it is, in truth, a

plea in abatement, and that the nature of the differences ought to have been stated.

Cowling, contra.—The plea is good, and is supported by sections 53 and 74.

[LORD DENMAN, C.J.—We have no doubt as to the effect of those sections: but is this properly pleaded in bar?]

Yes; it could not have been pleaded in any other way. In *Parker v. Elding* (4), where an act of parliament had prevented a party from suing for a debt under 40s. in the superior court, it was held that the defendant might avail himself of it on the plea of the general issue, and the objection taken at the trial was, that it ought to have been pleaded specially. Now, here, the statute has prohibited the suit from being brought in this court. It may be well to consider the state of the remedies which a curate is entitled to. It is laid down in 2 *Burn's Ec. Law*, 69, where *Johnson's Ec. Law* is cited, that if the bishop assign a salary, the curate's most effectual remedy for his pay is in the Ecclesiastical Court; but, if he sue at common law, he must prove an agreement between the incumbent and himself,—in which case he must prove that he has properly qualified himself. The statute 12 Ann. st. 2. c. 12. provided, that the bishop might summarily determine differences between the curate and the incumbent. This gave to the parties only a power to apply to the bishop at their discretion. The present has gone farther, and has confined the remedy to the bishop's summary decision. The statute prohibits an action from being brought in any other court. The present defence is not to be pleaded in abatement. It is not that the action ought not to be brought in *this* court; but that it ought not to be brought in *any* court—that is properly a plea in bar. Then it clearly appears, that this was not an appointment by the bishop, but by the defendant, and, consequently, the plea is not an argumentative traverse of the declaration. The plea admits the implied promise alleged in the declaration, but avoids it by shewing that the Court cannot decide upon it. That defence could not be given in evidence under the general issue, as a want of consideration for a promise is not admissible under that plea—

Passenger v. Brookes (5). Then, as to the omission to state the nature of the differences—if they had been stated, the very object of the legislature would have been defeated, which was to confine those disputes to that private tribunal. With regard to the difficulty felt by the plaintiff in not knowing what fact to traverse, if that be any objection, it would have been obviated by his replying *de injuriâ*, which would have put all the plea in issue.

Manning, in reply.—This point was not decided in *Parker v. Elding*.

[COLERIDGE, J. referred to *Taylor v. Blair* (6), and added, Is it not the common practice to take notice of the Courts of Requests Acts after plea?]

They generally contain provisions which expressly authorize the Courts in so doing.

LORD DENMAN, C.J.—The objections to the plea are ultimately these two :—first, that the nature of the differences does not sufficiently appear; second, that the plea ought to have been pleaded in abatement. I have no doubt that the statement in this plea is sufficient. I cannot see why we should go into the nature of those differences. Then, is the jurisdiction of this Court taken away by the 74th section? No reasonable doubt can be entertained on this point, that the bishop alone is to have jurisdiction in such a case as the present, and that no other jurisdiction can interfere. Mr. Manning says, however, that this objection ought to have been pleaded in abatement. It is enough to say, in answer, that this is not the setting up of some other court in exclusion of this, but it is a statement that there is no tribunal by which the action can be tried. The act of parliament has set up another mode of determining the case, and a better tribunal. Lord Kenyon appears to have decided this very case in *Parker v. Elding*. [His Lordship here read the report of that case.] Every word of that judgment is applicable to the present case. Here it is expressly enacted, that the parties shall not sue in this court; and we could not, without overruling that act of parliament, entertain it. In the case referred to, the defence was admitted under

the general issue; now, since the new rules, this plea has been specially pleaded, and shews that our jurisdiction is completely taken away.

PATTESON, J.—There are two questions which it is necessary to consider :—first, whether the jurisdiction is taken away; and if it be, whether the plea ought to have been pleaded in abatement. The second is, whether the plea shews that this case was exclusively within the jurisdiction of the bishop. Now, the 74th section is in very general terms. It seems to me, supposing it to be shewn that the subject-matter is within the jurisdiction of the bishop, it is clear that the jurisdiction is taken away by the statute. It is said that it should be pleaded in abatement. This is a transitory action; and it is laid down in 1 *Tidd's Practice*, p. 631, that in transitory actions the defendant cannot plead to the jurisdiction of the Court, unless the declaration shew that the cause of action accrued within some other jurisdiction. Whether that be laid down too generally or not, I do not stay to inquire. He goes on to treat of the claim of consanguinity, which may extend beyond the plea to the jurisdiction. This may be too general; I do not say that it is not; but the present is not a case where another jurisdiction is given, but where in fact there is no jurisdiction *at law* anywhere. A plea in abatement must give a better writ, and must shew where the action might have been brought: that could not be done here. The only difficulty I have felt has arisen from the enactment in the 53rd section, "that the licence shall be evidence of the amount of the salary in *all courts of law or equity*," which raises an implication that that subject might come in question somehow in these courts. It is not enough, however, to take away the effect of the 74th section. Let us then see whether the facts are sufficiently stated in the plea to bring the case within the 53rd section. First it states the non-residence of the rector. Now, under the 48th section, if a parson, having a right to be non-resident from his benefice, be absent from his benefice for a certain period, without having a curate, the bishop may appoint and license a curate, and is the proper person to do so; but he has no right to appoint

(5) 1 Bing. N.C. 587; s.c. 4 Law J. Rep. (N.S.) C.P. 195.

(6) 3 Term Rep. 452.

and license a curate, except under this section. Something more was required than is stated in this plea to shew that the Bishop appointed the plaintiff to be the curate. The plea goes on to allege, in the words of the 53rd section, that certain differences arose touching the salary. Now the bishop has jurisdiction in all cases where any dispute arises touching the stipend. There is a pointed averment in the plea, that there arose differences touching the stipend and the payment thereof; and that the action is brought to recover the payment of that sum, concerning which the differences have arisen: so that the case appears to be clearly within the bishop's jurisdiction. But it is said, that the plea ought to have set forth the nature of those differences. If so, that might have been traversed, and the case would have been carried to another tribunal—namely, to a jury; and thus the very thing would come to be decided by the Court, or a jury, which the legislature has directed to be decided by the Bishop: whereas the mere traverse of the fact of the existence of such disputes will be quite sufficient for the plaintiff. It is, however, sufficient for us to say, that the plea follows the language of the statute.

COLERIDGE, J.—I do not think that our decision will trench upon the general principle. This is not a plea to the jurisdiction, which must give a better writ; but suppose the plea had stated that all disputes had been referred to an arbitrator, who was to settle them, it would not have been a plea in abatement. Here, there is no plea in abatement; but it is pleaded, that no action is to be brought at all, for the proceeding before the bishop is not an action.

Judgment for the defendant; and the Court refused leave to amend.

1837. } THE KING v. THE BRISTOL DOCK
April 24. } COMPANY.

Local Act—Limitation Clause—Compensation.

The 43 Geo. 3. c. cxl, which incorporated the Bristol Dock Company, contained a clause which recited, that certain premises

would be rendered useless by their works, and authorized the company to purchase them, or to make compensation for the injury, at the option of the persons interested in those premises, and also to any other persons who might sustain any damage through their works. There was another clause, which provided, "that all claims for compensation should be made six months after any injury happened."—Held, that this latter clause applied as well to the premises specified as to others.—Held, also, that where, at the time of the completion of the works, a mill, which was mentioned in the above clause, was held by a tenant for life under a settlement, he ought to have claimed for the whole compensation, and, not having done so within six months, the reversioners were barred.

A rule nisi had been obtained, on the behalf of J. E. Mosley and others, for a mandamus directed to the Bristol Dock Company, calling upon them to issue a precept to the sheriff of the county of Gloucester, calling upon him to summon a jury at the Quarter Sessions, to assess the sums of money to be paid by the company to the said J. E. Mosley and others, as a compensation for the injury sustained by them by reason of the damage done to a close of ground, called Netham, and to the engine, mills, buildings, and premises thereon erected, by reason and means of the execution of an act of parliament, passed in the 43 Geo. 3, for improving the port of Bristol. Against that rule, cause was shewn this day. It appeared that in 1803, the company was incorporated by the 43 Geo. 3. c. cxl. for the purpose of improving the harbour of Bristol, by pounding back the waters of the river Avon, and obtained power to purchase or compensate all persons whose property might be injured by their works, and an express provision was made for the injury which might be sustained by a mill, called Netham Mill, in s. 107 (1). The

(1) Which recited, "That the several works and improvements, hereby authorized to be made, will render a certain dock, called, &c., useless as a dry or graining dock, and will also render certain messuages and premises at Hanham, in the county of Gloucester, a certain mill and premises, called Engine or Netham Mill, in the parish of St. George, in the county of Gloucester, a certain mill, called Trim Mill, in the parish of St. Mary, Redcliffe, in the

works of the company, which did, in fact, render this mill useless, were completed on the 1st of May 1809. At that time all the premises were held by the trustees of the Bristol Waterworks Company, under a lease, dated the 23rd of February 1793, from the Rev. J. P. Mosley and his wife, heiress of W. P. Clothier, for the term of twenty-one years, from the 25th of March 1793. That term was by a covenant contained therein on the part of the lessors, renewable at the end thereof for a further term of twenty-one years, upon six months' previous notice, and payment of a fine of 50*l.*, until the expiration of a term of 199 years, from the 25th of March 1709. In this lease there was merely a covenant to repair the hedges, fences, and ditches, and the lessees were at liberty to remove all erections. The mill and the greater part of the premises were underleased to Messrs. Pitt, Anderson, & Co., who, in 1809, made a claim for compensation, and a sum of 10,000*l.* was awarded to them by a jury, and, in the same year, the lease was assigned to the Dock Company from the Waterworks Company. No claim was then made on behalf of the lessors. In 1814 the term having expired, a lease for twenty-one years was granted to the Dock

Company, pursuant to the covenant for renewal, which was allowed to expire absolutely in 1835 through an inadvertence. The Dock Company, in 1824, made a towing-path over part of the land, but have done no other works since 1809. The property of the lessors was in settlement; having been conveyed in 1791 to trustees, upon the marriage of Sarah Maria Clothier with the Rev. J. P. Mosley, to the use of the wife for life, remainder to the trustees to preserve, &c., remainder to the husband for life, remainder to the trustees to preserve, &c., remainder to the use of such children as the said S. M. C. and J. P. M. should appoint by deed, with other remainders over. In 1817, it being considered necessary to have one of the leases of this property confirmed, Mr. and Mrs. Mosley, in execution of their power, appointed it to their eldest son, and he confirmed the lease which had been executed by them. On the 28th of January 1834 the husband, who had survived his wife, died; and on the 18th of April 1836, a memorial of claim for compensation was served upon the Dock Company on behalf of the children of Mr. and Mrs. Mosley, pursuant to the 113th section(2). The

city of Bristol, and a certain mill in the parish of St. James, in the city of Bristol, called Bridewell Mill, useless as mills, and by means of such works and improvements, or in the progress and execution thereof, injury and damage might be done to other hereditaments, houses, lands, and tenements, or the same might be rendered less valuable thereby." and enacted, "That the said company should, and they were thereby directed either to purchase or to make a just and liberal compensation or satisfaction to the owner or owners, and all other person or persons interested in such dock, mills, lands, houses, tenements, and hereditaments, so rendered useless, injured, or made less valuable, at the option of such owner or owners, or other persons as aforesaid, for the injury, loss, or damage, which such owner or owners, or other person or persons interested as aforesaid, should or might have suffered or sustained by reason or means of any loss or damage which any dock or docks, mills, messuages, or hereditaments, as aforesaid, belonging to such owner or owners, or in which such person or persons should or might be interested as aforesaid, should have received from or by means of the said works and improvements thereby authorized to be made, or in case, at any time or times thereafter, any person or persons should sustain any damage in his, her, or their lands, hereditaments, or property, by reason or means of the execution of any of the powers hereby given, or through or by means not hereby provided for."

(2) Which enacts, "That all claims for compensation, under or by virtue of this act, shall be made within six calendar months next after any injury, loss, or damage shall happen, and that all and every bodies and body politic, corporate or collegiate, and all other person or persons whomsoever, claiming such compensation, shall tender the said respective claims to be entered in a book, to be for that purpose prepared and kept by the clerk of the said company, which book the said clerk is hereby required to prepare and keep, and therein to make such entry accordingly, and that in case any compensation to be claimed under this act, shall not be claimed, and a memorial of such claim tendered within the said six months, and the ascertainment of such compensation, in manner aforesaid, proceeded in without delay, on the part of the claimant or claimants, then and in every such case no compensation shall be allowed for such loss or damage; and all and every person and persons whomsoever who might have claimed such compensation or compensations as aforesaid, but who shall have neglected to claim the same, and tender as before directed a memorial of such claim within the said six calendar months, and proceed without delay in causing to be ascertained such compensation or compensations, shall be barred and excluded from all right and title to any such compensation or compensations whatsoever, under or by virtue of this act, anything hereinbefore contained to the contrary notwithstanding."

company considered that they were not entitled to compensation, and refused to pay it.

Sir W. W. Follett and J. Henderson now shewed cause.—The Court will not grant this mandamus. First, the application is clearly too late. The claim should have been made when the works were completed in 1809, or at latest in 1824, when the towing-path was made. It is to be contended, however, that the state of the title of the applicants prevented an earlier application from being made. That argument is groundless. The father, though only tenant for life, might have claimed for the whole compensation due to him, and to those in remainder, by section 109; the subsequent clauses provide for the application of money belonging to persons under any incapacity; and section 114 provides, "that where persons have been barred of their remedy by the lapse of time, they may have an action of debt against the parties who ought to have claimed for the amount of the compensation that would have been due," which provisions shew that the father might have claimed for the whole amount. As to any incapacity on the part of the children to sue, express provision is made for one class of persons incapable in consequence of their being abroad, and it is, that they may make a claim within eighteen months after the injury has been done; evidently, therefore, no other incapacity is intended to be excepted. But the rights of the persons in remainder were vested in 1817, when the use was appointed to the eldest son. He had the whole estate in him at that time, and might have claimed for the entire

compensation. Secondly, there is no injury to be compensated. The mill is supposed to be damaged by the pounding up of the waters, but the lessors had no interest in that mill, the lessees under the covenants of their lease had power to remove it; and *The King v. the Directors of the Bristol Dock Company* (3) shews, that for an injury to the river itself a party cannot claim any compensation.

The Attorney General and Whately, in support of the rule.—The Court ought to grant the writ of mandamus, and let the company make an answer in their return to the writ. It appears, from the very 107th section, that the present applicants have a right to compensation, which has never been satisfied. It is there recited, that damage will be done to the Netham Mill; and it is enacted, that compensation shall be made to the owners in a liberal manner. Here there was an actual right in the water of the river vested in the owner of this mill, and therefore the case is very different from that which has been cited. The injury here was not immediate, but consequential. The company were either to purchase or make compensation; they knew by the act of parliament that their works would be injurious to this mill, and they ought to have gone to the owner to know what compensation would be required. It was not incumbent upon him in such a case to make any claim, and the section referred to as limiting the time for making the claim, does not apply to the present applicants. This, though a public act, is a bargain in effect, and falls within the principle, well established by a variety of cases—*Dudley Canal Company v. Grazebrook* (4), *Scales v. Pickering* (5), *The King v. the Inhabitants of Cumberworth* (6). But even if it were necessary to make a claim, it was made in proper time, considering the title of the parties. It was made as soon as the parties interested in remainder came into possession; for as to the appointment to the eldest son, that was a mere temporary act to render validity to

ing: provided always, that if any person or persons entitled to or who ought to claim any such last-mentioned compensation, shall happen to be absent from the United Kingdom of Great Britain and Ireland during the whole of the said six calendar months, and there shall not be any person in this kingdom duly empowered to act for him, her, or them, in that behalf, then and in every such case it shall be lawful for the person or persons so being or having been absent, to make his, her, or their claim of such compensation, and tender a memorial thereof as aforesaid, and proceed, without delay in the ascertainment of such compensation, at any time within eighteen calendar months after such injury, loss, or damage shall happen, or in default thereof shall be in like manner barred and excluded from all right and title to any compensation."

(3) 18 East, 429.

(4) 1 B. & Ad. 59; s. c. 8 Law J. Rep. K.B. 361.

(5) 4 Bing. 449; s. c. 6 Law J. Rep. C.P. 53.

(6) 1 Nev. & P. 197; s. c. 6 Law J. Rep. (N.S.) M.C. 91.

a lease, and there was an immediate conveyance by him to trustees.

LORD DENMAN, C.J.—If I entertained the smallest doubt in this case, I should think the *mandamus* ought to go, but I cannot bring my mind to entertain any doubt. The act of parliament contains a recital that the particular mill will sustain an injury, for which the company are to render satisfaction either in the form of purchase-money, or of a compensation to be settled by a jury. The parties now come and say that they have been injured, and cannot obtain compensation. Now no act of this sort can exist, unless there be some limit as to the time within which claims must be made, and accordingly there is a section which requires that the claim shall be put forth within six calendar months after the injury has happened. Here an injury was done many years ago, and the trustees of the settlement might have made their claim within six months. If they had done so, they would have been trustees of the money which they would then have received. As it is, the limitation clause applies, and the parties are now too late.

LITLEDALE, J.—In the 107th section, it is stated, the mill will be injured, and that the injury is to be compensated. It appears that the parties have only lately come into possession, so as to entitle themselves to the ownership; but, under the 109th section, a party might claim not only for himself, but for all those any way interested, and the sum to be paid might have been apportioned. It was competent, therefore, for the owner of the life estate in this property, to have obtained the compensation for the whole in the first instance. How it was to have been disposed of, depended upon the nature of the different interests. And by the 114th section, the party would be at liberty to bring an action of debt against the person receiving the compensation, who neglected to pay it over. Then the act provides, that the claim shall be made within six months. It is contended, however, that the case is not within that section, because it is provided for by the 107th section. But that section gives to the owner an option of having the property sold, or a compensation assessed,

He must therefore declare his option, and the language of the 113th section is general, all persons being required to make their claim, and send in their memorial within the six months. Here then there were persons who could have made the claim, and the applicants must look to the parties who neglected to make it.

PATTESON, J.—The question arises principally upon the 113th section, because, if that does apply, the present application is not in proper time.—[The learned Judge read the clause.] It is quite clear that this is not a consequential injury, but one which was caused immediately upon the construction of the works. It is expressly stated in the act of parliament, that they will be injured, and accordingly even before the works were completed the damage was sustained. The limitation, therefore, if it ran at all, must have run from the 1st of May 1809. But, it is said, that it did not run at all here, because there are two classes of premises to which the 107th section of the statute applies. It recites, that certain mills will be injured, and those form one class, and also that other premises may be damaged, and those form the other class; that as the latter are not necessarily injured, the claim will only be required in cases of that class. The enacting clause, however, applies generally to both classes, and enables the company to purchase or render compensation in either case. Then follow provisions in the statute for the disposition and application of the purchase-money, and the interest of persons not competent to convey. And the 113th section can only apply to the cases mentioned in the 107th. It is general in its terms, and must apply to all that is there contained. I can see no ground for any distinction in the limitation between such cases where the premises are necessarily injured, and those where it is contingent only. It is said, however, that the onus of tendering satisfaction is thrown upon the Dock Company. But the act of parliament does not say who are the owners of this property. The company, therefore, did not know to whom they should tender the money, while the owners had full knowledge to whom they should make their claim.

COLERIDGE, J.—Two points have been made in support of this application: one on the 107th section, without any reference to the state of the title to this property; the other with reference to the state of that title. It is said, as to the first point, that this was a specific and definite injury which, it was contemplated, must necessarily have resulted from the works of the Dock Company. Therefore, no claim was required; and the limitation clause, it is contended, applies to those cases only where it is necessary to make a claim. But if the policy and object of the act be considered, that construction cannot prevail. Besides, the language of the 113th section is quite general. And to support the view that no claim need be made in such a case as this, the Attorney General must contend that the company are to take the first step, and find out the owner of the property; and that if they failed to do so, the owner might at any time bring forward his claim. That would be an enactment unprecedented. The act gives them no legal means of knowing who the owners are—and how are they to obtain that knowledge? It applies, however, in its terms to certain as well as to uncertain injuries. Therefore, in the case of a tenancy in fee, the tenant in fee was bound to make his claim within six months. But then it is said, secondly, that the state of the title protected the parties in this case, and that they were not bound to come forward until their reversion vested in possession. The provision in the act, which enables the owner, who is abroad, to come and claim within eighteen months, affords a strong argument that the limitation clause is applicable to all persons, and renders it imperative upon the tenant for life or the trustees to come forward and claim for the whole;—and there is no hardship in such a provision, because, if he do come in, the parties who would have been barred, have a remedy against him for their compensation. No mandamus, therefore, ought to be granted.

Rule discharged.

1837. }
April 17. } THE KING v. C. P. HARRIS.

Quo Warranto—Municipal Corporation Act.

Where a party had been elected, and had acted as town clerk previous to the passing of the Municipal Corporation Act, but was not a burgess at the time of his election, and had not taken the oaths of allegiance and supremacy, nor signed the declaration required by 9 Geo. 4. c. 17. s. 2—the Court refused, at the instance of a private individual, to grant a quo warranto information against him, to know by what authority he had exercised the office, for the purpose of shewing that he was not an officer of the corporation, and therefore not entitled to compensation on being removed from his office.

This was an application for a *quo warranto* information against the defendant, to know by what authority he exercised the office of town clerk of the borough of Cambridge, previous to the year 1836. It appeared that Mr. Harris had been elected town clerk of that borough, in 1833, and had continued to act until December 1835, when the Municipal Corporation Act came into force, and he was removed from his office, and a new town clerk was appointed. Mr. Harris had made a claim for a compensation under the 5 & 6 Will. 4. c. 76. s. 66, but the present corporation considered that he had not been duly elected town clerk, not having been a burgess of the town at the time of his election, and not having taken the oaths of allegiance and supremacy, as prescribed by the 25 Car. 2. c. 2, nor signed the declaration required by the 9 Geo. 4. c. 17. s. 2. The object of the relator, who was a private individual, was to shew that he was not an officer of the corporation, and therefore not entitled to compensation.

Starkie, who applied for the rule, contended, that the Court ought to grant it, because, according to the 66th section of the Municipal Corporation Act, no person not legally appointed an officer, can be entitled to compensation; and it was proposed to try the validity of Mr. Harris's election by this proceeding.

[LORD DENMAN, C.J.—Does the act say anything about his title? Was he not in the office?]

Y

Not until he had been sworn in. Some doubt might have been raised, whether the judgment ought to be final ouster, or ouster *quousque* only; but *The King v. Reeks*(1), *The King v. Pindar*(2), *The King v. Courtney*(3), and *The King v. Roberts*(4), are authorities against the doubt expressed in *The King v. Clarke*(5), that the judgment should be *quousque* only. It may be urged, that the annual Indemnity Act should be called to the defendant's aid, but it will not be available, for two reasons: first, it only recapitulates and restores the party who takes the oaths within a certain period, (see 5 & 6 Will. 4. c. 11,) which was not, and cannot now be done by Mr. Harris; and secondly, there is a proviso which prevents the application of the act when the office has been already filled up (see section 9). Here the office has been filled up.

LORD DENMAN, C.J.—The defendant was removed from this office, by the authority given by the Municipal Corporation Act; and yet it is said that he is not an officer, so as to be entitled to compensation. If there be sufficient grounds for refusing it, they may be stated before the proper tribunal.

LITTLEDALE, J.—There have been cases of informations granted, to impeach bygone elections, but they have occurred where there have been elections of a mayor or aldermen, and the validity of other elections depends upon that of those officers. But here a private relator comes to impeach the title of an officer now out of office, not for the purpose of removing him, but to determine his right to the compensation. If he was not an officer, you may refuse to give him compensation, and then the question of his right to it, will come on in a regular course of proceeding.

PATTESON, J.—The decision of this *quo warranto* would not at all settle the constitution of the Municipal Corporation Act.

COLERIDGE, J. concurred.

Rule refused.

- (1) 2 Lord Raym. 1447.
- (2) Stra. 522.
- (3) 9 East, 246.
- (4) 3 Ad. & El. 771; a. c. 4 Law J. Rep. (N.S.) M.C. 118.
- (5) 2 East, 75.

1837. } THE KING v. WILLIAM TINDALL
Jan. 11. } AND OTHERS.

Indictment—Nuisance in a public Port—Special Verdict.

On an indictment for a nuisance by placing erections in the port of Scarborough, a special verdict found, that the defendants were owners of ship-building yards on the edge of the upper part of the harbour; that the piles in question had been driven into a sandy bottom during seventy years; and that the water used to flow between the piles until certain planking was placed there. It then found that certain commissioners, under certain acts of parliament, erected works, and deepened the harbour, so as to cause a greater rush of water against the defendants' premises than formerly, to the extent of washing away the soil and threatening destruction to their yard; and to protect their property they placed transverse planking in front of the piles, doing nothing more than was necessary to protect their property against the sea, in consequence of the alterations made by the commissioners; and that, by the defendants' works, the harbour was, in some extreme cases, rendered less secure:—Held, that the defendants were entitled to an acquittal.

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 97.]

1837. } THE KING v. THE INHABITANTS
April 20. } OF SCARISBRICK.

Highway, Repair of—Evidence—Presumption.

On an indictment against a township for non-repair of a highway, the defendants proved an agreement between the owner of all the lands in their township, and the owner of all the lands in an adjoining township, made in the reign of Queen Elizabeth, by which it was agreed, that a road should be formed through both townships, to be repaired in equal moieties; and that a stone was fixed at a place in the defendants' township, to mark a portion therein which was to be repaired by the adjoining township, and which part was the subject of the indictment. The agreement contained a stipulation that a further assurance should be prepared by a

lawyer,—but none was produced. Repairs were proved to have been done by the adjoining township for two centuries:—Held, that the Judge ought not to have advised the jury to find that there had been some legal charge created upon the lands in that adjoining township, to repair this road.

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 103.]

1837. }
April 21. } THOMAS V. JENKINS.

Evidence—Boundary—Reputation.

The question in the cause being as to the boundary of a certain estate, witnesses having stated that the boundaries of the estate, and of the hamlet, were identical:—Held, that they might state what, according to reputation, was the boundary of the hamlet.

This was an action of replevin, tried before Coleridge, J., at the last Carmarthenshire Assizes, when the question in the cause was, whether a certain piece of land belonged to one sheep-walk or another. Witnesses were called, who stated, to questions on the part of the defendant, without objection, that the boundary of the plaintiff's farm was the same as that of the hamlet. They were then asked what, according to reputation, was the boundary of the hamlet. This question was objected to, but the objection was overruled, and the defendant recovered a verdict.

Chilton now moved for a new trial, and contended that the last question was improper, and the evidence inadmissible. It was, in effect, evidence of the boundary of a farm by reputation. That is admissible to prove public boundaries, but not to establish those of private estates, which may be continually changing. He cited, 1 *Phil. Evid.* 249, *Weeks v. Sparke* (1), *Doe v. Thomas* (2), *Richards v. Bassett* (3), *Talbot v. Lewis* (4), *Crease v. Barrett* (5),

(1) 1 *Mau. & Selw.* 679.

(2) 14 *East*, 323.

(3) 10 *B. & C.* 657; *a. c.* 8 *Law J. Rep.* K.B. 289.

(4) 1 *Cr. M. & R.* 495; *a. c.* 4 *Law J. Rep.* (N.S.) *Exch.* 9.

(5) 1 *Cr. M. & R.* 919; *a. c.* 5 *Law J. Rep.* (N.S.) *Exch.* 8.

The King v. Antrobus (6), and *Jones v. Williams* (7).

LORD DENMAN, C.J.—There is no doubt that reputation is admissible evidence to prove a parish boundary; the question is, whether it is admissible here in a case where the parish boundary is the same as that of the farm. When once the fact has been established, that the boundaries of the two are identical, any mode of proving what the boundary of the hamlet is, was admissible. It seems that, no objection being taken to the question, it was answered, that the boundary of the farm was that of the hamlet; and then it was inquired, what was the boundary of the hamlet. Many observations might be made upon the nature of this evidence, but the two questions were inseparable. The case is the same as if one party had sold his estate, with an express reference to the boundary of the hamlet; when there can be no question that that boundary could be inquired into.

PATTESON, J.—The question in the case was, whether the land in question was parcel of farm A. or of farm B,—which was to be determined by all kinds of legal evidence. It is quite clear, that on such a question, evidence of reputation was inadmissible; but, on a question of a public boundary it was receivable. It being conceded that the boundary of the farm was the same as that of the hamlet, I cannot say that it did not let in all evidence which was applicable to prove the boundary of the latter. It is said, that the evidence which established the identity, was, in fact, reputation only. But, as I understand, the jury were cautioned not to take into consideration any evidence of this kind, which shewed what the boundary of the sheep-walk was. If they were satisfied that the boundaries of the estate and of the hamlet were identical, I do not think the evidence ought to have been rejected. If the evidence of the identity had been reputation only, it might have been objected to, but the witnesses stated that positively as a fact. It is urged, that the boundaries might be changed; the wit-

(6) 2 *Ad. & El.* 788; *a. c.* 4 *Law J. Rep.* (N.S.) K.B. 91.

(7) 6 *Law J. Rep.* (N.S.) *Exch.* 107.

nesses, however, stated that they were identical. It is quite enough, if the jury believed the first fact, and any objection to the mode of proving that fact, should have been taken at the time when the proof was offered.

COLERIDGE, J.—There is more novelty than difficulty in this point. The question which was objected to was this, "Have you had your sheep up to the boundary of the hamlet?" The only objection to that was, that it was not relevant to the issue. But that cannot be sustained when the answer to the previous question is considered, namely, that the boundaries of the estate, and of the hamlet, were the same. It is conceded, that the evidence would have been admissible, if the issue had been as to the boundary of the hamlet; then it cannot make any difference, whether that be the issue in the cause, or only an issue which assists in proving that which is the issue in the cause.

Rule refused.

1837. }
April 24, 27. } *In re GOMPERTZ.*

Prisoner—Rules of the Prison—Contempt.

Where a party is in the custody of the marshal for a contempt, for not putting in his answer to a bill in equity, the marshal cannot, of his own authority, allow him to have the benefit of the rules.

In Trinity term 1836, a rule nisi had been obtained, calling upon Henry Gompertz and the marshal of the Marshalsea, to shew cause why the said Henry Gompertz should not be deprived of the rules of the King's Bench prison, and confined within the walls thereof. The application was supported by an affidavit, which stated, that Henry Gompertz was in custody of the marshal of the King's Bench in execution, and upon detainers at the suit of various persons, as also detained upon six several attachments issued out of the Equity side of the Court of Exchequer at the instance of G. J. Best; five of such attachments being for contempt of court in non-payment of several sums for costs, and the other being for a contempt in not putting in his answer to a bill of the said G. J.

Best, filed in that court: that pursuant to an act of that court, the said Henry Gompertz was, on the 3rd of June last brought up on a writ of *habeas corpus cum causa* from the custody of the marshal into the Court of Exchequer, and committed to the custody of the warden of the Fleet: that, by another writ of *habeas corpus*, in a cause between S. Wilson and C. F. Colling, executors, plaintiffs, and the said Henry Gompertz, defendant, he was, on the 6th of June, again committed to the custody of the marshal, charged with the further debt therein mentioned, and also with the aforesaid contempt. And the affidavit also alleged, that Henry Gompertz was living within the rules in an expensive style, and that the marshal had stated that Henry Gompertz had paid a large sum of money for the benefit of the rules. There were affidavits in reply, negating the charges of expensive living, and stating that the health of Henry Gompertz required the benefit of the rules; but admitting that he had found security to the marshal for a large amount. In these affidavits, two instances were set forth of prisoners in contempt of the Court of Chancery for not appearing and not answering, who had been allowed the benefit of the rules. The rule had been enlarged to Michaelmas term, and subsequently to Hilary and Easter term 1837; the affidavits in answer were filed at different times down to January 1837.

Platt now shewed cause, and objected, that the affidavits were not properly entitled; that they ought to be entitled in some cause.

[The Court appeared to consider that they were not properly entitled, but the objection was not pressed.]

Then, there is no authority for such an application to this Court. The marshal has a discretionary power to allow the benefit of the rules to any person in custody, and the Court will not interfere with the exercise of his discretion. In *Landon Jones's case* (1), and *The King v. Hayes* (2), the marshal had refused to allow the rules, and this Court would not interfere. And, in *Hall v. Arnold* (3),

(1) 2 Stra. 817.

(2) *Ib. cit.*

(3) 1 D. & R. 709; s. c. 1 Law J. Rep. K.B. 187.

where the marshal had allowed a prisoner, in custody for a contempt, to have the benefit of the rules, the Court discharged a rule with costs, which had been moved for to make the marshal pay the debt, as on an escape. Here the affidavits shew that it is necessary, in consequence of the state of the health of Mr. Gompertz, that he should not be confined to the walls of the prison.

Knowles appeared for the marshal, and referred to the Rule M. 28 Car. 2, whereby it is ordered, that the marshal shall not permit any person whatsoever remaining in custody upon any action, or in execution, or for *any contempt whatsoever*, detained within the said prison, or within the liberty of the rules of the said prison, to go out of the prison, or the liberty aforesaid, without a special order of the Court. The marshal was quite ready to obey any order which the Court might make in the present case; but it is to be implied from that rule that the marshal had the power of granting the liberty to persons in custody for contempt.

W. H. Watson and *Elderton*, in support of the rule.—First, the marshal has no power whatever to grant the liberty of the rules to a party charged with a contempt, at least where it is such a contempt as the present—namely, for not answering. The imprisonment is by way of punishment, and not merely a confinement in custody until money be paid. The cases referred to in *Strange* shew, that a person in custody on a criminal charge, is not allowed the benefit of the rules. In the Court of Chancery, where a party is committed for a contempt in non-payment of money, he is simply committed to custody; whereas for a contempt in not answering, it is to close custody, and he is not allowed the rules—*Anonymous* (4). The cases mentioned in the affidavits probably passed without notice. In *Hall v. Arnold*, the application was misconceived, for certainly there was no ground for the motion then made against the Master. If there be a necessity for any special indulgence, the party must apply to the Court, or a Judge at chambers, and obtain an order for it—*The King v. Bennett* (5). Secondly, the

facts disclosed on these affidavits shew, that there has been a great abuse of the privilege, if it exist, which the Court will interpose to prevent. In *Ruthven v. Brown* (6), Best, C. J. said, "If the warden, after notice that a man has been abusing his privilege by going beyond the rules, does not think it right to lock that man up, I for one shall require a strong argument to convince me that it is not a negligent or voluntary escape." They also referred to a case furnished by the officers of the Court, *In re Bryant*, where a rule to deprive a prisoner in custody for a contempt, of the benefit of the rules, was made, on the ground that he was not entitled to them, and to the case of *Goodwin v. Baynes* (7).

LORD DENMAN, C. J.—This case may be placed on a broad and general principle: Whatever indulgence may be permitted to persons in custody for non-payment of money, is not applicable to persons who are to be considered as criminals; and therefore, the only question now is, whether the present party is to be considered as a criminal. The case does not present any doubt to my mind. Where a party is in contempt for not performing something which he has been ordered to do, he is in prison for criminal misconduct on his part. The marshal ought not to grant him any indulgence on his own authority, but if there be any necessity, the application ought to be made to the Court. The case of Sir W. Lewes was very peculiar (8);—he was an unfortunate and ruined man, and probably was not pressed by his creditors. I do not enter into the circumstances of this case, or the kind of abuse which is charged, but I decide it on the general ground, that the party was not in such a situation as authorized the marshal to allow him to have the rules.

LITLEDAL, J.—There is a marked distinction between the cases of persons in contempt for non-payment of money, and for not obeying the order of the Courts. In the former case, the marshal takes his own security, that the party shall not escape from his custody, and that is left entirely

(4) Barn. C.C. 374.

(5) 4 D. & R. 833.

(6) 2 C. & P. 535; s. c. 5 Law J. Rep. C.P. 54.

(7) *Post*, 166.

(8) One of the cases mentioned in the affidavit.

to himself. But contempts of the Court stand upon very different grounds, and the Court must see whether a party is properly let out of the prison. If he has any matter to urge which would warrant his being allowed to live in the rules, that must be submitted to the Court. But the marshal cannot take any security in such a case. I take it, when a person on a criminal charge is remanded, he ought to go within the walls of the prison; and until he receives the judgment of the Court, he ought to be confined within it. The rule of Car. 2. has no application to this case. It relates to the common day-rule, with reference to which, there is no distinction between the walls of the prison, and the rules of it.

PATTESON, J.—I agree that that rule has no application to this case, but is manifestly confined to day-rules. The question is, whether the marshal, of his own authority, in these cases can suffer a party to have the rules, or there must be an application to the Court. It is laid down in *Tidd's Prac.* p. 373, (6th edit.) that benefit of the rules is never granted to a prisoner in execution on a criminal account, or for a contempt. If there be any ground for an extension of the privilege, an application should be made to the Court. *Hall v. Arnold* is open to explanation. It was an application that the marshal should pay the debt, and the Court said they could not exercise that jurisdiction. Wherever a party is in custody for some contempt, which he must purge by some act other than the payment of money, he is a prisoner on a criminal charge.

COLERIDGE, J.—The case resolves itself into a short question, whether the marshal can take upon himself to allow the rules, or whether that is to be done by the Court. It is answered, by considering the nature of the commitment. Sometimes that is merely to insure the payment of money, and the production of the party. In other cases it partakes of the nature of punishment for a criminal charge. Now the marshal cannot take upon himself to remit any part of the punishment. The contempt, in the present case, was the refusal to do an act required to be done by a court of equity.

Rule absolute.

Knowles applied to the Court, to know whether Mr. Gompertz was to be prevented from obtaining day-rules. But the Court said, that the rule of Car. 2. did not apply to such a case as the present, and refused to give any direction upon the subject.

Platt made a special application that Mr. Gompertz might have the rules of the prison.

The Court granted a rule *nisi*, and on the last day of term, after hearing *Watson*, made a rule that he should have leave to reside without the walls for a week.

[1741, June 4.—GOODWIN v. BAYNES.—Prisoner in the Fleet for non-payment of money. Prisoner had been frequently out of the rules out of term time. Ordered by the Lord Chancellor, that he be confined a close prisoner within the walls—*Reg. Lib.* 1740, A. 356.]

1837. } LAW AND ANOTHER v. WILKINS.
May 4. }

Goods sold and delivered—Father and Child—Responsibility.

A father sent his son, aged fourteen, to a school at a distance. Being in want of clothes, the boy ordered a suit at a tailor's in the town, wore them, and took them home in his box. There was no evidence that his father saw them, or knew of the supply, or had given any directions as to the mode by which he was to be supplied:—Held, that there was a case to be submitted to the jury, of an authority in the son to give the order on behalf of his father.

Assumpsit for goods sold and delivered: Plea—Non assumpsit.

At the trial, before Parke, B., at the Summer Assizes for Cambridgeshire, in 1835, it appeared that the action was brought to recover the sum of 3*l.* 11*s.*, for a suit of clothes supplied by the plaintiffs, who were tailors at Cambridge, to the son of the defendant, a lad of fourteen years of age, who had been sent by his father to a school at that town. The boy had ordered the goods himself, which were suitable to his situation, and of which he was in great want. He had worn them while

at school, and took them home in his box, but it did not appear in evidence that the father had ever seen the clothes on his son, or had known of his having had them. On this evidence, the learned Judge was of opinion that the defendant could not be made responsible for these goods, and nonsuited the plaintiffs. In the ensuing Michaelmas term,

Kelly obtained a rule *nisi*, to set aside this nonsuit and for a new trial, against which, cause was now shewn by—

Storks, Serj.—The nonsuit was right. There was no order given by the father, nor any authority sufficient to warrant his son in ordering the clothes on the father's responsibility. It was not shewn that the father had not supplied the boy with proper clothing, or that any communication was made to the father respecting the goods which had been ordered. The father did not know of the supply, and is not shewn to have ever seen the goods.

[*LORD DENMAN, C.J.* referred to *Rolfe v. Abbott* (1).]

As to the case going to the jury, the Judge was not bound to leave the question to them, if he saw no evidence of authority.

Kelly, in support of the rule, was stopped by the Court.

LORD DENMAN, C.J.—I think the learned Judge went farther than any former case. A father is, in law, liable for the things supplied to his child, whom he sends out in a state of destitution. Here there is no evidence of any authority given to any one else to supply the necessary clothing, or that he gave the boy any means of providing for himself. The boy was in want of clothes, and the father ought to have shewn circumstances from which it would have appeared that he had not given him any authority to order the clothes. There was, under all the circumstances of the case, evidence to go to the jury, of an authority given to the boy to order these clothes.

PATTESON, J.—There is certainly some evidence in this case, though it is not very strong. The boy having had the clothes, took them home in his box.

COLERIDGE, J.—The question is, whether there is not something from which the jury might imply an authority in the boy from
(1) 6 Car. & Pay. 286.

the father, to order his own clothes. We are desired to suppose that the boy, when he took them home, kept them locked up in his box. There is evidence from which we can presume that the father did see them.

Rule absolute (2).

1837. } *DOE dem. JAMES THOMPSON v.*
May 4. } *SUSANNAH THOMPSON.*

Ejectment—Tenancy at Will—3 & 4 Will. 4. c. 27.

Where a party had held possession of land, without payment of rent or any acknowledgment for twenty years, but not adversely to the real owner,—Held, that his heir-at-law could not within five years after the passing of the 3 & 4 Will. 4. c. 27. maintain an ejectment against the widow, who continued to occupy after the death of the tenant at will.

The facts of this case have been stated in the report of *Doe dem. Burgess and another v. Thompson*, ante, p. 57, except that this was an action brought by the heir-at-law against his mother, to recover part of the premises which had belonged to his grandfather, William Thompson, and that was brought by the devisees of William against his grandson James, the present lessor of the plaintiff. The same question was raised in this case, which, indeed, was tried first, having been tried at the Cambridgeshire Summer Assizes, in 1835, before Parke, B., when the jury found that James Thompson, the father of the lessor of the plaintiff, had occupied the land in question, without payment of rent, for more than twenty years before his death, but not adversely to his father William, from whom he had obtained the possession. The learned Judge directed the verdict to be entered for the defendant; but gave the plaintiff leave to enter a verdict for him, if the Court thought him entitled under the 3 & 4 Will. 4. c. 27. s. 7. In the ensuing term,—

B. Andrews obtained a rule accordingly; against which—

(2) See *Baker v. Keen*, 2 Stark. N.P.C. 501; *Blackburne v. Mackey*, 1 Car. & Pay. 1; and *Fluck v. Tollemache*, *ibid.* 5.

Kelly (with whom was *Byles*) now shewed cause.—It is unnecessary to consider the meaning or effect of the 3 & 4 Will. 4. c. 27, because section 15 prevents the application of the statute to this case.

B. Andrews and *Gunning*, in support of the rule.—The facts were these:—In 1807, William gave the possession to his son James, who remained in possession until 1831, when he died, having had possession of the land for more than twenty years. Upon his death, the present defendant, who is his widow, entered, and the heir-at-law of James brings this ejectment. He stands in the same situation as his father would have done, and he had by the second section acquired an indefeasible estate against all the world except his father, who might, under the proviso contained in the fifteenth section, have recovered the possession. But it is not competent for the defendant, who does not come in under the grandfather, to set up his right.

[*COLERIDGE, J.*—Why may she not shew a right of entry in another person? In the ordinary case, where the right of a third person is set up by way of defence, as in the case of a term of years, it is a right of entry which is set up.]

The argument is, that the lessor of the plaintiff has acquired an estate defeasible only upon the real owner coming forward and setting up his claim. Therefore, as the present plaintiff shews a title by a twenty years' possession of his ancestor, which is rendered a valid title by the new statute, he ought to succeed against this defendant.

LORD DENMAN, C.J.—The monstrous consequences which would follow, clearly shew that this construction cannot be given to the statute. If it were correct, in every case where any person has had a possession for twenty years, without an adverse holding, his heir-at-law may come forward and turn out the party in possession, who may, nevertheless, have made out a good title.

LITLEDALE, J.—The statute is intended to apply to all tenancies existing at the time when it was passed. According to the argument now urged, whenever it could be found that there had been a holding for twenty years, a party might

come and make his claim after any lapse of time.

PATTESON, J.—It would have been quite a different thing if the lessor of the plaintiff had remained in possession for twenty years. Then, the second section would have been applicable, and the owner must have brought in aid the 15th section to support his case. Here, the lessor of the plaintiff must make out his own title, and must establish, that though after the time of the possession had elapsed, the estate had been determined, and given up to his grandfather, yet the twenty years' possession by his father was sufficient for him. That he cannot do.

COLERIDGE, J. concurred.

Rule discharged.

1837. } THE EMPEROR OF BRAZIL v.
May 8. } ROBINSON.

Practice.—*Security for Costs.*

A foreign sovereign residing abroad must find security for costs.

This was an action on a charter-party, brought in the name of the Emperor of Brazil, who resides in South America.

Watson had obtained a rule nisi for security for costs; against which—

Martin now shewed cause.—In *The Duke de Montellano v. Christin* (1), the Court said, that out of respect for his sovereign, they would not require a foreign ambassador to find security for costs. So here, the Court will not presume that a foreign monarch will not pay the costs of the action if he fail.

Per Curiam.—He is residing abroad, and cannot be distinguished from any other suitor. In that case, the ambassador was residing in England. The plaintiff must give security.

Rule absolute (2).

(1) 5 Mau. & Selw. 503.

(2) See as to the liabilities of a foreign sovereign suing in the courts of this country, *The King of Spain v. Hullett*, 7 Bligh, N.S. 359, s. c. 1 Clark. & Fin. 333, and *Glyn v. Soares*, 5 Law J. Rep. (N.S.) Exch. Eq. 49.

1837. } JONES v. LITLEDALE AND
April 19. } OTHERS.

Principal and Agent—Contract.

Where brokers sold goods by auction, and being under advances to their principal, gave an invoice in their own name, and received the price:—Held, that they were concluded by their invoice, and were not at liberty to set up that they only sold as brokers, and that the buyer knew, or had the means of knowing, that they did not sell as principals.

Assumpsit for a breach of contract, in not delivering a quantity of hemp, purchased by the plaintiff of the defendants, and also for money had and received to the plaintiff's use.

Plea—to the first count, non assumpsit; and, as to the second count, a tender of 52*l.*, which was admitted by the replication.

At the trial, before Patteson, J., at the last Liverpool Assizes, the plaintiff produced an invoice, signed by the defendants' clerk, and stating that he had bought sixty-four boles of hemp, of J. and H. Littledale, for 155*l.* 14*s.* 11*d.*, payment in fourteen days and six months; received on account 100*l.*, October 31. This money was paid by the plaintiff, and on the 26th of November, he also paid 52*l.*, the residue, and demanded a delivery order. The defendants' clerk gave him an order upon Messrs. Coupland & Duncan, in whose warehouse the hemp was lying. The order was presented on the same day, but they refused to deliver the hemp. The defendants were then applied to, and promised to procure the delivery; but never did so. The hemp was sold at a public auction, and the defendants' counsel opened, that he was prepared to prove, that the hemp, in point of fact, belonged to Coupland & Duncan; that the sale had been publicly advertised in two newspapers circulating in Liverpool, where the plaintiff lived; and it was there stated, that Messrs. D. & C. were the merchants, and that the catalogue of the sale contained a notice, that the defendants were only selling for the merchant, whose name was not mentioned;—that the defendants were under advances to Messrs. C. & D., in respect of this

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hemp, and were accustomed under such circumstances to make the invoices in their own name, to secure the repayment of their advances.

A fiat issued against Messrs. C. & D., on the 25th of November. The learned Judge was of opinion, that these facts afforded no defence to the action, and directed a verdict for the plaintiff. On a former day in this term,—

Cresswell moved for a new trial, on the ground of a misdirection. If the plaintiff knew that the defendants were only selling as brokers for a third party, who was or ought to have been known to him, he cannot sue the defendants. The facts offered by the defendants were such as to have warranted the jury in drawing the inference, that the plaintiff had such a knowledge. Then the invoice is immaterial, and parol evidence is admissible to shew who is really the party contracting.

[PATTESON, J.—It may be admissible to charge the real person. Is there any case where it has been admitted to exonerate a party?]

In *Moore v. Clementson* (1), an invoice was given in the broker's name; but Lord Ellenborough treated it as an unimportant fact. The real question is, with whom was the contract made? The defendants admit, that the 52*l.* which was paid to them after the bankruptcy, cannot be retained; but as to the 100*l.*, they received it in the character of agents for Messrs. C. & D., and it was a payment to them, which would give the plaintiff a right to prove under the fiat.

[PATTESON, J.—What necessity was there for the delivery order from the defendants?]

To shew that the payment had been made.

[COLERIDGE, J.—If the plaintiff had paid Messrs. C. & D., could he have obtained the goods?]

Certainly not, after the invoice—*Warner v. M'Kay* (2).

[PATTESON, J.—The invoice should have been, "Bought of Messrs. C. & D., payment to be made to us."]

Cur. adv. vult.

(1) 2 Campb. 24.

(2) 1 Mee. & W. 591; s. c. 5 Law J. Rep. (N.S.) Exch. 276.

And now the judgment of the Court was delivered by—

LORD DENMAN, C.J. [who, having stated the facts of the case and the grounds of the motion, continued] — There is no doubt that evidence is admissible on behalf of one of the contracting parties, to shew that the other was agent only, though contracting in his own name, and so to fix the real principal; but it is clear, that if the agent contracts in such a form as to make himself personally responsible, he cannot afterwards, whether his principals were or were not known at the time of the contract, relieve himself from that responsibility. In this case, there is no contract signed by the sellers, so as to satisfy the Statute of Frauds, until the invoice, by which the defendants represent themselves to be sellers; and we think, that they are conclusively bound by that representation. Their object in so representing was, as appeared by the evidence of custom, to secure the passing of the money through their hands, and to prevent its being paid to their principals; but, in so doing, they have made themselves responsible; and, we think it impossible to read the invoice in the sense proposed.

Rule refused.

1837. } THE KING v. THE INHABITANTS
April 26. } OF KIMBOLTON.

Poor—Statement of Grounds of Appeal—Adjournment.

An appeal against an order of removal having been entered, it was objected that the statement of the grounds of appeal had not been duly served according to 4 & 5 Will. 4. c. 76. s. 81: the Sessions decided that the objection was valid, and adjourned the appeal:—Held, that they had power to do so.

A statement of the grounds of appeal must be served upon the overseers: if delivered to their attorney, the service is insufficient.

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 90.]

1837. } RANSFORD, ONE OF THE PUBLIC
May 5. } OFFICERS OF THE LEAMINGTON
TON BANK, v. COPELAND.

Banker—Pleading—Evidence.

In an action of assumpsit by one of the public officers of a banking company, on a bill of exchange, the defendant pleaded that the company consisted of more than six persons, and that they were illegally associated together, and carried on trade for the purpose of borrowing and taking up money on their bills or notes, payable on demand, during the continuance of the privilege granted by 3 & 4 Will. 4, to the Governor and Company of the Bank of England; and the replication traversed that they were illegally associated, or carried on trade modo et forma:—Held, that the allegation that the company was illegally associated, was a mixed allegation of law and fact, and, therefore, that the Judge was right in requiring the defendant to prove that the company carried on business within sixty-five miles from London.

Assumpsit by the plaintiff, one of the public officers of the Leamington Bank, on a bill of exchange, drawn by one J. Manning, upon the defendant, for 100l., payable three months after date, and accepted by him.

Plea—That the said persons so united in co-partnership, carrying on the trade or business of bankers, in England, were and consisted of more than six persons, to wit, &c., and that they were illegally associated together, and carried on the trade or business aforesaid, with the view and for the purpose of borrowing and taking up in England sums of money on their bills or notes, payable on demand, or at a less time than six months from the borrowing thereof, during the continuance of the privilege granted by the 3 & 4 Will. 4, to the Governor and Company of the Bank of England. Verification.

Replication—That the said persons united in co-partnership were not illegally associated together, nor did they carry on the said trade with the view or for the purpose in the plea mentioned, modo et forma.

At the trial, before the Lord Chief Baron, at the last Warwick Assizes, it was admitted, that the company consisted of more

than six members, and that they were bankers, and that they drew and accepted bills for money advanced to them; but his Lordship required the defendant to go farther, and prove that they carried on business within sixty-five miles from London; and, as he was not prepared to do so, directed a verdict to be entered for the plaintiff, giving the defendant leave to move to enter a verdict for him, if the Court should think that this fact was not in issue on these pleadings.

On a former day in this term,—

Hayes moved accordingly.—It may be admitted that the plea is bad, because it is not alleged, that the business was carried on within sixty-five miles from London, and the plaintiff may be entitled to judgment *non obstante veredicto*; but as there was no averment of that fact in the plea, it was not incumbent upon the defendant to prove the fact, and he was entitled to a verdict on this plea. It was said, that the word “illegally” being in the plea, rendered it necessary for the defendant to prove all that constituted the illegality; but that word does not enlarge the plea beyond the actual averments.

[*LITTLEDALE, J.*—You contend that it is not more than the words “wrongfully and injuriously,” in a declaration.]

Certainly. It is nothing more than *contra formam statuti*, which does not enlarge the plea.

[*PATTESON, J.*—It is customary to allege a want of reasonable and probable cause. It is not necessary to state the facts, but only the legal inference.]

Cur. adv. vult.

The judgment of the Court was now delivered by—

LORD DENMAN, C.J.—This was an action on a bill of exchange, brought in the name of one of the public officers of a banking company, under the 7 Geo. 4. c. 46. The defendant pleaded that the company consisted of more than six persons;—that they were illegally associated together, and carried on trade for the purpose of borrowing and taking up money on their notes, payable on demand, during the continuance of the privilege granted by the 3 & 4 Will. 4, to the Governor and Company of the Bank of England. The

replication traversed that they were illegally associated, or carried on trade *modo et forma*. At the trial, the defendant proved, that the company did take up money on their notes, payable on demand, and insisted that such proof entitled him to a verdict, inasmuch as the illegality of the association was not put in issue by the replication, being matter of law, which is not traversable. The learned Judge held, that it was incumbent on the defendant to go further, and prove the trading within sixty-five miles of London, (in order to shew the illegality of the association,) and for want of such evidence, directed a verdict for the plaintiff. It is now admitted, that the plea is bad, but contended, as at the trial, that it was proved in fact. The question is, whether the allegation in the plea, that the company was illegally associated, is an allegation of a mere result of law, or of law and fact mixed. The distinction is obvious, and all the authorities (most of which are referred to in *Lucas v. Nockells*) (1), turn upon it. We are clearly of opinion, that the allegation in this case is one compounded of law and fact, and, therefore, traversable. The plea does not state certain facts, and then go on to allege, whereby the association was illegal, or any words to that effect; but contains a distinct and separate allegation, “that the said association was illegal within the statute 3 & 4 Will. 4. c. 96.” It is plain, that if it were so illegal, that illegality must arise from some fact, or the absence of some fact, either of which required to be established by proof, and such proof is necessarily matter for the consideration of a jury. We think, that the learned Judge was quite right in requiring such proof, and that the verdict must stand.

Rule refused.

1837. }
May 5. } THE KING v. DAVID WARWICK.

Indictment—Disorderly House.

The indictment charged that the defendant kept a disorderly house, and in the said house, for his own lucre, caused to be brought

(1) 4 Bing. 729; 2 Y. & J. 304; 10 Bing. 157.

together divers idle, dissolute, depraved, and bad persons, to be and remain in his house dancing, drinking, tippling, making great noises and disturbances, and behaving themselves ad commune nocumentum:—Held, after verdict, to be a good indictment.

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 96.]

1837. }
May 5. } THE KING v. RICKETTS.

Contempt—Writs De Contumace Capiendo—Defective Significavit.

A writ de contumace capiendo was directed to the sheriff of Herefordshire, and commanded him to take T. B. R. of P, in the county of Radnor:—Held, to be bad.

One of those writs recited a significavit by two delegates appointed under a commission, of a contempt in disobeying a monition issued by three delegates, and was held to be bad, on the ground that the two could not signify the contempt.

The following writ had issued to the sheriff of Herefordshire:—

“Herefordshire.

“Our Lord the King hath sent to the sheriff of Herefordshire his writ, closed in these words, that is to say, William IV. &c. To the sheriff of Herefordshire, greeting. Sir J. Nicholl, knt., L.L.D., Official Principal of the Arches Court of Canterbury, lawfully constituted, hath signified to us, that one T. B. R, esq., of the parish of Presteign, in the county of Radnor, is manifestly contumacious, and contemns the jurisdiction and authority of the law and jurisdiction ecclesiastical, in not obeying the lawful commands of the said Sir J. N, knt., the Judge of the said court lawfully authorized, contained in a certain monition duly issued under the seal of the said Arches Court of Canterbury, bearing date the 7th of June 1833, and which was personally served upon the said T. B. R, on the 15th of July following, and returned into the said court, with a certificate of the due execution thereof, and an affidavit as to the truth of such certificate, whereby the said T. B. R. was monished peremp-

torily and personally to pay, or cause to be paid to J. B, &c. or to their proctor, the sum of 55*l.* 15*s.* 4*d.*, at which sum the costs incurred in the said Arches Court, on the part and behalf of the said J. B, &c. were taxed and moderated, together with the expense of the said monition, on a day and hour long since passed, under pain of the law and contempt thereof, and which said monition issued in a certain cause or business of appeal and complaint of nullity, lately depending before the said Sir J. N, the Judge aforesaid, between the said T. B. R, the party appellant and complainant, and the said J. B, &c., the parties appellate and complained of in the said cause, on the other part, and which, in the first instance thereof, was a cause of subtraction of church-rate or church-rates, promoted and brought by the said J. B, &c. against the said T. B. R, in the Episcopal and Consistory Court of Hereford, nor will he submit to the ecclesiastical jurisdiction; but, forasmuch as the royal power ought not to be wanting to enforce such jurisdiction, we command you, that you attach the said T. B. R, by his body, until he shall have made satisfaction for the said contempt, and how you shall execute this, our precept, notify unto us on the 9th day of June next, wheresoever, &c. Witness, &c., Bentall. And, be it known, that the said writ, on Monday the 9th of May, in the same term, before our said Lord the King, at Westminster, was delivered of record to the sheriff of Herefordshire, to be executed in due form of law.”

Another writ had also issued against the same defendant in the following form:—

“Herefordshire.

“Our Lord the King hath sent to the sheriff of Herefordshire his writ, &c. William IV. &c. to the sheriff of Herefordshire, greeting. John Daubeny and Thomas Blake respectively Doctors of Laws, Judges, amongst others, delegate respectively appointed under a certain commission under the Great Seal of Great Britain, bearing date the 2nd of June 1832, have signified to us that one T. B. R, of the parish of Presteign, in your county of Hereford, esq., is manifestly contumacious, and contemns the jurisdiction and authority of the law and jurisdiction ecclesiastical, in not obeying the lawful commands (to

pay, or cause to be paid, to John Bodenham, R. L, J. A. P, and W. H, or to their proctor, the sum of 213*l.* 16*s.*, being the amount of costs on their behalf duly taxed, pursuant to a monition duly issued under seal of our High Court of Delegates, and duly and personally served on him, and returned to our said High Court of Delegates, with certificate and affidavit of the execution thereof,) of the said John Daubeney, and of Joseph Phillimore, and of the said Thomas Blake, Doctors of Laws, Judges delegate, amongst others, respectively appointed under the said commission, and lawfully authorized, by not paying or causing to be paid to the said John Bodenham, &c., or to their proctor, the said sum of 213*l.* 16*s.*, according to the tenor of the said monition, on a day and hour now long past, in a certain cause, or business of appeal, and complaint of nullity from the Arches Court of Canterbury, promoted and brought by the said T. B. R., the party appellant and complainant, on the one part, and the said John Bodenham, &c., the parties appellate and complained of, on the other part, and which was originally and in the first instance a certain cause of subtraction of church-rates, depending in the Consistorial Court of Hereford, promoted and brought by the said John Bodenham, &c., churchwardens of the said parish of Presteign, in the counties of Radnor and Hereford, diocese of Hereford, and province of Canterbury, against the said T. B. R., a parishioner and inhabitant of the said parish. Nor will he submit to the ecclesiastical jurisdiction. But, forasmuch as, &c. We command you," &c.

Rules *nisi* had been obtained for quashing both these writs, against which—

The Attorney General shewed cause.—The objections taken to the writ *de contumace capiendo*, are these three. First, that it is directed to the sheriff of the wrong county, because the sheriff of Herefordshire is directed to take T. B. R., of the parish of Presteign, in Radnorshire. Secondly, that Sir John Nichol is improperly described as Official Principal of the Arches Court of Canterbury, whereas, he was the Judge of the Court of the Archbishop. Thirdly, it is said that jurisdiction is not shewn on the writ, because it is not alleged that the suit was for a church-rate amount-

ing to more than 10*l.*, or that the legality of the rate was in dispute. First, the writ is according to the form given by the 53 Geo. 3. c. 127, at least there is no material variance. Secondly, the description of the Judge is accurate, (reference was made to *Burn's Ec. Law*, 'Arches'; 1 *Hag. Ec. Rep.* p. 48; 3 *Black. Com.* ch. 5, and ultimately this objection was abandoned). Thirdly, it is not necessary to set out in the writ, what was the nature and object of the suit in the Ecclesiastical Court. That is not in the form given in the schedule, and the Court will not assume that there was any want of jurisdiction in the Judge who issued this writ.

Sir F. Pollock and *J. W. Smith*, *contra*.—This writ omits the important words in the form, *in your county*, which words alone compel the sheriff to arrest within his own county. Evidently, the legislature intended that they should be inserted, because there is not the ordinary provision, *if he be found within your bailiwick*, which exists in other writs. It never could be meant that the sheriff might arrest a party not in his own county. That these forms are to be strictly pursued, has been determined by the Courts in various instances. See *Davison v. Gill* (1), *The King v. the Justices of Middlesex* (2), and *The King v. the Inhabitants of Milverton* (3), on the Highway Act. *Hennah v. Whyman* (4), on the Uniformity of Process Act. Here, the word in the schedule, *of*, is not the mere description of the person, but it signifies his residence—*Yardley v. Jones* (5), and *Rolfe v. Swann* (6). Then the writ is also bad, for not shewing that the Ecclesiastical Court had jurisdiction over this suit. It is now to be considered, that the Ecclesiastical Court have no jurisdiction in cases of church-rates under 10*l.*, where there is no dispute as to the legality of the rate; therefore, it was incumbent upon the Judge who issued this writ, to shew

(1) 1 East, 64.

(2) 1 Nev. & P. 92; s. c. 6 Law J. Rep. (N.S.) M.C. 10.

(3) 1 Nev. & P. 179; s. c. 6 Law J. Rep. (N.S.) M.C. 73.

(4) 3 Dowl. P.C. 673; s. c. 2 Cr. M. & R. 239; 4 Law J. Rep. (N.S.) Exch. 200.

(5) 4 Dowl. P.C. 43.

(6) 1 Mee. & Wel. 305; s. c. 5 Law J. Rep. (N.S.) Exch. 168.

that there was a jurisdiction, he being the Judge of an inferior jurisdiction. See *Regina v. Hill* (7), *Com. Dig.* 'Excommenagement,' (B), 4.

The objections taken to the second writ were these. First, that it did not follow the form given in the schedule to the 53 Geo. 3. c. 127. Secondly, that it was not shewn that the Court had jurisdiction, the amount of the church-rate not being stated. Thirdly, that it did not appear that Dr. Daubeney and Dr. Blake alone had power to issue the *significavit*. Fourthly, that the Court was not properly described as the Arches Court.

The Attorney General, against the rule, contended that the writ was sufficient in form, and that as it was granted by a court of appeal, it was not necessary to shew any jurisdiction in the original court. On the third objection, he referred to the 53 Geo. 3. c. 127. s. 1, which enacts, "That it shall be lawful for the Judges or Judge who issued out the citation, or whose lawful orders or decrees have not been obeyed, or before whom such contempt, in the face of the Court, shall have been committed, to pronounce such person contumacious and in contempt, and within ten days to signify the same, in the form in the act annexed, to his Majesty in Chancery." Now it appears that a commission issued to Dr. Blake and Dr. Daubeney, and it is incumbent upon the other party to shew that they were not authorized to issue the monition, and to signify the contempt. In *The King v. Blake* (8), where this objection was taken, it was shewn by affidavits that there was a quorum clause in the commission. There is nothing on the face of this writ, to shew that the two doctors who issued the *significavit* were not a quorum. The statute 25 Hen. 8. c. 19. s. 4. does not require any particular number of commissioners to be mentioned in the commission.

Sir F. Pollock and J. W. Smith.—It was necessary for the writ to shew an original jurisdiction, otherwise it is void, and the Court cannot aid it by any presumption or intendment—*Wickes v. Clutterbuck* (9).

Indeed, no presumption can make this writ good. *The King v. Dugger* (10) is precisely in point, to shew that it is immaterial that this is a case of appeal, and the form in the schedule shews that the nature of the suit must be stated in the writ. Then there is nothing to warrant the issuing of the *significavit* by the two Judges alone. It appears that the commission was issued to several; they did not constitute either a common law or a statutory court, and, therefore, *prima facie* all were bound to act, and consequently it should have appeared affirmatively on the writ, that the two were warranted in acting alone.

Cur. adv. vult.

The judgment of the Court was now delivered by—

LORD DENMAN, C.J.—This case came before the Court on a writ *de contumacia capiendo*; and as we are of opinion that one of the objections taken to it is fatal, it is not necessary for us to notice the others. The writ is directed to the sheriff of Herefordshire, and it recites that Mr. Ricketts, of Presteign, in the county of Radnor, is contumacious, and commands the sheriff to attach him by his body. The form of the writ given in the schedule to the statute 53 Geo. 3. c. 127, is directed to be this:—"George, &c. to the sheriff of , greeting. The hath signified to us that of in your county, is manifestly contumacious, and contemns the jurisdiction and authority of, [here, the non-appearance, disobedience, together with the command disobeyed, or the contempt in the face of court, are to be fully stated,] nor will he submit to the ecclesiastical jurisdiction; but, inasmuch as the royal authority ought not to be wanting to enforce such jurisdiction, we command you that you attach the said by his body, until he shall have made satisfaction for the said contempt." Mr. Ricketts has been pronounced contumacious, and it is contended that the statute intends the writ should be directed to the sheriff of the county in which the party resides, and is described to be by the *significavit*. In the present case, the writ was directed to the sheriff of Herefordshire, instead of to the

(7) Salk. 294.

(8) 2 B. & Ad. 139; s. c. 9 Law J. Rep. K.B. 142.

(9) 2 Bing. 483; s. c. 3 Law J. Rep. C.P. 67.

(10) 5 B. & Ald. 791.

sheriff of Radnorshire. It is the more necessary that the form should be adhered to, because, neither in the schedule nor in the writ, are the words, "if found in your county," but there are only these, namely, "in your county." On these grounds, we think the writ must be

Quashed.

There is also another case of Ricketts, which comes before the Court under a writ issued out of the High Court of Chancery, at the instance of the Court of Delegates. The first objection taken to it is, that the form of the schedule, just referred to, in the statute 53 Geo. 3, has not been properly followed. And the next objection is, that the *significavit* has been issued by two Judges, when, in fact, three are included in the commission; and that objection, we think, is clearly fatal. The statute enacts—[Here his Lordship read the clause.] It is clear, therefore, that all the Judges whose orders have been disobeyed, must certify. Such has not been the case here, and it would be difficult to say that such a course should prevail, contrary to the words of the statute. Under these circumstances, we are of opinion that this writ must also be

Quashed.

1837. }
May 6. } TEBBUTT v. SELBY.

Pleading—Declaration in Case—Arrest of Judgment.

A declaration in case stated, that the plaintiff was possessed of apartments in a house, and had the liberty and privilege of taking water from a cistern, and of using a dusthole; and alleged by way of breach, that the defendant intending to deprive him of the use of the cistern and dusthole, fastened up a door and doorway in the house, leading to the said cistern and dusthole, and thereby prevented the plaintiff from having access to them, and prevented the plaintiff from taking water from the cistern, and from using the dusthole. Plea—traversing the right to the use of the cistern and dusthole:—Held, after verdict, that the declaration was bad, as there was no averment of a right to go through the door and doorway, or that it was the only mode of access to the cistern and dusthole.

Case. The declaration stated, that the plaintiff before, &c., was possessed of certain apartments in a dwelling-house, situate &c., in which apartments he dwelt with his family, and ought to have had, and still of right ought to have, for himself and his family, dwelling in the said apartments, at all seasonable times, the liberty and privilege of taking water from and out of a cistern, situate and being in the said dwelling-house, and the use, benefit, and enjoyment of such cistern, and also the privilege of using a certain dusthole, situate in the dwelling-house, for the purpose of throwing and depositing therein such ashes, dust, and dirt, as might be made and accumulated in the said apartments; yet the defendant, intending to deprive the plaintiff of the use, benefit, and enjoyment of the said cistern and dusthole respectively, wrongfully locked and fastened, and caused and procured to be locked and fastened up a certain door and doorway, situate and being in the said dwelling-house, and leading to the said cistern and dusthole respectively, and thereby hindered and prevented the plaintiff and his family from having access to the said cistern and dusthole respectively, and prevented the plaintiff and his family from taking any water from the said cistern, and wholly excluded them from the use of the cistern, and also the privilege of using the dusthole.

The defendant, in his pleas, traversed the right to the use of the cistern and of the dusthole; and at the sittings after last Michaelmas term, the plaintiff recovered a verdict on both issues, with 40s. damages. In last term,—

Peacock, in the bail court, before Patterson, J., obtained a rule nisi to arrest the judgment; against which—

The Attorney General and *Jervis* shewed cause.—The objection to the count is, that it does not state the plaintiff's right to the way, which is alleged to have been obstructed. But the action is not brought for the disturbance of the way; it is for the disturbance of the use of the cistern and dusthole; and it is merely stated, that the plaintiff was disturbed therein, by the defendant's having stopped up the doorway. There is no traverse of the obstruction which might have been; but the right is denied—namely, the right to the use of the

dusthole and cistern. After verdict, the Court will support this declaration.

Peacock, contra.—The plaintiff has not complained of being disturbed in the use of the dusthole and cistern; but says, that the defendant locked up the doorway, and thereby prevented him from using the cistern; so that the real grievance stated in the declaration is, the locking up of the doorway. No right is shewn in the plaintiff to that doorway, or right of passage. It is like a claim of a right of common, where, if the party complains that a gate is locked up on the road leading to the common, he ought to state that his road was obstructed, and set out his right to that road. He cannot complain of a disturbance of his right of common by the obstruction of the road. It would not have been necessary for the plaintiff, indeed, to set out a title to the way—*Com. Dig. 'Pleader,'* (C, 39), *St. John v. Moody* (1), 1 *Wms. Saund.* 346, n. 2; but still he must allege that he had a right to the way—*Blyth v. Topham* (2). This is not a case where there was a right of necessity; because it is not shewn that there was no other mode of getting to the dusthole and cistern. See the notes to *Pomfret v. Ricroft* (3), and *Ballard v. Harrison* (4). Then this defect in the declaration is not cured by pleading over. It is not an accurate statement of the plaintiff's right, to which the statutes of Jeofails apply.

[PATTERSON, J.—Is that quite clear? See *Corbyson v. Pearson* (5).]

There, there was an informal statement of the right of common. Here, the gist of the action is the blocking up of the door; but it is quite consistent with this declaration, that there was another way to the dusthole and cistern, and no right through this door.

[PATTERSON, J.—In *Corbyson v. Pearson*, the right was stated properly; but there was not a proper averment of the mode of disturbance.]

Lastly, this defect is not cured by the verdict, because there is no issue upon this part of the declaration.

LORD DENMAN, C.J.—We cannot adopt the doctrine, that after verdict, everything is to be considered as perfect; but the question is, whether this declaration would have been good on general demurrer. Supposing that the plaintiff had stated in general terms, that the defendant had obstructed him in the enjoyment of the use of the cistern, it would have been good after verdict. But, instead of relying upon general terms, the plaintiff has stated the mode in which the obstruction took place—namely, by the defendant's fastening up the door and doorway. In that statement, he makes that to be his grievance. It is quite consistent with the declaration, that the defendant may have prevented him from going through a door where he had no right to pass to use this cistern. I thought that necessarily he could not use the cistern without going over this part of the premises; but, to shew that he has been wrongfully prevented from using it by the stopping up of this door, he ought to have alleged that he had a right to go through it.

LITLEDAL, J.—If there had been an issue on the obstruction, the declaration would have been good after verdict; but there has not been an issue on it; and, therefore, it is not cured by the verdict. The defendant, by pleading over, has only admitted it, in like manner as where there is judgment by default; and the objection is now open. It is said, that the words "thereby prevented the plaintiff from having access to the dusthole," are sufficient to charge an obstruction of the right. But that is not the charging of an obstruction, it is the statement of the mode by which the injury was carried into effect. It does not necessarily follow, that the plaintiff had any right to go through the door; and the proper mode of shewing, that the fastening of the door was a wrongful act, was, by stating that the plaintiff had a right to pass through it.

PATTERSON, J.—I thought at first that there was nothing in the objection, though it was very ingenious. I now think, that the defendant is right. There is a claim of a right to use the cistern, without stating how it is to be got at, or any right of way to it. It is very like the case of the right of common, in which a party complains of

- (1) 1 Vent. 275.
- (2) Cro. Jac. 138.
- (3) 1 Wms. Saund. 322.
- (4) 3 Mau. & Selw. 387.
- (5) Cro. Eliz. 458.

his right being obstructed by the locking up of a gate. It does not follow, that that is a wrongful act. The obstruction ought to be in that matter, in respect of which the right is claimed. If it had been charged, that the defendant had prevented the plaintiff from taking the water from the cistern, the declaration would have been good on general demurrer. It is much otherwise when the mode is stated in the declaration to be the blocking up of the door and doorway. Supposing, however, that this is an informal mode of complaining of the obstruction of the way, the declaration is, nevertheless, defective, for not averring a right to the way. There ought to have been an averment of a right of way to go to the cistern. This is not to be considered as a case cured after verdict, because there has been no issue on it. It struck me, that this declaration might be supported on general demurrer, by taking the words "leading to the cistern and dusthole," as involving an assertion, that it was the proper way to both; and then it would amount to an informal assertion of a right to the water of the cistern. But they are not in that part of the declaration where the right is claimed, and only in the statement of the grievance; so that the plaintiff may have a right to the water, but not a right to go this way to it. To hold that it means that the party had a right to go that way, and that there was no other way to go, would be to adopt a very forced construction. The declaration only means that the plaintiff was prevented from going that way.

Judgment arrested.

1837. }
May 1. } SAXON V. CASTLE AND OTHERS.

Malicious Arrest—Declaration—Averment of Malice.

In an action on the case against a creditor for arresting on a ca. sa., to an excessive amount, and contrary to the terms contained in the defeasance to a warrant of attorney, the want of an averment of malice is fatal after verdict.

NEW SERIES, VI.—K.B.

Case. The declaration stated, that an action of assumpsit was pending in the Sheriff's Court, in London, at the suit of the defendants, George Castle the elder, and George Castle the younger, against the plaintiff; and it was agreed, that to settle and put an end to the same, the plaintiff should execute a warrant of attorney to confess a judgment in the Court of King's Bench, at the suit of George Castle the elder and George Castle the younger, upon certain terms; and it was alleged, that the plaintiff did execute the warrant of attorney, on which a memorandum was indorsed, declaring, that it was given to secure the payment of 18*l.*, together with the costs of the said action, commenced in the Sheriff's Court, afterwards removed into the Court of King's Bench, and sent back to the Sheriff's Court, to be taxed by one of the Masters of the Court of King's Bench, as between attorney and client. And it was declared, that the sum of 18*l.* was to be paid by different instalments, and the costs within four days after the Master should have taxed the same; and that, if default should be made in payment of either or any of the sums, at the days mentioned, judgment was to be entered up, and execution to issue for the whole, or any part of such sums as should be then due and unpaid.

Averment, that though only 12*l.* remained due and unpaid, and the costs had not been taxed, the defendants, disregarding the terms in the memorandum expressed and contained, and their duty in that behalf, and intending to cause the plaintiff to be imprisoned for a larger sum than was due according to the tenor of the memorandum, and to injure the said plaintiff, on the 6th of February 1834, wrongfully and injuriously sued out a writ of *ca. sa.*, under colour of a pretended judgment, indorsed to levy 62*l.* 12*s.*, and 10*s.* 6*d.* for the writ, &c., the same being a much greater amount than was then due to the said George Castle the elder and George Castle the younger, and wrongfully and injuriously delivered the said writ to the sheriffs of London, who arrested the plaintiff thereon.

Pleas—First, not guilty;—second, that the sum of 18*l.* was due, and the costs

2 A

had been taxed by the Master at 44*l.* 12*s.*, making, with the sum of 12*l.* then due, the sum of 66*l.* 12*s.*, for which the defendants sued out the writ of *ca. sa.*

Replication—*De injuria*.

At the trial, before Lord Denman, C.J., at the London Sittings after Trinity term, 1835, the plaintiff recovered a verdict, damages 20*l.* In the ensuing term,—

Kelly obtained a rule for a new trial, on the ground, that the plea was proved by the evidence, or, if the Court should think otherwise, then in arrest of judgment, on the ground, that the declaration did not aver that the defendants acted maliciously—citing *Scheibel v. Fairbank* (1), and *Mitchell v. Jenkins* (2).

Swann now shewed cause, and relied on *Wentworth v. Bullen* (3), as an authority in support of the declaration. This was an action similar in its circumstances. It does not appear from the report of that case, that there was any averment of malice; and Parke, J. puts the action on the ground of a breach of contract.

Bayley, contra, argued, that the plea was proved; but this point was not of any importance, and the argument and judgment thereon are omitted.—[He was stopped from arguing the point in arrest of judgment.]

LORD DENMAN, C.J.—I should like to have seen some authority, to shew that this action could be maintained without an allegation of malice. It is averred, that the creditor arrested his debtor without legal authority. In the case of *Scheibel v. Fairbank*, a creditor arrested his debtor, who paid the debt, but was, nevertheless, detained in custody; and the Court of Common Pleas held, that there ought to have been an averment of malice, it being the plaintiff's own default that he did not get a proper discharge. Then, in *Gibson v. Chaters* (4), the Court held, that it was necessary to prove actual malice: al-

though it is true, in *Sinclair v. Eldred* (5), Lawrence, J. questioned that case, and observed, that the defendant knew that he had been paid, and, therefore, the action was maintainable. There are many cases which establish, that the mere want of probable cause may be a ground for inferring malice; but there are none where it has been held, that malice need not be averred.

LITLEDAL, J.—With regard to the declaration, the question is, whether there ought to have been an averment of malice. Now, this is not an action of trespass, in which it is not necessary to allege malice. Indeed, it could not have been trespass, because the defendants had a right to sue out a *ca. sa.*, and the complaint is, that they sued it out for too much. The proper remedy is, therefore, an action on the case, for maliciously arresting the plaintiff for more than was due. It may be said, that this is different from the ordinary case of a malicious arrest, because the defendants might be ignorant of some of the facts, whereas, here, as all the documents were on the files of the court, they must be taken to have been cognizant of the whole, and could not have made a mistake. On this ground, there might be no reason why malice should have been alleged. But even though all the documents were before the defendants, and therefore there might be strong evidence of a want of probable cause, and the malice might be easily proved, still it is necessary that malice should be averred.

PATTERSON, J.—If any action were maintainable, it is properly an action on the case for maliciously causing the plaintiff to be arrested for too large an amount. It is said, that there ought to have been evidence of malice in this case; but none is alleged; there is no ground, therefore, for a new trial. But as to the motion in arrest of judgment, I cannot entertain any doubt. There must be malice, either express or implied, or the action cannot be supported, and it must be alleged in the declaration.

COLERIDGE, J.—The action is properly conceived; but inadequately expressed on the record. It is an action for arrest-

(1) 1 Bos. & Pul. 388.

(2) 5 B. & Ad. 588; a. c. 3 Law J. Rep. (N.S.) K.B. 35.

(3) 9 B. & C. 840; a. c. 9 Law J. Rep. K.B. 33.

(4) 2 Bos. & Pul. 129.

(5) 4 Taunt. 9.

ing without reasonable or probable cause, and the existence of malice was a necessary averment.

Rule for arresting the judgment absolute.

[See also *Lewis v. Morris*, 2 Cr. & M. 712; s. c. 4 Law J. Rep. (N.S.) Exch. 264.]

1837. { *DOE dem. CHAWNER, H. W.*
May 1, 2. { *BEAVAN, AND H. P. BEAVAN,*
 v. BOULTER.

Landlord and Tenant—Annuity.

A tenant for life granted a rent-charge upon certain lands, which he subsequently charged with another rent, and then leased for a term of years. The second charge contained a clause of entry in default of payment, and the grantee brought an ejectment upon that clause against the lessee who attorned tenant to him. The first grantee then claimed possession to satisfy arrears of his annuity. By agreement between all parties, the lessee attorned tenant to the time when his arrears were satisfied:—Held, that a yearly tenancy was created between him and the lessee, and the right of the latter under the lease was suspended. Therefore, on receiving a six months' notice to quit, he was bound to give up the possession of the land.

Ejectment for a farm in Radnorshire.

At the trial, before Patteson, J., at the Presteign Assizes, in the summer of 1835, the plaintiff was nonsuited, with liberty to move to enter a verdict for him. The plaintiff proved a case of landlord and tenant, between H. P. Beavan and the defendant, by producing an attornment from the defendant to H. P. B. in 1826, subsequent payments of rent to him, a distress by him, and a determination of the tenancy, by a notice to quit, which had expired before the commencement of the action. The defendant put in a lease for a term yet unexpired, granted by one Theophilus Beavan in 1811, and contended that he only attorned to H. P. B. as the reversioner. The plaintiff in reply, proved that Theophilus B. in 1785, charged the farm in question with a rent-charge, with a power

of entry to trustees, now represented by H. P. B., and in 1795 created another rent-charge to Chawner, by means of a demise and re-demise, demising the land to Chawner at a pepper-corn, and he re-demising it to Beavan at a yearly rent of 55*l.*, with a power of entry(1). It was shewn, that after the lease to the defendant, the latter rent being in arrear, Chawner brought an ejectment in 1823, recovered a judgment against Theophilus B., and having entered into some lands comprised in the demise to him, was about to execute a writ of possession upon the defendant's farm, when the defendant attorned to him, and afterwards paid him the rent according to the amount reserved in the lease, but on different days. An award between Chawner and H. P. B., made in 1826, was given in evidence to explain the attornment to the latter, it having been thereby declared that the rents should be paid, first, in satisfaction of Beavan's charge, and then of Chawner's. The learned Judge was of opinion, that the clause in Chawner's lease to Theophilus Beavan, for re-entry, did not destroy that lease, but only gave a right of entry to satisfy the arrears from time to time; and, therefore, as it was valid at the time of the lease to the defendant, and also at the time of the attornment of the latter to Chawner, Beavan's lease to the defendant was still in force, or if the title was in Chawner, then the defendant continued his tenancy, and there had not been any determination of his tenancy by a notice to quit. In regard to H. P. B.'s claim, the attornment was not an admission of his title, but only amounted to an agreement by the defendant, to pay his rent to him, instead of to Theophilus Beavan. In the ensuing term—

Chillon obtained a rule *nisi*, according to the leave reserved, on the grounds, first, that the clause in Chawner's demise was a clause of forfeiture, and, therefore, by his entry for the arrears, the demise was altogether determined, and the interest of the defendant, his lessee, ceased; and secondly, that after the attornment to H. P. B., the defendant was no longer at liberty to dispute his title to the property.

(1) See as to this mode of creating a rent-charge, *Lumley on Annuities*, p. 69.

J. Evans and *W. M. James* now shewed cause.—The direction was right. The lease to the defendant is still in force. Theophilus Beavan had power to grant it at the time when he executed, for it does not appear that H. P. Beavan had any interest in the land beyond the receipt of the annuity, and Chawner had, at the utmost, only a right to enter when his annuity was in arrear, and to hold until those arrears were satisfied; and when they are satisfied, Theophilus Beavan would have had a right to the land again, and consequently his lessee—*Litt. s. 327*, and *Co. Com.* Therefore, if the ejectment had proceeded, and Chawner had obtained possession under it, he would have held the land for a time only. Instead of doing so, he agrees to take the rent from the defendant, the then lessee. By so doing, he confirmed the lease—*Vin. Abr.* 'Confirmation.' Here, too, the lease was neither void nor voidable, it was only liable to be suspended while Chawner was in possession. But, it is said, that the defendant by his attornment, became tenant to H. P. Beavan in 1826, on a new tenancy. An attornment, however, does not create any new tenancy; it is only an acknowledgment of an existing tenancy, (*Litt. s. 551*), and an assent to recognise a fresh landlord.

[LORD DENMAN, C.J.—An attornment is well defined by Holroyd, J., in *Cornish v. Searell* (2).]

The real effect of that attornment under the circumstances of this case, was a recognition of the direction, according to the award, to pay the rent to H. P. Beavan. He was in the character of a receiver appointed to receive the rents, and pay them over to the parties duly entitled. The defendant never intended to admit himself tenant to him, so as to defeat his lease. Either, therefore, that lease is in existence and prevents the lessors of the plaintiff from recovering, or the defendant was a tenant to Chawner under a new tenancy created by the attornment to him which has not been duly determined.

Sir W. W. Follett, Chillon, and *E. V. Williams*, in support of the rule.—H. P. Beavan was the trustee of the prior annuity, and either he had expressly a right

to enter and hold the land until his arrears were satisfied, as Chawner had; or, at all events, he had a right to enter and distrain for the arrears from time to time, and such a right enabled him to bring ejectment and to grant leases—*Haverhill v. Hare* (3), and *Jemot v. Cooley* (4). His title was prior to that of Chawner. He was authorized, therefore, to enter upon Boulter, and turn him out of possession. Instead, however, of that being done, the attornment took place, which operated as an agreement, creating a new tenancy between the defendant and H. P. Beavan, which was so far beneficial to the defendant, that after it was executed, he could not be turned out of possession by H. P. B. without, at least, six months' notice—*Cooper v. Blandy* (5). After the acknowledgment by the defendant, of H. P. B. as his landlord, he cannot now dispute the title of the person whom he so acknowledged. As to Chawner's title, assuming that a tenancy existed between him and the defendant, that was determined when Chawner, on the award, assented to H. P. B.'s receiving the rents, or the defendant has disclaimed his title by attorning to H. P. B.—*Throgmorton v. Whelpdale* (6), *Doe v. Whittick* (7), *Doe v. Lutherland* (8); and see also *Partington v. Woodcock* (9).

LORD DENMAN, C.J.—This case has been argued only on the ground, whether the defendant was in possession as a yearly tenant under Chawner or H. P. Beavan, or under the lease of 1811. Without considering the deeds containing the title, the facts are these—[Here his Lordship recapitulated them]. The result of them is, that the defendant became tenant from year to year to H. P. B. until the arrears of his annuity should be paid off, and that relation was acknowledged by the document of 1826. There is no fraud nor

(3) Cro. Jac. 510; a. c. Pop. 126, 147.

(4) 1 Lev. 170; a. c. 1 Saund. 112. See also *Hassell v. Gouthwaite*, Willcs, 340.

(5) 1 Bing. N.C. 45; s. c. 3 Law J. Rep. (N.S.) C.P. 274.

(6) Bull. N.P. 96.

(7) Gow. N.P. 195.

(8) 4 Ad. & El.

(9) 5 Nev. & Man. 672; s. c. 4 Law J. Rep. (N.S.) K.B. 239.

(2) 8 B. & C. 476; s. c. 6 Law J. Rep. K.B. 855.

misconception on the part of Boulter, which could alone get rid of it. The defendant did not require that question to be left to the jury, though I see no grounds for its being left to them. We have only now to decide on the legal effect of the defendant's agreement; and as, upon this point, my learned Brother says he should have directed a verdict for the plaintiff, had he not nonsuited on another point, in respect to which he has altered his opinion, I think the verdict must be entered for the plaintiff.

LITTLEDALE, J.—We are not bound by the technical terms used in the instrument, but must see what relation was created by it, and I think we ought to consider it as if it had recited the award. It appears by the award, that H. B. Beavan had a title paramount, and was empowered to turn Boulter out of possession. Having this power, an arrangement is come to, by which H. P. Beavan, though not strictly a landlord, having only a right to receive the rent, with a power of entry, assumed the power of granting a lease, and took upon himself the title of landlord, and the defendant called himself his tenant. Although this is not strictly a tenancy from year to year, as it could only last while the arrears were unsatisfied, it amounts to the same thing, and the plaintiff is entitled to the verdict. As soon, however, as his arrears are satisfied, the defendant may claim the possession.

PATTESON, J.—I was wrong in supposing that Chawner could not have maintained the ejectment in 1823 against this defendant. I thought the clause of entry in the deed only enabled Chawner to obtain possession of the land, provided it continued in the possession of Th. Beavan, but that he could not turn out any one else. I believe I was mistaken, for *Doe v. Horsley* (10) shews, that under a clause, such as the present, possession may be obtained without even a demand, and without any regard to the actual occupier. Then can the nonsuit be supported on any other ground? Now, the effect of the agreement between H. P. Beavan, and the defendant was to create a new tenancy from year to

year, until the arrears of the annuities are paid. If the case had been based upon the supposition, that Boulter, in agreeing to become tenant to H. P. Beavan, intended to give up his rights under the sixty years' lease, I think there would have been a gross fraud upon him, and that no jury would have found such an intention. But neither fraud nor misconception is suggested, and it is immaterial whether he knew the effect of his act or not, as he must hold such interest as the law allows, and that, by necessary implication, was a yearly tenancy under H. P. Beavan.

COLERIDGE, J. stated the facts and continued—With regard to the demise by Chawner, my doubt is not removed, as the defendant received no notice to quit from him; and, therefore, the tenancy created by the attornment to him, is not put an end to. But I decide on the effect of the defendant's agreement, which created a yearly tenancy. Perhaps, the defendant considered he was still in possession, under the sixty years' lease, but if the law puts a certain construction upon the acts of parties, it is immaterial what they may intend, provided there be no fraud or misrepresentation, and there was none in the present case. This is, therefore, a question between landlord and tenant, and nothing is more important to be preserved on a solid basis than the law of landlord and tenant.

Rule absolute.

1837. }
May 5. } WRIGHT v. ACRES.

Pleading—Plea of Payment—Effect of Nolle Prosequi.

A declaration contained two counts, one for 10l. for teaching; the other for 10l. on an account stated; concluding to the plaintiff's damage of 20l. The defendant pleaded, payment of 10l. in satisfaction of the promises in the declaration, and infancy. The plaintiff then entered a nolle prosequi to the second count, and, at the trial, the defendant recovered a verdict on the plea of payment:—Held, on a motion to enter up judgment non obstante verdicto, that the plea was sufficient at the time of the trial.

(10) 1 Ad. & El. 766; s. c. 3 Law J. Rep. (N.S.) K.B. 183.

Assumpsit. The declaration stated, that the defendant was indebted to the plaintiff in the sum of 10*l.*, for teaching the mathematics, and in 10*l.* on an account stated; promise to pay the said several monies, and breach, non-payment thereof, or any part thereof; to the plaintiff's damage of 20*l.*

First plea, non assumpsit;—second plea, that upon the making of the promises, and before the commencement of this suit, the defendant paid to the plaintiff divers sums of money, amounting to a large sum, to wit, the sum of 10*l.*, in full satisfaction and discharge of the promises in the declaration mentioned, and of all damages sustained by the plaintiff, by reason of the non-performance thereof, which said monies the plaintiff then received in full satisfaction, &c.;—third plea, infancy. The plaintiff had entered a *nolle prosequi* to the second count, and the defendant at the trial having succeeded on the second plea,

Erle had obtained a rule to enter judgment for the plaintiff, *non obstante veredicto*; against which—

Cleasby now shewed cause.—It is objected, that the plea of payment in this case is bad, because the declaration claims 20*l.*, and the plea is only to 10*l.* But the first answer is, that by the *nolle prosequi*, the plaintiff has removed one of the counts, and the declaration at the trial was for 10*l.* only; secondly, the plea is good, at least after verdict. The jury have found that the plaintiff accepted 10*l.*, in full satisfaction of the damage sustained by the breach of promise; and the Court cannot assume that more than 10*l.* was proved—*Stennett v. Hagg* (1).

Erle, in support of the rule.—The record is to be taken as it was when the plea was pleaded, and then the plea would have been bad, being a plea of payment of a small sum, in satisfaction of a larger. He referred to *Thomas v. Heathorn* (2). The plea ought to have been, as to all except 10*l.* non assumpsit—as to that sum, payment.

The COURT, without saying whether the plea was good or not, held, that the record

must be looked at as it stood at the time of the trial, and then the objection did not apply.

Rule discharged.

1837. }
May 5. } LEWIS v. HOWELL.

Evidence—Costs of proving Documents.

The execution of certain documents not having been admitted by the defendant, the plaintiff obtained the usual Judge's order, that the costs of proving them, on the trial, should be paid by the defendant, whatever might be the event of the cause. The trial took place, and the plaintiff recovered a verdict, which was afterwards set aside for irregularity, without costs. Previous to a second trial, the defendant admitted the documents:—Held, that the plaintiff, who also succeeded at the second trial, was entitled to the costs of proving them at the former trial.

This was an action by the plaintiff, an apothecary, to recover the amount of his bill for medicines and attendance. An order having been obtained for a trial before the under-sheriff of Cardiganshire, the plaintiff's attorney delivered the usual notice of inspection of documents, and the execution of the certificates from the Apothecaries' Company and from the College of Surgeons not having been admitted, an order, was made by Gurney, B., pursuant to the rule Hil. 4 Will. 4, r. 20, that the costs of proving these documents should be paid by the defendant, whatever might be the result of the cause, provided the same were proved at the trial to the satisfaction of the Judge or other presiding officer, by his indorsement on the notice.

The cause was tried before the under-sheriff of Cardiganshire, on the 12th of July 1836, when the plaintiff recovered a verdict. That verdict was set aside, on the ground of irregularity, without costs, and a new trial ordered, previous to which, the defendant consented to admit the execution of these documents. On the 14th of last January, the cause was tried again, and the plaintiff recovered. The Master refused to allow to the plaintiff the costs of proving the execution of those docu-

(1) 1 Saund. 228, n. 1.

(2) 2 B. & C. 477.

ments, whereupon Patteson, J. made an order upon the Master to review his taxation.

Chilton now moved to rescind that order, contending, that the trial on which the plaintiff succeeds, is the one to which the rule applies. Here the plaintiff incurred no costs at that trial, and the Master was right in refusing to allow him the costs incurred at the former trial.

Per Curiam.—This order is right. The plaintiff is entitled to recover the costs incurred by the proof of the documents. The Judge's order was quite collateral to the issue of the cause, and cannot be affected by the result of the trial. The certificate made by the Judge at the first trial remains in force: indeed, it could only be given by the Judge who presided at that trial.

Rule refused.

1837. }
May 5. } MINTER V. MOWER.

Patent—Claim too large.

Where a patentee claimed in general terms the application of a principle to produce a mechanical effect, and it was proved that another person had previously applied the same principle to produce the same effect, but with different machinery:—Held, that the patent could not be supported, as the claim was too large.

Case for the infringement of a patent for reclining chairs.

Pleas—1st, Not guilty: 2nd, That the plaintiff was not the inventor of the said invention, and that it was not a new invention or improvement as to the public knowledge, use, and exercise thereof in England; 3rd, That the specification enrolled by the plaintiff, (which was fully set out in the plea,) did not particularly describe and ascertain the nature of the said invention; which last plea was traversed in the replication.

At the trial, before Lord Denman, C.J., at the sittings in London after Trinity term, the plaintiff put in the specification of his patent for the reclining chairs by the application of a self-adjusting leverage,

which has been already printed in the case of *Minter v. Wells* (1), and proved the infringement by the defendant. Evidence was given in answer, that before the plaintiff took out the patent, one Brown, who had been a chair-maker, had made a reclining chair for the defendant, which contained in it the principle of a self-adjusting leverage. To enable it, however, to act properly, a pad, a stop, and a spring were attached to it, and by the means of their action, the chair could be made to act on the self-adjusting leverage. By the pad, the back was drawn forward; by the spring, it was sent back. The plaintiff's chair acted upon the same principle of the lever, but was adjusted by the mere pressure of the body either on the back or the seat, without the application of any machinery requiring an additional exertion on the part of the sitter. The jury found that Brown's chair, without the spring and pad, would have acted, so as to have produced equilibrium by a self-adjusting leverage; that he was the inventor of the principle, but was ignorant of the practical uses to which it might be applied; and that the plaintiff was the inventor of that application. On this finding of the jury, his Lordship ordered the verdict to be entered for the plaintiff, but gave the defendant leave to move to enter a nonsuit. In the ensuing Michaelmas term—

Talfourd, Serj. obtained a rule accordingly, citing *Minter v. Wells*, against which rule cause was shewn in last term.

The Attorney General, Sir F. Pollock, and J. Evans, for the plaintiff.—The Court of Exchequer have already decided that the plaintiff's patent is valid, and it is one of great utility. The present defence is raised upon an experiment, which produced no result to the party, which has never since been acted upon, and the machine then made was not fit for the purposes to which the plaintiff has applied the same principle. It is for the application of that principle that his patent has been obtained, and the jury have found that he was the inventor of that application of the principle. It has been contended, that the plaintiff claims the application of the principle

(1) 4 Law J. Rep. Exch. (N.S.) 2; also reported 1 C. M. & R. 505.

of the self-adjusting lever to the chair, and, therefore, claims that which had been discovered by Brown. But, the whole of the specification must be taken together, and then it will appear that what is really claimed is the application of the principle in the particular manner there described, and no more. If the patent be read in that manner, Brown's invention does not interfere with the plaintiff's right.

Talfourd, Serj. and Godson, in support of the rule.—If the plaintiff do not claim the general application of the self-adjusting lever to a chair, the defendant is not guilty of any infringement, because his mode of application is very different from that of the plaintiff. He thrusts forward the seat, whereas, the plaintiff lifts it up. If, indeed, the plaintiff do claim the general principle, no doubt the defendant's chair would be an infringement upon his patent, because it does proceed upon the application of the self-adjusting leverage. But, then, Brown's invention had anticipated the plaintiff's: it was an application of the same principle to a chair. Brown did not merely discover the principle, as Dr. Hall in his closet discovered the object glasses, but never published them (2); he actually made the chair to which this principle was applied. Then, the plaintiff cannot appropriate to himself that principle, nor its application. To Brown's chair it is true a pad and spring were attached, which were an inconvenience; but the plaintiff cannot, by rejecting them, appropriate the rest of Brown's invention, and say no one else shall avail himself in any manner of that same principle. To prove that Brown had done enough to invalidate the present patent, if the inventions were identical, *Jones v. Pearce* (3), *Lewis v. Davies* (4), and *Lewis v. Marling* (5), were cited.

The judgment of the Court was now delivered by—

LORD DENMAN, C.J.—An action between the same plaintiff and another party, has already been decided by the Court of Exchequer, in which the patent claimed by

the plaintiff was deemed good and valid. But, on the trial in this court, an entirely new fact was given in evidence, and affirmed by the verdict of the jury, namely, that a chair, very closely resembling that made by the plaintiff's patent, had been made and sold before that patent was taken out. The words of the jury were these:—"We are of opinion that Brown was the inventor of the machine, and found out the principle, but not the practical purposes to which it is now applied. We think that Minter, the plaintiff, made that discovery." This statement might not be fatal to the plaintiff's title, if his invention were truly set forth in the specification: but, the issue in this cause being simply whether the plaintiff did thereby particularly discover, and ascertain the nature of the invention, we find it necessary to examine the terms of it. Now, the patent is taken out for "an improvement in the construction, making, or manufacturing of chairs." The method of making the machine, and the way in which it acts, are then fully described, without any mention of any of the means employed in Brown's chair. The specification thus concludes:—"What I claim as my invention is the application of a self-adjusting leverage to the back and seat of a chair, whereby the weight on the seat acts as a counterbalance to the pressure against the back of such chair as above described." Now, it was perfectly clear upon the evidence, that this description applied to Brown's chair, though that was incumbered with some additional machinery. The specification, therefore, claimed more than the plaintiff had invented, and would have actually precluded Mr. Brown from continuing to make the same chair that he had made before the patentee's discovery. We are far from thinking that the patentee might not have established his title by shewing that a part of Brown's chair could have effected that for which the whole was designed, but his claim is not for an improvement upon Brown's leverage, but for a leverage so described that the description comprehended Brown's. We are, therefore, of opinion, that the patent cannot be sustained, and a nonsuit must be entered.

Rule absolute.

(2) Cited by Buller, J. in *Boulton v. Ball*, 2 H. Bl. 470.

(3) *Gods*, Pat. Supp. 10.

(4) 3 C. & P. 502.

(5) 4 C. & P. 52.

1837. { THE KING v. THE MAYOR AND
Jan. 31. { COMMONALTY OF THE CITY
OF YORK.

Poor Rate—Freemen's Common Rights.

The freemen householders of one of the wards of the city of York were entitled to a right of common over lands, of which certain persons were seised in fee. By an act passed in 1817, commissioners were empowered to extinguish the right of common, and allot a portion of land to the mayor and commonalty of the city of York, free from all manorial rights, to be exclusively enjoyed by such freemen of the city as were before entitled to the right of common, and in the same manner as the right of common was enjoyed. The commissioners accordingly allotted a certain portion of land to the mayor and commonalty. Certain officers called pasture-masters were appointed at the wardmote of mayor and aldermen, and were subject to the wardens, one of whom was the mayor, and the others were the aldermen. The pasture-masters regulated the enjoyment of the rights of common, accounting to the wardens, and the expenses of keeping up the rights of common were defrayed by an annual sum paid by each freeman who exercised the right. The freemen had the exclusive right of pasture over the whole of the land allotted by the commissioners, and the mayor and commonalty received no money in respect of this right of common, nor derived any benefit from it in their corporate capacity; but the annual value of the rights of pasture was to the freemen 400*l.*, and the lands were worth to let 250*l.* a year. Part of the land had formerly been leased, and from the rents then received, a sum of money had been raised, by a portion of which five acres of land had been purchased and vested in trustees, for the freemen of this ward, in extension of their right of common:—Held, that the mayor and commonalty were properly assessed as occupiers of the land allotted to them by the commissioners, but not of the five acres conveyed to the trustees.

[For the report of the above case, (which was decided in Hilary term,) see 6 Law J. Rep. (N.S.) M.C. p. 121.]

1837. { STANNARD v. FORBES AND
April 26. { WIFE, EXECUTOR AND EXECUTRIX OF JOHN LOCK.

Covenant for Title—Construction—Eviction.

J. L. by an indenture, reciting that he was possessed of a term for years provided one C. should so long live, granted and assigned the term to S, and covenanted, that notwithstanding any act, deed, matter, or thing, done by him at any time heretofore, the lease was, at the time of the assignment, a good, valid, and effectual lease, and that the same, and the term of eleven years therein expressed, was in full force and effect, and in nowise forfeited, surrendered, assigned, determined, or otherwise become void or voidable, or prejudicially affected in any manner howsoever, otherwise than by effluxion of time; and also, that for and notwithstanding any such act, he, the said J. L. had full power to assign; and also for quiet enjoyment against all acts done by or through him. Before the assignment, C. had died, and J. L. knew the fact:—Held, that the covenant that the lease was valid, and that the term was not determined, was qualified by the preceding covenant, and restrained to any acts done by J. L., and that therefore he was not liable upon this covenant for an eviction by the party entitled on C's death.

After C's death, J. L. paid rent to the reversioner, and thereby created a tenancy from year to year, previous to the assignment:—Held, that this could not be treated as an act done by the covenantor within the meaning of the qualifying words.

This was a special case, which set forth a declaration in covenant for a breach of covenant by the testator. It set out an indenture dated Feb. 26, 1825, between one G. Stott, guardian of Georgiana Stott, of the first part, one Seanah Stoe Clement, of the second part, and John Lock, of the third part, by which George Stott demised one moiety, and the said Seanah Stoe Clement demised the other moiety of certain premises, to hold one moiety for eleven years, if the said G. Stott should so long live, and the other moiety for the same term, if the said Seanah Stoe Clement should so long live; and the said John Lock covenanted to pay the rent and

repair the premises : by virtue of which indenture, the said John Lock entered upon, and was possessed of the said premises, and after the making of the said indenture, by another indenture on September 21, 1826, between the plaintiff and the said John Lock, which recited the above demise, and an agreement by Lock to sell the said lease to the plaintiff, and the goodwill of a trade, carried on therein, it was witnessed, that the said John Lock did grant, bargain, sell, assign, and transfer the said messuage and premises to the said plaintiff during the residue of the term, subject to the payment of the rents, and performance of the covenants. The following covenant by Lock was then set forth :—"That for and notwithstanding any act, deed, matter, or thing whatsoever by him, the said John Lock, at any time theretofore made, done, committed, or knowingly occasioned, suffered, or omitted, to the contrary, the said thereinbefore in part recited indenture of lease was, at the time, a good, valid, and effectual lease in law and in equity, of and for the premises thereby demised, or expressed, or intended so to be ; and that the same, and the term of eleven years therein expressed, were respectively in full effect, and in nowise forfeited, surrendered, assigned, determined, or otherwise become void or voidable, or prejudicially affected in any manner howsoever than by effluxion of time." It was also covenanted, that all the rent and taxes were paid, and all his covenants performed ; and that notwithstanding any such act, matter, or thing, the said J. Lock had, in himself, full power and authority to sell and assign the lease : also, there was a covenant for quiet enjoyment against all persons claiming by, through, or from him, and for an indemnity against all acts theretofore or thereafter to be committed, created, or knowingly occasioned or suffered by the said John Lock, or any person claiming by, from, under, or in trust for him ; and there was also a covenant for further assurance.

The declaration then stated, that the plaintiff, on January 19, 1829, sold the lease to one Robert James, with a covenant that the lease was a good and subsisting lease, and alleged, that before the sale of the lease by Lock to the plaintiff, the said

Seanah Stoe Clement died, and the demise to Lock became voidable and void as to one moiety, and one George Stott became entitled to that moiety, and in 1831 ejected James from that moiety : that James afterwards brought an action of covenant for breach of covenant in the plaintiff's assignment of the lease, recovered 95*4*/. for his costs and damages, and the plaintiff incurred costs to the amount of 200*l*/. It was alleged, that Lock had notice of the death of Seanah Stoe Clement before he made the first-mentioned indenture.—Breach, that the said lease was not a good valid lease, and in full effect, and the said John Lock had not full power to assign it, and the plaintiff could not enjoy the said lease according to the covenant.

The defendants pleaded, first, that the deed was not the deed of Lock ; second, that George Stott did not eject James from the premises ; third, that Lock had not notice of the death of Seanah Stoe Clement before the sale of the lease ; fourth, that Lock clearly indemnified and protected the plaintiff from all former and other assignments, which at any time were committed, &c. by the said John Lock, or any person claiming by, from, under, or in trust for him ; conclusion to the country. Issue was joined on all these pleas.

The case set out the indentures mentioned in the declaration, and continued :—Seanah Stoe Clement died on the 7th of September 1825, and the jury found that Lock had notice of her death before September 1826. The plaintiff entered into, and was possessed of the premises under the assignment of the 21st of September 1826, and afterwards assigned to one Robert James, who was by due course of law evicted, in Hilary term 1831, of one moiety of and in the demised premises, by one George Stott having a title arising upon the death of the said Seanah Stoe Clement, and by reason of the death of the said Seanah Stoe Clement. It was proved, at the trial, that the said George Stott received from Lock, in April 1826, 50*l*/. for one year's rent, due to one Hardisty (the guardian of Joseph Clement), on whom Seanah Stoe Clement's moiety had devolved, and himself, and afterwards received the rent of James and Stannard, up to the time of his evicting them from both moieties, as reserved by

the lease of February 1825. Assets were admitted by the defendant.

The cause came on for trial at the Middlesex sittings in Michaelmas term 1834, when a verdict was taken for the plaintiff, subject to the opinion of the Court on the plaintiff's right to recover damages against the defendants for breach of covenant entered into by Lock as aforesaid.

In Hilary term, the case was argued by *Kelly*, for the plaintiff.—The first three issues must be found for the plaintiff; and, if the fourth plea be held to have been proved, it is no answer to the action, and the plaintiff is entitled to judgment *non obstante veredicto*. The defendants have pleaded that Lock indemnified the plaintiff from all acts done by him, but the plaintiff complains that the covenant entered into by Lock, that it was a valid subsisting lease at the time of his assignment, has been broken. The question, therefore, is, whether Lock entered into any absolute covenant, that the lease was a valid lease at that time. The plaintiff contends that he did. First, as there is a recital of the lease, and the testator *granted* and *assigned* it to the plaintiff, a covenant may be implied on his part that it was a valid and subsisting lease; and that implied covenant is not affected by the subsequent express covenants, if they only add to the former, and do not qualify it—*Co. Litt.* 384, *a*, *Johnson v. Procter* (1), which is exactly in point. It is explained by Lord Eldon in *Browning v. Wright* (2), to have proceeded upon an implied warranty, contained in the recital of the covenantor's interest. *Barton v. Fitzgerald* (3), and *Smith v. Compton* (4), which overrules *Milner v. Horton* (5), and *Howell v. Richards* (6), are all authorities to establish, that implied or express absolute covenants are not affected by subsequent qualified covenants, where the qualification is not intended to apply to all, and is not connected with the former covenants. *Browning v. Wright* (7), where a

general covenant for good title was held to have been qualified by the other covenants of the deed, will be cited on the other side, but it is to be observed, that in that case there was a conveyance of an estate in fee, whereas the present question arises on the assignment of leasehold property; and a different construction may therefore be well given to the covenants in the two cases. Besides, it was in fact decided, upon the intention of the parties to be gathered from the whole of the deed, and if that test be applied in the present case, it is clear that the parties intended to covenant that the lease was a valid and subsisting lease. Then, secondly, there is an express covenant, that this was a good and valid lease, and that the term of eleven years was in full effect. It will be said, that it is qualified by the preceding words, and is restrained by them. But, the mere collocation of covenants and words in a deed, will not defeat the intention of the parties, if it can be ascertained from the whole context—*Gainsforth v. Griffith* (8). It is impossible to suppose that the parties meant to protect the plaintiff against the mere acts of Lock. The object must have been generally and absolutely to secure a valid lease. Thirdly, if the covenant is to be considered as qualified, it has still been broken, because Lock, knowing of the death of S. S. Clement, paid rent to the reversioner, and thereby accepted a yearly tenancy, which, as to a moiety, operated as a surrender of his interest therein; consequently, by his act, the lease has been determined—*Haves v. Brushfield* (9), *Lady Cavan v. Pulteney* (10), *Sugden's Vend. and Pur.* p. 571 (7th edit.).

Hoggins, contra.—Certainly the real question is, whether this covenant be absolute or qualified. In *Sug. Ven. and Pur.* 575 (7th ed.), the rule is stated to be, "that where restrictive words are inserted in the first of several covenants having the same object, they will be construed as extending to all the covenants, although they are distinct." And he cites *Browning v. Wright*, and other cases, to support the position. Here the covenant is expressly qualified, and the testator covenanted against all acts

(1) *Yelv.* 175; *s.c.* *Cro. Jac.* 233; 1 *Buls.* 3; 2 *Brownl.* 212.

(2) 2 *B. & P.* 25.

(3) 15 *East*, 530.

(4) 3 *B. & Ad.* 189; *s.c.* 1 *Law J. Rep.* (N.S.) K.B. 43.

(5) *M'Clel.* 647.

(6) 11 *East*, 622.

(7) 2 *B. & P.* 13.

(8) 1 *Wms. Saund.* 60, *a*, n. 1.

(9) 3 *East*, 491.

(10) 2 *Ves. jun.* 544.

done by *him*, and that, notwithstanding any act done by *him*, the plaintiff should quietly enjoy. All the covenants are therefore restricted, and the deed does not disclose any intention on the part of Lock to covenant generally for the validity of the lease. But it is said that the covenant has been broken, because Lock knew at the time that the lease was determined. But it cannot be said that that was any act or default done or committed by him. He had no power to prevent the determination of the lease, which is the real ground on which *Lady Cavan v. Pulleney* depends, as is stated by Tindal, C.J. in *Woodhouse v. Jenkins* (11). This is a strong authority for the defendant, and it shews there is no distinction between the conveyances of leasehold and of freehold property. As to the cases of *Hawes v. Brushfield*, it is commented upon by Sir Edward Sugden, and the decision is questioned by him; and he refers to *Hesse v. Stevenson* (12), as pointing out the distinction between a general and restricted covenant. Again, it is contended, that a covenant may be implied from the recital in this deed, and *Johnson v. Proctor*, as interpreted by Lord Eldon, has been cited. But Sir Edward Sugden has shewn that that case was not decided upon the effect of the recital. The word "grant" in the assignment was of itself held to operate as a warranty of the title, and was not qualified by the ensuing covenant. The recital in *Barton v. Fitzgerald* was much stronger than in the present deed, where it is expressly stated that the lease is to continue for eleven years if S. S. C. should so long live, and which recital merely designates the lease to be assigned.

Kelly replied.—The covenant is, that the lease is not forfeited, or otherwise impaired, except by effluxion of time. That exception would be wholly insensible if the covenant is to have the restricted sense imputed.

[COLERIDGE, J.—If this is to be considered in arrest of judgment, we cannot notice that Lock was aware of the determination of the lease, or that he had cre-

ated a tenancy from year to year by the payment of the rent.]

It is alleged in the declaration, that he knew that the lease had determined.

Cur. adv. vult.

On this day the judgment of the Court was delivered by—

LORD DENMAN, C.J. [After stating the pleadings, he continued]—It has long been established, that where in a conveyance express covenants for warranty are introduced, none can be implied from the general words of conveyance, and that the Court has no other duty to discharge than that of correctly construing the language employed. In performing this task on any particular occasion, we are not likely to derive much assistance from the former decisions that may be cited, as every instrument varies in some respect from all others, and must be interpreted according to its own language. It should seem that the true grammatical sense of the words employed, when that can be ascertained, must prevail; and no case can be quoted in which our Courts have thought themselves at liberty to act in direct contravention of it. Such a course might indeed become necessary; for a deed may contain repugnant clauses: where these occur, the authorities fully warrant us in comparing the clause under immediate consideration with all that precedes and follows it, even though not forming parts of the same sentence, and with the nature of the obligations entered into, for the purpose of discovering and effectuating the intention really expressed by the parties. But when we examine the covenant said to have been broken by Lock, by conveying the term after his title had determined, and find it inseparably connected with the preceding words, we do not feel the least difficulty as to the grammatical meaning, and that appears on examination to be conformable to the general intention of the party who entered into the covenant. All the covenants but the second are admitted to be restricted; the second is in these terms—[His Lordship here read the covenant]. But the whole series of covenants is introduced by qualifying words, which, we cannot doubt, run through both clauses of the sentence. The effect is,—I covenant

(11) 9 Bing. 431; s. c. 2 Law J. Rep. (N.S.) C.P. 38.

(12) 3 Bos. & Pul. 565.

that for and notwithstanding any act of mine, I have a right to convey the term, and that the term is neither forfeited, surrendered, nor in anywise impaired, except by the effluxion of time. It was acutely remarked, that these last words rendered the restriction nonsensical, as effluxion of time could have been no act of the covenantor. They are indeed unnecessary, but from that quality in legal documents too strong inferences cannot be safely drawn. On the other hand, the absurdity of guarding himself from covenanting against any acts but his own, and in the same breath covenanting that the term was not affected by the acts of any person whatever, is glaring, and is rendered still more so by his repetition of the qualifying words after the succeeding covenant, which relates to the fact of clearing up arrears, &c., a fact with which his predecessors could have no concern. The same words are carefully incorporated in the residue of his covenants. The covenants, in truth, form one sentence, the first clause of which is restricted by the acts of the covenantor; the second omits to repeat the restriction, but the third refers to it, by the expression "for and notwithstanding any such acts," &c. If both parties had attentively scanned the language of the deed before completing the assignment, neither could have believed the covenant to include any others than the covenantor and those claiming under him. We feel it unnecessary to travel through the cases; that of *Browning v. Wright* may, however, be referred to, as fully warranting the principle on which we act, and closely resembling the present case in the form of the covenant.

A second point was attempted to be raised from an additional fact in the case, viz. that supposing the construction above stated to be right, there was still a breach of covenant by Lock in paying rent to the reversioner, after knowledge that one of the lives had fallen. This act, it was said, would have the effect of converting his term into a tenancy from year to year, if done while the life continued, and could have no less effect after the life had dropped. But granting these premises for the sake of argument, we think the conclusion does not follow, for the simple reason, that the payment of rent made no

difference whatever in Lock's interest, which had previously expired. What he did was wholly inoperative, and could not therefore be a breach of the covenant. For these reasons we are of opinion that the plaintiff is not entitled to recover; and out judgment must be for the defendant.

1837. }
April 26. } THE KING v. JOHN HAYWARD.

County Rates—55 Geo. 3. c. 51—*Separate Jurisdiction*.

In a borough, by prescription, there were various charters, none of which contained any non-intromittant clause, and there were borough Justices who did not try felonies, and had no separate jurisdiction, yet the inhabitants had never been assessed to the county rate, but had always supported their own bridges and gaol, and had paid the expenses of prisoners within the gaol, and the costs of conveying them to the assizes,—these expenses being defrayed by a borough rate:—Held, that the borough was not within the proviso in the 55 Geo. 3. c. 51. s. 1, and thereby exempt from the county rate.

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 138.]

1837. }
May 5. } TYSON v. SMITH.

Public Custom—*In alieno solo*.

A custom for all persons exercising the trade of a victualler to enter on the soil where a fair was to be held a reasonable time before it took place, and erect stalls and booths thereon, for the more convenient carrying on of his trade, and to keep them there until a reasonable time after the fair, paying 2d. to the lord of the fair, is valid.

Trespass for breaking and entering the plaintiff's close, called Rosley Hill, or Rosley Fair-ground, in the parish of Westward, in Cumberland, and erecting stalls thereon.

Pleas—First, not guilty. The second plea stated, that, from time immemorial,

on certain days in each year, to wit, on &c., fairs for the buying and selling of all kinds of goods, wares, and merchandises, have been, and of right ought to be holden on the commons and waste grounds of the manor, lordship, or forest of Westward—that is to say, on some part of it appointed for that purpose, from time to time, by the lord of the said manor for the time being; and that immemorially there hath been an ancient and laudable custom within the manor, that every liege subject of this realm, exercising the trade or calling of a victualler, at a reasonable time before the Monday next after the feast day of Pentecost, hath been accustomed to enter into and upon the part of the grounds appointed for holding the said fairs, and for the more conveniently carrying on his trade or calling, to erect a booth or stall, and to put and place posts and tables there, and to keep and continue the said booth, &c., so erected, &c., from thenceforth until a reasonable time after the last of the said fairs so as aforesaid holden in each year. The plea then justified under this custom. The third plea stated the same custom, qualified by this addition, that the victualler should pay 2*d.* to the lord of the manor when lawfully demanded. The fourth plea stated the same custom as in the second, until the passing of an inclosure act, in the 51 Geo. 3, when the land was allotted by the commissioners to the Earl, on which the fair was to be, and has since been held, and the custom continued. The fifth was the same as the fourth, but setting out the custom with the same qualification as in the third. The sixth plea was, leave and licence of the plaintiff. The seventh plea was, leave and licence of the Earl. The plaintiff, in his replications, traversed the customs alleged in the pleas, and denied the leave and licence.

At the trial, before Lord Abinger, C.B., at the Summer Assizes for Cumberland, in 1835, the plaintiff recovered a verdict on the first, second, fourth, and sixth issues; and the defendant on the third, fifth, and seventh; and in the Michaelmas term following, a rule *nisi* to enter a judgment for the plaintiff, *non obstante veredicto*, was obtained; against which cause was shewn in last term by—

Cresswell and Wightman.—The defen-

dant is entitled to judgment. The jury have found the custom for the victualler to enter upon the soil, and to fix his stalls there during the fair, paying the sum of 2*d.* to the lord, if demanded, and this is a good custom. It is not necessary to find the origin or cause of any custom, per Coke, C.J., in *Hix v. Gardiner* (1); unless it be manifestly unreasonable, the Courts will always presume in favour of an ancient custom. See *Broadhurst v. Wilkes* (2), and *Cocksedge v. Fanshaw* (3). Then, what is there unreasonable in the present custom? The defendant claims an easement for the public in the soil, for which a fixed compensation is to be paid. But the cases of *The Mayor of Northampton v. Ward* (4), *The Mayor of Norwich v. Swann* (5), and *The King v. Burdett* (6), were cited. They decided, that where there is a public market, a party cannot of common right insist upon erecting a stall in the market to sell goods. But they are clearly distinguishable from the present. In the report of the first case in 1 *Wils.* p. 107, it appears, that the defendant set up a custom to erect stalls in the market without paying for them, which custom was traversed by the plaintiff, and the verdict was against the custom. Here, however, the custom alleged is, that a compensation shall be made, and it is found for the defendant. It is manifest, that the right to use the market does not necessarily confer a right to erect a stall, because the owner of the market may not be the owner of the soil. Here, however, the soil of the ground where the fair was held, did belong to the owner of the fair, and the custom is thereby supported. The other two cases only establish the same position as *The Mayor of Northampton v. Ward*—namely, unless there be a custom, there is no right to set up a booth, or to break the soil, without making a compensation. There is no claim here to carry away the soil, which would not be valid as a custom: but the defendant sets up only a right to enjoy an easement. In

(1) 2 Bulst. 196.

(2) Willes, 363.

(3) 1 Doug. 132.

(4) 2 Stra. 1238.

(5) 2 W. Bl. 1116.

(6) 1 Lord Raym. 148.

Bro. Abr. tit. 'Customs,' p. 46, a custom claimed by the fishermen of Kent to dig holes in the soil, in which they might fix stakes for drying their nets upon, was held to be void. But that was an indefinite custom, and was a destruction of the soil without compensation. In the present case, the stalls are only placed on the soil during the fair time.

Blackburne, Armstrong, and W. H. Watson, in support of the rule.—This custom is bad on three grounds. First, it is too extensive with reference to the persons who claim to enjoy it. It is for every subject, exercising the trade of a victualler: that may apply to so many persons as to occupy the whole of the fair. Such a custom would let in all mankind, and is like the case of *Fitch v. Rawlings* (7), where a custom for all persons being in the parish to sport on a particular close in the parish, was held bad, on the ground of its being too extensive, being in effect a custom for all mankind. In *Vin. Abr.* 'Customs,' p. 175, it was decided, that a claim cannot be made of a custom through all England, for that is the common law, and not a custom. There a custom was pleaded for the merchants in England to assign licences to lade wine in a foreign ship; and it was held bad on this ground. Secondly, the custom is too extensive in regard to its exercise. The party claims, according to the custom, to enter and fix his stalls on the ground a reasonable time before the first fair-day, and keep them until a reasonable time after the last fair-day. Now, this is too general as to time. There ought to be some fixed and limited period: it cannot be good to leave it to the discretion of each individual as to what is or what is not a reasonable time. Thirdly, the custom is void of itself. It is certainly of a novel character. It is a claim to fix a stall on the soil of another, wherever the party may choose in the particular spot. It is not asserted that the custom would exist in any other place; and the lord of the market has necessarily, as incidental to his market, a right to remove it to some other spot. If he exercise that power, the custom must fail. How can it be valid, when it is so uncertain? Then it is inconvenient. The stalls may extend

over the whole of the fair, and the other persons may be excluded. *The King v. Burdett* shews that the owner of the market cannot inconvenience the persons frequenting it by erecting stalls. It is impossible to say that any other party can justify under a custom which may produce the same effect. Then this is really a claim for an interest in the soil; the defendant sets up a right of erecting stalls and placing booths on the plaintiff's soil. What is that but an interest in the soil, which cannot be acquired by custom? It is like the case cited from *Broke's Abridgment*, of the custom to fix stakes in the ground for the drying of fishermen's nets, and is not, in fact, materially distinguishable from *The Mayor of Northampton v. Ward*, and *The Mayor of Norwich v. Swann*, for all the reasoning upon which the Courts proceed in holding that, in an open market, a party cannot claim to erect a stall or booth, applies to prove that this custom is bad. In 2 *Inst.* 220, will be found the old law respecting fairs and markets; but no notice is there taken of such a custom as the present.

Cur. adv. vult.

Afterwards on this day the judgment of the Court was delivered by—

LORD DENMAN, C. J.—This is a motion for an arrest of judgment, where the verdict was for the defendant. The defendant set up a custom for all persons to erect booths on a certain *locus in quo* from one day to another; and he claimed, as a victualler, a right to erect such a booth, and to keep it there during the whole period. The plaintiff's argument was to shew that this claim was bad in law; but we are of opinion that it is good. The description of a victualler is definite; and the attendance of that class of persons at a fair is necessary, in order to afford refreshment to the number of persons who resort there. The exclusion of the owner from his own soil may be lawful by virtue of a reasonable custom. It appears to me that it would be unreasonable, if the argument for the exclusion of these parties could prevail. The fair itself, to which all trades, of every class, are invited to come and vend their goods, must be discontinued. As to the excess of persons exercising the trade of

(7) 2 H. Bl. 393.

victuallers, their own interest must limit their number to such as have a fair chance of success.

Rule discharged.

1837. } THE KING v. THE GUARDIANS
May 6. } OF THE ASTON UNION.

Guardians of the Poor—Quo Warranto, When it will not lie.

The Court refused to grant a quo warranto information against guardians of a union, elected under the New Poor Law Act.

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 135.]

1837. } THE KING v. THE INHABITANTS
May 6. } OF BRIGHTON.

Parochial Loans—22 Geo. 3. c. 83, 42 Geo. 3. c. 74, 43 Geo. 3. c. 110.

A party, who has advanced money to the guardians of the poor under the 22 Geo. 3. c. 83. s. 20, is not affected by the omission of the guardians to pay off or provide for one-twentieth part of his debt annually, but is entitled to a mandamus to them to pay his debt and interest, though twenty years have elapsed from the time when the money was borrowed, and he has only been paid his interest yearly.

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 100.]

N.B.—A few cases of this term are unavoidably postponed.

END OF EASTER TERM, 1837.

CASES ARGUED AND DETERMINED

IN THE

Court of King's Bench.

TRINITY TERM, 7 WILL. IV.

1837. }
May 24. } BLAND v. WARREN.

Trial of Undefended Causes.

A cause to which the defendant had pleaded several special pleas, was set down in the marshal's list as an undefended cause, to be tried at the third sittings in term for Middlesex; and on that day it was tried, no counsel appearing for the defendant, no notice of its being undefended having been given to the marshal or to the plaintiff's attorney:—Held, that the trial was regular.

This was an action of assumpsit, to which the defendant had pleaded several pleas, and, issue having been joined, the plaintiff gave notice of trial on the 17th of April for the 20th, which was continued until the 5th of May, the third sittings in Easter term for Middlesex. The printed notice of the sittings contained a memorandum, that, on that day, none but undefended causes would be tried. The plaintiff's cause was marked in the marshal's book as undefended. At those sittings the plaintiff tried his cause, and recovered a verdict; the defendant not appearing by counsel, not having given notice to the marshal, nor to the plaintiff's attorney, that there

was a real defence. On the last day of term,—

Archbold obtained a rule to set aside this verdict and to have a new trial, on the ground of irregularity; against which, cause was now shewn by—

Humfrey, who contended, that the trial was irregular.

Archbold, contra, contended, that the plaintiff could not try the case as an undefended cause, without giving notice that it would be taken as such.

[*PATTESON*, J. observed, that that was the rule when a case was taken out of its place in the list, and tried before its proper term as an undefended cause.]

Besides, here, the plaintiff must have known that the cause was defended.

LORD DENMAN, C.J.—There was a list of causes in the marshal's list, for the third sittings, which he supposes to be undefended. This case was in that list; therefore, *prima facie*, it was an undefended cause. The practice has been for the defendant to give a brief to counsel to appear on that day for him, or to serve a notice upon the plaintiff, that it is not undefended, in which latter case, the plaintiff will try at his peril. Here, the defen-

2 C

NEW SERIES, VI.—K.B.

dant did not instruct counsel to appear, nor give any notice of its being a defended cause. But it is said, there were special pleas. There may be, and yet there may be no real defence. It seems to me, that the defendant has not done what he ought to have done, and he can only be let in on payment of costs.

Rule absolute, on payment of costs.

1837. } THE KING v. THE JUSTICES OF
May 25. } THE NORTH RIDING OF YORK-
SHIRE.

Bastardy—Notice of Order—Churchwardens of Township.

The church or chapel-wardens of a township are not overseers of the poor of that township, and need not sign the notice of an application for an order of maintenance, required by the 4 & 5 Will. 4. c. 76. s. 73.

Quære—Whether such a notice must be signed by all the overseers.

The Court will not take judicial notice of the duties and powers of an assistant overseer.

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 110.]

1837. } DOE dem. VERNON v. ROE,
May 25. } (RICHARDS, TENANT.)

Practice. — Term's Notice — Costs in Ejectment.

A defendant in ejectment obtained before appearance an order for particulars, with a stay of proceedings in the meantime, and afterwards an order for ten days time to plead, after delivery of the particulars:—Held, that no particulars having been delivered during the lapse of twelve months, the defendant was entitled to a term's notice; and that a judgment for want of a plea was irregular.

Where a judgment is signed irregularly in ejectment, a defendant may apply to set it aside before he has appeared; but, as the defendant on the record is a nominal party, no costs can be awarded.

In this case, Williams, J. had, by an order dated February 20, set aside a judg-

ment signed for want of a plea, with costs; and in last term,—

Whateley had obtained a rule nisi, to discharge this order on affidavits, which set forth these facts. On the 25th of May 1835, a declaration in ejectment was served upon Richards, the tenant in possession of the premises, to appear in the ensuing Trinity term. No appearance was entered, but on the 15th, Coleridge, J. made an order for a delivery of particulars, and stayed all proceedings in the meantime. On the 30th of June, an order of Patteson, J. was obtained for ten days time to plead, after the delivery of the particulars. Some correspondence took place between the attorneys for the lessor of the plaintiff and the defendant; and on the 2nd of February last, the plaintiff delivered a bill of particulars to the town agent of the defendant's attorney, who received them at first conditionally, and afterwards refused to receive them, requiring a term's notice, as no proceeding had taken place in the cause for more than twelve months. The defendant not having pleaded at the expiration of ten days, the plaintiff signed judgment, which the learned Judge set aside with costs. It was objected, that this order could not be supported—first, because the defendant, not having appeared, could not be heard to set aside the judgment;—secondly, that as the cause had been stayed by the defendant's own order for particulars, the rule was not applicable, or at least, under the circumstances of this case, it had been waived; and, lastly, the Judge had no power to give costs, as the defendant had not appeared.

Bayley now shewed cause.—First, as there is a rule for judgment in effect against the defendant, he is entitled to come and set it aside if it be irregular;—secondly, the defendant is, in strictness of law, entitled to a term's notice; it was certainly his own order for particulars, but the plaintiff ought to have acted upon it at once. Then, there has been no waiver of this right. The plaintiff's attorney wrote to the defendant's attorney, to know what steps the defendant would take in the case; but, though he answered the letter, nothing was done, and he did not intimate any relinquishment of his right to the notice. The cases in which a term's notice is not required, are stated in *Tidd's Prac.* p. 468.

to be only where judgment as in case of a nonsuit is moved for, where a cause is stayed by injunction, or at a party's request. The present is not within those exceptions.

Whateley, in support of the rule, contended, that the defendant had ample means of knowing that the action had been abandoned—*Richards v. Harris* (1); besides, the order for the particulars was the act of the defendant. Then *Goodright v. Badtittle* (2) shews, that the defendant, before an appearance, being merely a nominal party, cannot have costs.

LORD DENMAN, C.J.—There is nothing in this case which has deprived the defendant of his right to a term's notice; but that case is an authority to shew, that the order cannot be sustained for the costs.

LITTLEDALE, J.—The judgment was irregular. In strictness, the defendant had no right to apply for particulars before appearance; yet, as the Judge treated him as having appeared, and made the order for the particulars, the proceedings were then stayed; and it is the plaintiff's own default that he did not deliver them sooner. He was then irregular in delivering them without a term's notice. It does not appear, that the defendant has tied himself down to dispense with that notice. With regard to the costs, the defendant is a nominal party, and is not entitled to them.

PATTESON, J. concurred.

Rule absolute, for setting aside the order as to the costs; discharged as to the rest.

1837. { BERKELEY v. JOHN WATLING,
May 26. { JAMES NAVE, AND JOHN
CRISP.

Bill of Lading not conclusive.

The plaintiff declared against three defendants, and alleged, that he caused certain wheat to be shipped on board their ship, deliverable to himself. Two of the defendants pleaded, that he did not cause the wheat to be shipped. At the trial, the plaintiff gave in evidence a bill of lading,

signed by the master of the ship, stating that the other defendant had shipped the wheat deliverable to the plaintiff. This bill of lading had been forwarded to the plaintiff:—Held, that the defendants were not precluded from shewing, that, in point of fact, no wheat was shipped.

Assumpsit. The declaration alleged, that the defendants were the owners of a ship called the *Search*, lying in the port of Yarmouth, and bound to Newcastle; and that the plaintiff caused to be shipped in the said ship 168 quarters of wheat, deliverable to the plaintiff, or his assigns, at Newcastle; that the defendants promised to deliver them. Breach, that the defendants did not convey the said goods from Yarmouth to Newcastle. To this declaration the defendant, Watling, pleaded separately non assumpsit; and the two other defendants pleaded jointly, first, non assumpsit;—second, that the plaintiff did not cause the goods to be shipped in and on board the said vessel;—third, that the defendants did convey the goods alleged to have been shipped on board the said vessel; and on these pleas issues were joined. The cause was tried at the Summer Assizes, in 1835, for the town and county of Newcastle-upon-Tyne, before Lord Chief Justice Tindal, when a verdict was found for the plaintiff for 27*l.* 16*s.* 4*d.*, subject to the opinion of the Court on the following

CASE.

The plaintiff is a corn-factor, residing and carrying on business at Newcastle-upon-Tyne. Defendant Watling was, during the years 1833, 1834, and 1835, a merchant, residing at Yarmouth, and during that time had several dealings with the plaintiff, in the way of consigning, from Yarmouth to the plaintiff at Newcastle, cargoes of corn for sale on commission. The ship, called the *Search*, had during these years been engaged in the coal trade, in carrying coals from Newcastle to Yarmouth, and occasionally bringing cargoes of corn from Yarmouth to Newcastle, from Watling to the plaintiff, and other merchants and factors in Newcastle. During that time, and at the time of signing the bill of lading hereinafter mentioned, the three

(1) 3 East, 1.

(2) 2 W. Bl. 763.

defendants were the owners of the *Search*, whereof one John Blyth was the master, and Watling the managing owner at Yarmouth. On the 2d May 1835, the plaintiff received a bill of lading for 168 quarters of wheat, signed by the said John Blyth, then the master of the *Search*, which stated, that the wheat was shipped by Watling, deliverable to the plaintiff, or his assigns. It was inclosed in a letter from Watling to the plaintiff, noticing the transshipment of the wheat *per Herring* to the *Search*, and expecting his approval. Watling had previously inclosed a bill of lading for the same wheat in a letter, dated April 18, 1835, signed by the master of a vessel, called the *Herring*, which letter required a remittance. The plaintiff, in answer, sent 200*l.* as an advance on the wheat. In another letter, dated 27th April 1835, Watling stated, that he intended, with the plaintiff's permission, to re-ship the wheat into the *Search*, or some other vessel, and hoped that it would meet his approbation. On the 2d of May, the plaintiff wrote to Watling, and, in a postscript, noticed the altered destination of the *Herring*. The *Search* afterwards sailed from Yarmouth, and arrived at Newcastle without the wheat on board; in consequence whereof, the plaintiff wrote to the defendant Nave, one of the owners of the ship *Search*, and also to the owner of the *Herring*, for the value of the wheat shipped by Watling according to the bills of lading. The corn, if delivered at Newcastle by the *Search*, would have been of the value of 360*l.*, or thereabouts. Watling was, and still is, indebted to the plaintiff over and above the sum of 200*l.*, so advanced as aforesaid, in the sum of 72*l.* 16*s.* 5*d.*, which sums are now wholly unpaid. On the part of the defendants Nave and Crisp, evidence was offered to shew, that, although the master signed the bill of lading for the corn, yet, that no part of the corn was shipped on board of the *Search*, as therein expressed. This evidence was objected to on the part of the plaintiff, but was received:—the question as to its admissibility to be a question in this case. For that purpose, the mate of the *Search* was called, who deposed, that he was mate on the voyage in question; and that the *Search* had no corn on board, be-

tween Yarmouth and Newcastle, on that voyage. If the Court shall think the evidence was not admissible, then the case is to be considered as if the evidence had not been stated.

W. H. Watson, for the plaintiff.—The defendants, in this case, are liable. The bill of lading states, that the goods have been shipped. It has been handed over to the consignee; and the question is, whether the ship-owner can say, in contradiction of the bill of lading, that they were not shipped on board their vessel. It is now submitted, that they cannot. In *Bates v. Todd* (1), it was certainly held, that, as against the shippers indeed, the ship-owner may contradict the bill of lading. But that is very different from the present case. Here, it is a question between the ship-owner and the holder of the bill of lading, who appears to have given value for it, since he has advanced money upon the consignment. A bill of lading resembles a bill of exchange; it is negotiable as such, and passes by indorsement. It contains an acknowledgment by the captain, that the goods have been shipped. There is a distinction, indeed, between a general and a particular agent; the acts of the former will bind his principal in all cases; but those of the latter only when he is within the scope of his authority. The captain is the general agent for the ship-owners; and, therefore, his act binds the ship-owners: consequently, the defendants are concluded by his admission in the bill of lading.—See *Howard v. Tucker* (2). The nature of this instrument, indeed, is fully explained in the great case of *Lickbarrow v. Mason* (3), and *Abb. on Shipping*, p. 381; and it is established, that a *bond fide* holder of it is entitled to the property to which it relates. Then, *Hawes v. Watson* (4) shews, that, after a party has made an admission, upon which another person has acted, he is bound by it. The question, as to the admissibility of the evidence, is involved in the one already considered.

Wightman.—The bill of lading is not conclusive against the defendants. It

(1) 1 Moo. & Rob. 106.

(2) 1 B. & Ad. 712; a. c. 9 Law J. Rep. K.B. 108.

(3) 2 Term Rep. 63.

(4) 2 B. & C. 540; a. c. 2 Law J. Rep. K.B. 83.

might have been conclusive, indeed, between the parties, if the situation of either of them had been altered; or, if the bill of lading had been assigned over to another party. *Howard v. Tucker* was an instance of the former; and *Lickbarrow v. Mason* of the latter. It is like a receipt, which is not conclusive upon the party who gives it, so long as the situation of the other party is not changed—*Scaife v. Jackson* (5), *Graves v. Key* (6). Here, the goods were never shipped on board the *Search*, and the bill of lading was a fraud by Watling upon the other ship-owners. There is nothing to shew, that the plaintiff's situation has been affected by this instrument. But, however the question might have been raised by different pleadings, at present, by the issue in the cause, the plaintiff appears to be the shipper; for he alleges, in his declaration, that he caused the goods to be shipped, and the plea traverses his having so caused them to be shipped. If, therefore, he is to be considered as the shipper, the bill of lading cannot be used by him as an estoppel. As to the argument, that the plaintiff is a holder of the bill of lading for value, it does not appear that any money was advanced upon it.

Watson replied.—The action is properly brought by the plaintiff, as the consignee of the goods—*Dutton v. Solomonson* (7). Here, the plaintiff was a holder for value, for the 200*l.* was advanced on this cargo; at least, the plaintiff gave up his right under the bill of lading given by the captain of the *Herring*, for that by the captain of the *Search*; and this was a good consideration.

[*PATTERSON, J.*—I have a difficulty in seeing that that was so.]

Then, as to this being like a receipt, there is this obvious distinction—the bill of lading is negotiable; not so the receipt.

[*LITTLEDALE, J.*—This is not a case of estoppel. Watling was the shipper of the goods, and a party to the fraud; and the case comes to this—he who was the shipper, and is now represented by the plaintiff, says, "I shipped certain goods on board this vessel;" whereas he had not. There was a fraud by him, but no estoppel.]

Though he may have been guilty of a fraud, the other ship-owners are, nevertheless, liable.

LORD DENMAN, C.J.—This is an action brought against the defendants, as owners of the *Search*, for the non-delivery of certain wheat. [His Lordship stated the declaration, the plea, and the facts.] The question arises on the second plea, which states, that the plaintiff did not cause the wheat to be shipped on board the defendant's vessel. There was, however, a bill of lading delivered to the plaintiff; and the question is, whether evidence was admissible to contradict it. I think it was. The plaintiff was bound to prove, that Watling was his agent, and had shipped the corn for him. Therefore, the evidence was admissible to shew, that, though the bill of lading purported that Watling had shipped the corn for the plaintiff, yet, in point of fact, he had not done so. This gets rid of the question as to the negotiability of the bill of lading, and also of the effect of the evidence of what occurred afterwards, which was an estoppel against the plaintiff, almost as strong as it is contended the bill of lading is against the defendants.

LITTLEDALE, J.—I am of the same opinion. The plea states, that the plaintiff did not cause the corn to be shipped; and the evidence to support the allegation in the declaration, which is traversed by the plaintiff, is the bill of lading, which, it appears the master has signed. But that does not shew that the corn was shipped by the defendants. It purports to have been shipped by Watling, and the plaintiff must prove the agency of Watling for the defendants. It turns out, that the corn was not actually shipped on board the vessel. But the plaintiff says, you are estopped by your master's bill of lading. But are they estopped? Watling, who was the plaintiff's agent for shipping this wheat, knew that it was not shipped; therefore, the plaintiff, by his agent, knew it. How can there be any estoppel, in his favour, against the ship-owners? Watling stood in a twofold capacity, as one of the owners, and as shipper of the goods. Could he, as the owner of the ship, be estopped from setting up that which, as

(5) 3 B. & C. 421; s.c. 3 Law J. Rep. K.B. 43.

(6) 3 B. & Ad. 313.

(7) 3 Bos. & Pul. 582.

shipper of the goods, he knew, namely, that the corn was not, in fact, put on board? I think he could not; and then this was a case, where, in point of law, the plaintiff knew that the goods had not been shipped. I think the bill of lading was not conclusive.

PATTERSON, J.—This is an action by the consignee of the goods, and not by the indorsee of the bill of lading, which cases are distinguishable, and the form of declaring is different. It is not alleged here, that there was any indorsement of the bill of lading; but it is stated, that the plaintiff, at the request of the defendants, caused the wheat to be shipped on board their vessel. The shipper, therefore, must be the agent of the plaintiff. If the declaration had stated, that Watling had shipped for the plaintiff, or if the bill of lading had stated it in that way, the case might have been different: but it is alleged, that the plaintiff had caused the wheat to be shipped; he thereby makes himself the shipper. Then, can it be said, that the bill of lading is conclusive, as between the ship-owner and the shipper? It cannot be. This decision will not affect any question between the ship-owners and the consignee; and I should be very sorry to lay down any doctrine, which would lessen the negotiability of bills of lading. I merely say, that, in this case, the bill of lading was not conclusive; and the evidence was, therefore, receivable.

Judgment for the defendants.

1837. { THE KING v. ANDREW BOURNE,
May 27. { FRANCIS BOURNE, AND A.
HOWARD.

Criminal Law—Practice, on Reversal of Judgment.

The Court of Quarter Sessions sentenced three persons, convicted of burglary, to be transported:—Held, on a writ of error, that that judgment was erroneous; and that, as this Court had no power to pronounce the right judgment, the prisoners were entitled to be discharged.

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 129.]

1837. } ECKSTEIN AND ANOTHER v.
May 30. } REYNOLDS.

Tender—Question for the Jury.

*A tender was made in these words, "I tender 8*l.*, in settlement of the plaintiff's account:—Held, that it was properly left to the jury to say, whether this was a conditional or absolute tender; and that the verdict of the jury that it was absolute was not wrong.*

Debt for goods sold and delivered.

*Plea—Nunquam indebitatus, except as to 8*l.*, and as to that a tender, which was denied in the replication.*

At the trial, before Lord Denman, C.J., at the Guildhall Sittings after Michaelmas term, 1835, the plaintiffs failed in proving their demand beyond the sum of 8*l.*; and the question in the cause turned upon the validity of the tender, of which the evidence was this:—A witness was called, and stated, that he went to the plaintiffs, saw one of the firm, and said, "I tender 8*l.* in settlement of the plaintiff's account," which was refused. It was objected, that this was a conditional offer, and, therefore, not a valid tender. The learned Judge left it to the jury to say, whether it was a conditional offer or not, and they found a verdict for the defendant. In the ensuing term—

The judge obtained a rule nisi for a new trial, on the ground, that this was not a question for the jury, but ought to have been decided by the Judge, and that it was a conditional and not an absolute offer.

Alexander and C. Jones now shewed cause.—The verdict is right. The meaning of the language used was doubtful; and, therefore, it was properly submitted to the jury, for their interpretation. No doubt, if the offer was conditional, it would not have been a valid tender; but the words do not necessarily import a condition, and it is for the jury to say, what is the meaning of words used by parties in mercantile contracts—Clayton v. Gregson (1), Bold v. Rayner (2). Then Read v. Golding (3) is an authority to prove, that this was

(1) 4 Nev. & Man. 602; s.c. 4 Law J. Rep. (N.S.) K.B. 161.

(2) 1 Moo. & Wels. 343; s.c. 5 Law J. Rep. (N.S.) Exch. 172.

(3) 2 Mau. & Selw. 88.

a good tender. It is very different from *Evans v. Judkins* (4).

C. R. Turner, in support of the rule.—The party to whom the tender is made, must not be prejudiced by any admission obtained as the price of the tender. Therefore, a tender in full of all demands is not a good tender—*Cheminant v. Thornton* (5), and it must be unconditional—*Peacock v. Dickerson* (6). Here, the money was offered in settlement of the account. That imports a condition. Whether it be conditional or not, is a question for the Court, and not for the jury; though it does not appear from any of the cases to have been determined, whether the jury can be called upon to give their interpretation to the language. In *Finch v. Brook* (7), the jury found a special verdict, and there, indeed, the Court determined the tender to be bad.

LORD DENMAN, C.J.—Suppose the witness had come, and had said, "I am come to settle the account, and I tender you this sum of money;" it would have been a good tender. I cannot think it can make any difference in what order the words are used. The meaning of the witness was ambiguous; and it was, therefore, properly left to the jury to interpret them.

LITLEDALE, J.—It was properly left to the jury to say, whether this tender was conditional or not. At the same time, there may be cases so clear that they ought not to be submitted to them, but the Judge may take it upon himself to say, as a matter of law, that it was either conditional or unconditional.

PATTESON, J. concurred.

Rule discharged.

1837. } BREARLEY, ASSIGNEE OF JAY,
May 31. } v. ANDREW.

Bankrupt—Pleading—Insufficient Contract.

A promise by a bankrupt to pay a sum of money due to a creditor, for money had and

received to his use, after the delay of a few months, in consideration of his proving for it under the fiat, is bad.

Assumpsit. The first count stated, that before W. Jay became a bankrupt, to wit, on &c., the defendant was indebted to the said W. Jay, in the sum of 200*l.*, for money before that time received by the defendant for the use of the said W. J., and that on &c., a certain commission of bankruptcy had been and was issued against the said defendant; and thereupon the said defendant, on the 5th of December 1829, in consideration of the premises, and that the said W. J. would prove the sum of 200*l.* against the estate of the said defendant, under the said commission of bankruptcy, promised the said W. J. to pay him the said sum of 200*l.*, after the delay of a few months; yet the said plaintiff saith, although a long time, to wit, five years, have elapsed since the making of the promise, and although the said W. J. did afterwards prove the said sum of 200*l.* against the estate of the said defendant, yet that the defendant hath not paid the said sum of 200*l.*

Plea—Non assumpsit.

The plaintiff having recovered a verdict at the Guildhall Sittings after Michaelmas term, 1835, a rule nisi had been obtained for arresting the judgment; against which—

Sir F. Pollock and Hoggins now shewed cause.—It is said, that the declaration does not disclose a sufficient legal consideration for the defendant's promise. But these circumstances might be suggested; the defendant may have committed a wrongful act against the plaintiff, by conversion of his goods, for which the plaintiff might maintain either an action of trover or money had and received. The former would not be affected by the defendant's certificate under his fiat, whereas the latter would. What objection can there be to the creditor agreeing to waive his action of tort, and prove for the amount, in consideration of the bankrupt agreeing to make up the difference? The latter receives a benefit, and it is not easy to see how any one is injured by it. That was the present case, and supports this count.

W. H. Watson, contra, was not heard.

(4) 4 Campb. 156

(5) 2 Car. & Pay. 50.

(6) Ibid. 51.

(7) 1 Bing. N.C. 253; s. c. 4 Law J. Rep. (N.S.) C.P. 1.

LORD DENMAN, C.J.—It appears to me, that the count is bad, and could only be made good by supposing facts not stated in it. The declaration (which His Lordship read,) states a promise by the bankrupt to bind his property in a manner which he could not do.

LITTLEDALE, J.—It is clear, that this is a promise by the bankrupt to pay one of his creditors his demand in full.

PATTESON, J.—I do not know whether, if the facts had been set out in the way suggested, the declaration would have been good; but the point does not arise, because the contract is not so stated.

Rule for arresting the judgment, absolute.

1837. } **LISTER v. LOBLEY AND**
June 1. } **ANOTHER.**

Turnpike Trustees—Power to take Buildings.

A local act for making a new turnpike road, authorized the trustees to take or pull down the houses, buildings, &c., described, making or tendering satisfaction to the owners or proprietors thereof, for the same, or for any loss or damage they might sustain thereby.

Held, first, (Coleridge, J., dubitante,) that a lessee for years was an owner or proprietor within the meaning of this clause; secondly, that the making compensation was not a condition precedent to the trustees' right to take the houses.

Trespass for breaking and entering the plaintiff's closes, and destroying and damaging his buildings.

Pleas—First, not guilty;—second, that the premises were mentioned in the schedule to an act of parliament, passed in the 5 Will. 4, for repairing a road from Wellington Bridge Road, in the parish of Leeds, to Tong Lane, in the parish of Birstall; and the trustees under the act having occasion to take and use the said closes, and to pull down and remove the buildings, for the purpose of making the new road in the act mentioned, the defendants by and under the authority of the trustees, (they having before and at the time when, &c., made

satisfaction to the owners of the said closes and buildings,) at the said time when, &c., and for the purpose of making the new road, broke and entered the closes, &c.

Replication, admitting the command of the trustees, *de injuriâ absque residuo causæ.*

At the trial, before Lord Denman, C.J., at the York Assizes, in the summer of 1835, it appeared, that the plaintiff was the lessee of the premises in question, under a lease from one John Farrer, for twenty years from February 2, 1830; and the defendants were the trustees of John Farrer, who died in 1832.

On the 17th of June 1835, an act of parliament was passed for repairing an old road, and for making a new road from it to Pudsey, in the West Riding of Yorkshire. It contained a clause authorizing and empowering the trustees to make the new road upon, in, over, and through any lands; and continued "for such purpose or purposes, it shall and may be lawful for the said trustees of the same district of road, and all persons acting under their authority, and they are hereby authorized and empowered, to enter upon, and to take and use the lands and premises upon, over, or through which the line of the said road is laid down or described in the map or plan and book of reference hereinafter mentioned, and also to take and use, or pull down and remove the houses, buildings, tenements, hereditaments, and premises described or mentioned in the schedule to this act annexed, any law or statute to the contrary notwithstanding; making or tendering satisfaction to the owners or proprietors of all private lands, houses, buildings, tenements, and premises, so taken and used for the same, or for any loss or damage they may sustain thereby." The premises in question were certain buildings mentioned in the schedule, and being required by the trustees, they paid a sum of money to the defendants for the same, and the latter were to pull them down, and to rebuild as might become necessary. Accordingly, the defendants did enter on the premises, and pull them down, and not agreeing with the plaintiff as to the compensation to be paid to him, this action of trespass was brought against them. It was contended at the trial, that the plaintiff

did not come within the terms *owner* or *proprietor*, and was not entitled to any compensation: but if he were, still the making of the compensation was not a condition precedent to the right of entry on premises given by the statute; and therefore, that the action of trespass was not maintainable. The learned Judge directed a verdict to be entered for the plaintiff, subject to a motion for a nonsuit on both points. In the following term,—

Cresswell moved accordingly, when the Court (Lord Denman, C.J., Littledale, J., Patteson, J.; and Coleridge, J. *dubitante*;) refused the rule on the first point, holding that the plaintiff, though a lessee, might fairly be considered to be an *owner* or *proprietor*, which are not technical words, within the meaning of this act of parliament; but granted it on the second.

Crompton now shewed cause.—It is not necessary to consider whether the second plea be good; because the defendants, acting under the trustees of the road, may justify under the general issue. But the objection which is open to that plea is also raised on the general issue. The tender of compensation was a condition precedent before the trustees could take down these houses. The clause in the local act may be compared with the 3 Geo. 4. c. 126. s. 83, which authorizes the trustees of turnpike roads to alter roads, by diverting them over any private lands, making or tendering satisfaction to the owner; and it is provided by section 86, that on payment of the monies agreed for, or assessed, to the party or into the bank, the land required shall vest in the trustees, and may be taken and used for the purposes of the act. This provision affords a fair argument, that the land would not vest under the former clause, until the compensation had been tendered. There are also other clauses which provide for the acquisition of the land by the trustees. These general provisions, by which the land is vested in them, it is true, are not contained in the local act; but the same construction must be given to the clause, which is the same in both acts. The 4 Geo. 4. c. 95. s. 65. requires the trustees to obtain the consent in writing of the owner or proprietor, before they can take down any dwelling-house or other building; and therefore, it is clear,

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that the defendants cannot justify under that act. The 9 Geo. 4. c. 77. s. 9. repeals the 3 Geo. 4. c. 126. s. 83, and provides, that the trustees may make, divert, alter, &c. the roads under their care, over private lands, making compensation to the owner. It may be doubtful, whether this applies where an entirely new road is made. But if it do apply to the present case, the same question arises as to the meaning of the provision. The proper construction is, that either before or at the time when the buildings are taken, the compensation must be made. How, otherwise, is it to be obtained? Can any action, either of assumpsit or on the case, be maintained? It seems not—*Boulton v. Cromther* (1). Then, the only mode of effectuating the intention of the legislature is, by holding that the making compensation is a condition precedent to the taking of the land. In *Boysfield v. Porter* (2), a similar question arose on the 13 Geo. 3. c. 78; but the Court did not decide it. As to the language of this clause, it is quite immaterial. A condition precedent may be expressed in such language, if the intention be apparent—*Thomas v. Cadwallader* (3).

Cresswell, (*Wightman* was with him,) contrâ.—The real meaning of the act is, that the trustees are authorized in pulling down the buildings; but are compellable to render compensation to the owners. If it be true, that no mode of compelling the trustees to make compensation be expressly provided by any of these acts, this Court would award a mandamus to compel them to pay it to the party entitled. As to its being a condition precedent, in many cases it would be quite impossible to ascertain what compensation to pay until it was known what damage had actually been done.—[Here he was stopped by the Court.]

LORD DENMAN, C.J.—I do not see how that can be answered. The proper amount of compensation cannot be known until the premises have been taken; but they cannot be taken without the trustees becoming liable to make a due compensation.

LITTEDALE, J.—It is impossible to

(1) 2 B. & C. 703; s. c. 2 Law J. Rep. K.B. 139.

(2) 13 East, 200.

(3) Willes, 496.

know what is the proper compensation, until the land has been taken; but the making compensation is not a condition precedent; it is analogous to the right of the lord of a manor to dig for stones, making compensation to the owner of the land.

PATTESON, J. and WILLIAMS, J. concurred.

1837. }
May 31, June 1. } THE KING v. STARKEY.

Market—Removal of.

The lord of a market, which was toll free, removed it to a new market, built by trustees on land demised by him to them for a term of years, in which lease the trustees covenanted that the market should be open to all persons who came to buy or barter in the same, with liberty to the trustees to make orders and regulations for the management of the market, and to impose rents or other sums for licence to sell goods:—Held, that the new market was not so open and free as the former, and therefore the removal was bad.

Quere—whether, as the new market stood on land not in the possession of the lord, the removal was good.

Indictment against the defendant for obstructing a highway, called Church Street, in Keightley, in the county of York, by erecting stalls thereon; to which the defendant pleaded not guilty.

At the trial, before Lord Denman, C.J. at the York Assizes in 1835, it appeared that there was a market held in the town of Keightley, in the county of York, belonging to the Earl of Burlington, under a grant from Edward III. It was formerly held in a place called Church Street and Church Green, but Lord Burlington had lately, at the request of many of the inhabitants, removed the market from that place to another part of the town, and a market-house had been built by trustees, the land on which it was built having been demised by the Earl to them. This lease was not, however, read at the trial. At first, tolls were demanded at the new market-house from the persons attending it, but as the former market had been toll free, after remonstrance the tolls were discontinued. Public notice was given of the change of

the market. The defendant contending that there had not been a legal and valid change, fixed his stall in the street where the old market had been held, and the indictment was brought against him for that nuisance. His Lordship directed a verdict to be entered for the Crown, but gave the defendant leave to move to enter a verdict for him. In the ensuing term—

Alexander obtained a rule accordingly, against which—

Cresswell, Wightman, and Baines shewed cause, and, at the desire of the Court, produced the lease from Lord Burlington to the trustees.

It was dated the 13th of August 1833, and was made between the Earl of Burlington and five persons as trustees; by it the Earl demised a piece of land in Denbeigh Square, in Keightley, as the same was marked and set out, for the purpose of erecting a new market-place thereon for the town of Keightley aforesaid, measuring, &c., together with a road to the intended new market-place, together with the privileges which the said Earl might have in obliging persons exposing goods for sale openly in any of the different streets in Keightley, to remove the same into the intended new market-place so to be erected. *Habendum* for sixty years, at the rent of 10*l.* per annum, payable quarterly. There were covenants for the payment of the rent, and immediately to erect and build a market-place, so intended to be built, and all requisite conveniences for the using the said premises, as and for a general market for the town of Keightley, and to lay out 1,000*l.* at least therein, and also that they would, when the said market should have been completed, appropriate and use the said premises, as and for a general market for the said town, and the buying, selling, and dealing in marketable commodities in open market, as now used in the open markets held in the said town; and that they should not use and employ the said premises for any other use, purpose, or trade whatsoever, without the leave and licence of the said Earl; and that the said premises should be open for public resort, and the purpose of such markets, on such days of the week as the said markets and fairs of the town are now held, and any other days or times, weekly or otherwise,

as the trustees should choose so to use the same. The lease then contained a covenant, on which the case was ultimately decided, (and which is stated at length in the judgment of the Court,) a covenant to repair, and the usual provisoes for re-entry in case any of the covenants were broken.

It was contended, that the market was well removed. Since the cases of *Dixon v. Robinson* (1), *Curwen v. Salkeld* (2), and *The King v. Cotterill* (3), there is no doubt that the lord of a market can remove it from one part of the town to another. Then what is there in this case to render the removal invalid? It is removed to the lord's own soil, and though he has leased the land out to the trustees, it is only leased to them for the purposes of the market, and therefore, in fact, they represent him. They cannot, under the terms of the lease, prevent the public from having a full enjoyment of the market. It was objected, that the trustees had demanded tolls; now, although perhaps it might be urged, that the lord was entitled to stallage dues, in the old market, as necessarily incidental to his ownership of the soil—*Bac. Abr. 'Fairs and Markets,' D*; *The Mayor of Northampton v. Ward* (4); still those tolls are not now demanded. *Prince v. Lewis* (5) was cited when this rule was moved for, but it only proves that the lord of the market cannot sue where goods are sold out of it, there not being sufficient space in the market. Granting, however, that the market has not been properly removed, the franchise may be forfeited, yet that is no answer to this indictment.

Alexander and Bliss (with whom was *R. C. Hildyard*), in support of the rule.—It is not denied that the lord may remove the market, but he must remove it to a place where the public can have the same permanent enjoyment as they were entitled to in the old market. In the present case, the lord has not even the possession of the new site; he has leased it out for a term of sixty years; and as to this being an open market, it is expressly made subject to the

controul and regulations of the trustees. The old market also was free from all toll; under this lease the trustees may impose tolls if they think fit, as indeed they have done. It is said, that the lord is entitled to the stallage of common right, but according to 2 *Show. 266*, that is a right which is only due by custom. Indeed, the right to the market seems still to remain in the lord, though the right to the possession of the soil is in the trustees. In *Mosley v. Walker* (6), Bayley, J. says, "The grantee, if he confine it (the market) to particular parts within a town, shall fix it in such parts as will from time to time yield to the public reasonable accommodation, and that if the place once allotted ceases to give reasonable accommodation, he is bound, if he has land of his own, to appropriate land on which to hold it, or, if not, to get land from other people, in order that the market, which was originally granted for the benefit of the public, as well as for the benefit of the grantee, may be effectually held." If then the old market be not gone, the defendant was not indictable for placing his stall in the street where it had been held—*The King v. Smith* (7).—Here they were stopped by the Court.

LORD DENMAN, C.J.—This is the case of an indictment against the defendant for obstructing a highway; and he shews that he would not be guilty of a nuisance, but for the removal of the market from the street where he placed his stall; and the question is, whether that market has been so effectually removed, that he is guilty of a nuisance in frequenting the old market-place. That depends on the legality of the removal by Lord Burlington. Now, if the removal has been made so as to deprive any part of the public of any portion of the right they enjoyed in the old market, the removal is not valid in law. Without going into the effect of all the clauses in the lease, there is one which completely encroaches on the rights of the public. [His Lordship here stated the general provisions of the lease, and read the covenant, that "during such periods of open market all persons shall be at liberty to attend the

(1) 3 Mod. 106.

(2) 3 East, 538.

(3) 1 B. & Ald. 67.

(4) 2 Stra. 1238.

(5) 5 B. & C. 363; s. c. 4 Law J. Rep. K.B. 188.

(6) 7 B. & C. 55; s. c. 5 Law J. Rep. K.B. 358.

(7) 4 Esp. 109.

same, and enter in and upon the said premises for the purpose of buying and bartering in the said market without molestation, or hindrance, or necessity of licence first had and obtained of or by the said trustees," and continued—] That applies to the buyers, but sellers are as necessary for the market as buyers, and what follows in the lease applies to sellers: "nevertheless with full power and authority for the trustees to make all such orders and regulations for the maintenance and good management of the said markets, and the renting of the stalls and imposing rents or other sums, as and for licence and permission of vending, selling, or exposing goods to sale on the said premises, to deny entrance to the said premises for any such purpose to all persons not so authorized, and the exclusive enjoyment of all rents and profits to arise thereby from the premises, as to the said trustees shall seem meet and proper." Thus it appears that there is a discretionary power given to the trustees to impose such rents upon the persons coming to the market to sell goods as they may think proper. Now, there is no evidence that any rent for stallage was imposed upon the frequenters of the old market, much less of any certain payment; nor was there any evidence of a right to make contracts from time to time with the persons who came to the market to sell, for the use of the stalls. The frequenting of the market by sellers is so essential a part of the market, that this power of imposing a charge on them, which could not be made before, must render the removal invalid. I thought at first that the lease would have given to the trustees all the powers and rights enjoyed by the lord of the market up to that time. If that had been the state of the case, there might have been a question as to the other provisions of the lease. But it appears that Lord Burlington has done that which he had no authority to do. When it is not proved that any payments had been made for stallage, it cannot be open to the lord of the market to impose anything for the use of the soil. The grant of the market alone is beneficial to the grantee, as it induces a resort of persons to the place, and thereby increases the value of his surrounding property. There are many markets with-

out toll; nor does the mere grant of a market carry with it a right to impose a toll. The removal here was not well made; and the defendant was not guilty of a nuisance in resorting to the old market.

LITLEDAL, J.—The question is, whether the market has been well removed; as, if so, the defendant had no right to erect this stall. I form my opinion upon the terms of this lease, independently of the consideration of the fact that the lord of the market had leased out the land, and I consider that the market has not been well removed. It ought to be held in the soil of the owner of the market; for this is different from the case where the market belongs to one person, and the land to another, in which case the law distinguishes the rights of each. Now, the lord of the market must have the correction of the market, otherwise he cannot maintain any action for the disturbance of his market: that is the consideration for the grant. Here he has it not. It is said, that the trustees must keep the market open to the public, and are to have the management of it; but how are the public to know this? The trustees may violate the public rights, and may become liable to Lord Burlington for a breach of their covenant, but the public can obtain no redress. If the lord will remove, he must remove to a place where the public can have as complete enjoyment of the market as in the old site. *Cummen v. Salkeld* shews that he must remove to his own soil, which was not the case here, because he has already parted with the possession of the soil. It is clear that he could not have supported an action for a disturbance of his toll, framed in the way in which such actions are ordinarily framed.

PATTERSON, J.—There is one short ground on which I think this market has not been properly removed. It is quite clear, that where a lord of a market removes it, the new market must be quite as free and unrestricted as the old. Now, it is admitted that in the old market there was no liability to toll upon goods bought and sold. Whether the lord could have set up a claim of stallage, I do not now decide. I do not say that he could or that he could not; I do not wish to be understood as saying that he could. But here he has appointed

a new market, and has authorized the trustees to impose rents or other sums for a licence to sell goods there. That is a charge not payable before. The words of the lease leave no doubt that the present market was for the free resort of all persons who came to buy, but that is confined to them, for the following words require a licence for the sale of goods. The new market is not, therefore, so free and open as the old.

WILLIAMS, J. concurred.

Rule absolute.

1837. } THE EARL OF EGREMONT v.
June 3. } SAUL.

Tolls—Construction of Charters.

In an ancient charter the word consuetudo does not necessarily signify toll.

Debt for tolls.

Plea—Nil debet.

At the trial, before Lord Abinger, C.B. at the Summer Assizes in 1835, for Cumberland, the plaintiff claimed a toll of 1d. per head on all cattle sold at Wigton Fair, of which fair he was the owner. He gave in evidence many leases of the tolls from the year 1683 to the present time, and a grant from Henry I., in the following terms:—“Henricus, Rex Angliæ, &c., Episcopia, &c.: sciatis nos concessisse et hâc cartâ nostrâ confirmasse dilecto, &c. Waltero de Wigton, quod ipse et hæredes sui in perpetuam habeant unum mercatum singulis septimanis per diem Martis 6, apud manerium suum de Wigton, et unam feriam ibidem singulis annis, per tres dies duraturam, viz. in vigiliâ, et in die et in crastino nativ. B. Mariæ, nisi mercatum illud et feria illa sint ad nocumentum vicinorum et vicinarum feriarum. Quare volumus et firmiter precipimus pro nobis, et heredibus nostris, quod prædictus Walterus et hæredes sui in perpetuam habeant prædictum mercatum, et feriam prædictam, apud manerium suum, cum omnibus libertatibus, et liberis consuetudinibus, ad hujusmodi mercatum et feriam pertinentibus, nisi mercatum, &c. Testibus,” &c. And also the proceedings in a *quo warranto* in the 20th Edw. 1, against one John de Wygheton, to know by what authority he

claimed to hold the fair at Wigton, and the right of infangthef and outfangthef; to which he pleaded that he claimed the fair under a charter, by which King Henry III. granted and confirmed the market: and the infangthef and outfangthef he claimed by prescription. His Lordship, in his charge to the jury, told them that in ancient documents the word *consuetudo* of itself signified toll, and the jury found a verdict for the plaintiff. In the ensuing term—

Cresswell obtained a rule nisi for a new trial, contending, that this was a misdirection. Cause was shewn in last term by—

Alexander, Armstrong, and W. H. Watson.—The verdict in this case is right upon the merits of the case. Besides the grant containing the term *consuetudines*, there was evidence of long payments, and a continued usage, which gave an exposition to that word. That distinguishes the present from the case of *Heddy v. Wheelhouse* (1), which will be relied on. There it was decided, that in a grant of a fair similar to the present, the word *consuetudo* would not carry market tolls. But the question was raised upon demurrer in that case, and there was nothing to explain the grant. The same remark is to be made on the case of *Holloway v. Smith* (2).

[LORD DENMAN, C.J.—The defendant says that the grant is the foundation of the right, and that the Lord Chief Baron told the jury that the word *consuetudo* must mean tolls. Have you any authority for that?]

In *Co. Litt.* 58, b, it is said, “that *consuetudo* properly signifieth a custom, but in legal understanding it signifieth also tolls, murage, pontage, paviage, and such like, newly granted by the king.” Now, if the word may mean *toll* even in a new grant, *à fortiori* may it have that meaning in a charter of confirmation, which this appears to have been. The meaning of the word was discussed indeed in *Brett v. Beales* (3); and in *The Corporation of Stamford v. Pawlett* (4), it was admitted that the word *consuetudo* might signify tolls. The effect of the whole of the direction is, that that might

(1) Cro. Eliz. 558, 591.

(2) 2 Stra. 1174.

(3) Moo. & M. 416.

(4) 1 Cr. & Jer. 57.

be the proper interpretation to be given to it.

Cresswell and Wightman.—The jury were told absolutely, that this word signified of itself tolls. The cases cited shew that that was not a proper direction. In all grants, which carry toll, where this word occurs, it will be found in company with *customagiis* and *theolonio*, which last word properly signifies "toll." See *Holcroft v. Heel* (5). This was not a charter of confirmation, but a new grant of the market; and as to the usage it does not appear to have been contemporaneous, for in the *quo warranto* there is no mention of any claim of toll.

[COLERIDGE, J.—This grant was near the time of Magna Charta, and in the chapter (80th) concerning alien merchants, the word is used to signify customs.]

[LORD DENMAN, C.J.—And in the Commentary of Lord Coke, it is said, that it is used for customs, tributes, or impositions, as *de novis consuetudinibus levatis in regno, sive in terra, sive in aqua*.]

Cur. adv. vult.

LORD DENMAN, C.J. now delivered the judgment of the Court.—The question is, whether the lord is entitled to the tolls of the market. To prove his right he put in the grant of a market by King Henry I., in which he used the words *concessisse* and *confermasse*, and granted the market *cum consuetudinibus*. It was conceded, that where there is a charter of confirmation, that word might signify tolls. But the Judge told the jury that it would have the same effect in a new grant; and they may have given their verdict upon that direction, though this was a charter of grant, and not of confirmation. With all possible respect for the learned Judge, we have thought it right to pause on that ruling, and to examine all the cases and authorities upon this point. We can find no instance in which it has had that strict operation. In *Co. Litt.* it is said, that "*consuetudo* properly signifies a custom; but in legal understanding, it also signifieth tolls, murage, pontage, paviage, and such like, newly granted by the king." But it is never used to signify toll in the sense attributed to it

by the learned Judge in this case. There are two cases, one in *Coke*, and the other in *Strange*, where it was laid down that the word *consuetudo*, in a grant of a market, would not carry market tolls. This verdict, therefore, which possibly was given upon this instruction, cannot stand, and the rule must be made—

Absolute.

1837. { THE KING v. DANIEL NEWTON,
June 6. { GEORGE COLE, HENRY HUNT,
AND CHARLES HUNT.

Indictment—Certiorari—Procedendo.

Where one of several defendants has removed an indictment from the Quarter Sessions by certiorari, and entered into a recognizance according to the statutes, to go to trial at the Sittings after term, the Court will not, on the application of the prosecutor, and merely on the ground that there must be two trials, or that the trial of the indictment will otherwise be delayed, grant a rule to shew cause "why a procedendo should not issue, unless the other defendants appear and plead, and take short notice of trial for the same time."

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 104.]

1837. } SMITH v. EGGINTON, ESQ.
June 6. }

Trespass—Sheriff.

A sheriff who refuses to discharge a prisoner, committed to his custody under an attachment on a contempt of the Court of Chancery, for not answering, or not appearing, and who is entitled to be discharged under the 11 Geo. 4. c. 36. s. 13, r. 5, is not a trespasser ab initio.

Quære—whether he is bound to discharge without a rule or order of the Court.

Semble, if he is bound to discharge without such an order, he is not liable in trespass, but in an action on the case, if he neglect or refuse to do so.

Trespass for assaulting and imprisoning the plaintiff, in the gaol of Kingston-upon-

(5) 1 Bos. & Pul. 400.

Hull, and detaining her, without any reasonable or probable cause, for two months.

Plea, as to the assaulting, imprisoning, and detaining the plaintiff for a part of the time, that, before the time in the declaration mentioned, a writ of attachment issued out of the Court of Chancery, directed to the defendant, as sheriff of the county of Kingston-upon-Hull, by which the defendant was directed to attach the plaintiff, and one J. Dudding, so as to have them in Chancery, on the 8th of January, there to answer to the King, as well touching a contempt, which they had committed against the King, as also such matters as should be laid to their charge, and abide such order as the Court should make: that the writ was delivered to the defendant, by virtue of which writ the defendant arrested the plaintiff, and confined her in the gaol; and not having received any writ of *habeas corpus*, or other order or direction to bring her to the bar of the Court of Chancery; nor having received any order or direction from the Court of Chancery, or other competent authority, to discharge her from his custody under the writ of attachment, he detained her until March 31, 1835, when she was discharged by an order of the Vice Chancellor as to the contempt for which the said writ of attachment was issued. Averment, that the arrest and detainer were lawful.

Replication, that the writ issued against the plaintiff for a contempt, in not answering a bill filed in Chancery against the plaintiff, at the suit of one John Dudding, and one George Dudding, and one Joseph Dudding, and Richard Dudding; and that the plaintiff, being under such process of contempt for not answering, was in actual custody of defendant, in the said gaol, for the space of thirty days, under the writ, to wit, from December 18, 1834, to January 17, 1835, and ~~was~~ not, during all that time, brought to the bar of the Court of Chancery under process to answer her contempt, ~~or~~ was her contempt during or at the expiration of that time, or at any other time, cleared: that the last of the thirty days was in Hilary term; and that John and Richard Dudding did not bring the plaintiff to the bar of the said court within thirty days from the time of her being actually in custody upon the said process of

contempt; by reason thereof, it became and was the duty of the defendant to have discharged the plaintiff out of custody under the said process of contempt; and, though the plaintiff often requested the defendant to discharge her out of custody, yet he refused to do so, and wrongfully, and against the form of the statute, detained her in custody. Verification.

Demurrer to this replication, and joinder therein.

R. V. Richards, in support of the demurrer.—This action of trespass is not maintainable against the sheriff. First, it is not shewn that he has acted wrongfully. The question turns upon the 11 Geo. 4. c. 36. s. 15. rule 5 (1). It is admitted, that the plaintiff was taken by the sheriff, on an attachment out of the Court of Chancery, for a contempt in not answering to a bill filed therein. Then the sheriff was not bound to discharge her without some order of the Court, or, at least, some notification that the attachment was at an end. The rule says, indeed, that, in case the party be not brought to the bar of the court within the time, the sheriff shall forthwith discharge

(1) Which is, "That if the defendant, under process of contempt for not appearing or not answering, being in actual custody, and shall not have been sooner brought to the bar of the court, under process, to answer his contempt, the plaintiff, if the contempt be not sooner cleared, shall bring the defendant by an *habeas corpus* to the bar of the court within thirty days from the time of his being actually in custody or detained, (being already in custody) upon process of contempt; and, if the last day of such thirty days shall happen out of term, then, within the four first days of the ensuing term; and where the defendant is in custody of the sergeant-at-arms, or of the messenger upon an attachment, or other process, the plaintiff shall, within ten days after his being taken into such custody, or, if the last of such ten days shall happen out of term, then within the first four days of the next ensuing term, cause the defendant to be brought to the bar of the court; and, in case any such defendant shall not be brought to the bar of the court within the respective times aforesaid, the sheriff, gaoler or keeper, sergeant-at-arms or messenger, in whose custody he shall be, shall thereupon discharge him out of custody without payment, by him, of the costs of contempt, which shall be payable by the party on whose behalf the process issued; and this rule shall apply to every defendant in custody, before and at the time of passing this act, who shall not have been brought to the bar of the court; but the thirty days allowed in the first above-mentioned case, and the ten days allowed in the second above-mentioned case, shall be reckoned from the first day of next term."

him out of custody. But how is the sheriff to know whether the party has, or has not, been discharged? Is he bound to take notice that the time has elapsed; or is he to make inquiries; and if he be, of whom is he to inquire? A number of difficulties will arise, if it be determined that the sheriff is absolutely bound to discharge the party, which will be avoided if it be required that some order or notice shall be given to him, that the party is to be discharged. But, secondly, supposing that the detention by the defendant was wrong, still the action is misconceived. He is treated as a trespasser *ab initio*. There is no ground for that construction. This is not a case where an authority has been given by the law, which the sheriff has abused, in which case he would be a trespasser *ab initio*, according to *The Six Carpenters' case* (2); but the imprisonment, in the first instance, was lawful; and the detention for thirty days was clearly lawful—the grievance is, that the sheriff did not discharge the plaintiff as soon as he ought. The proper remedy is an action on the case; as where the sheriff refuses to take a bail-bond, or sells goods taken on an execution, without paying the landlord's rent. *Crozer v. Pilling* (3) is analogous, and shews that this action ought to have been in case, and not in trespass. In *Winterbourne v. Morgan* (4), there was a continuing trespass; and the sheriff was held responsible for the trespass in continuing on the premises after the time allowed by law; but he was not treated as a trespasser *ab initio*.

Hurlestone, contra.—If the sheriff was bound at once to discharge the plaintiff on the expiration of the thirty days, the defendant is liable in this form of action. The plaintiff contends that he was. It is admitted on the pleadings, that she demanded her discharge; and the detaining of her in custody, after that demand, is a misfeasance, and not a mere nonfeasance. The rule which has been read is absolute, and makes no mention of any order of the Court for the discharge; whereas, in other rules in the same statute, the legislature have required orders of the Court to be made.—

(2) 8 Co. 290.

(3) 4 B. & C. 26; a. c. 3 Law J. Rep. K.B. 131.

(4) 11 East, 395.

See rules 13. 15. 17. 18. And it is observable, that, under the 5th rule, there is nothing to be done by the defendant on his discharge; but he is to be discharged without payment of the costs. To hold, that an order of the Court is necessary for the discharge of the party, may defeat the object of the legislature; for the party may be too poor, or too ignorant to obtain it, and thus may be kept in prison. There was a case of *Ex parte Dunn* lately before the Vice Chancellor, in which he is said to have expressed an opinion, that this is the proper construction of the act. Then, if no order be requisite, the attachment is at an end; and there is nothing to warrant the imprisonment by the defendant. It is like the case of a sheriff detaining a prisoner in custody on a *cà. sa.*, after an order from the plaintiff to discharge him. It is urged, that the sheriff had no knowledge of the particular contempt charged against the plaintiff; but it is averred, in the replication, that the defendant refused to discharge her, contrary to the form of the statute. Then, trespass is the proper form of action. The defendant has justified the whole detention; and the replication is in the nature of a new assignment, and a new assignment can only be where there has been an original trespass. According to 1 *Wms. Saund.* 299 a, n. 6, this is the correct form. No doubt, the defendant was justified, in the first instance, in arresting; but his detainer was unlawful; yet the plea covers the whole imprisonment. The replication, therefore, properly applies to the detainer subsequent to the lapse of the time.

Richards replied.—The rule only meant to exempt the party from payment of fees. It never could have been intended that the sheriff should be made a trespasser and wrong-doer by the mere lapse of time. Then the replication is not framed as a new assignment. To support the plaintiff's present argument, it should have been replied, that the action was brought for the detention.

LORD DENMAN, C.J.—This action is not maintainable. If the sheriff be liable at all, it must be in an action on the case. The case in *Cro. Car.* (5) is an authority

(5) *Salmon v. Percival*, *Cro. Car.* 141.

in point. Wherever the law directs a sheriff to arrest, but authorizes him to take bail, which he refuses to do, the remedy is not in trespass, but by an action on the case. Besides, it does not appear that the sheriff, in this instance, had any notice of the right of the plaintiff to be discharged. It is only stated, that she required him to discharge her.

LITLEDALE, J.—I also think that this action is not maintainable. At all events, the replication is not proper. It ought to have been alleged, that the sheriff had a knowledge of the contempt for which the plaintiff had been attached. It appears that the defendant is treated as a trespasser *ab initio*. Now, the general rule established by the *Six Carpenters' case* is, that an abuse of a licence given by law makes a party a trespasser *ab initio*, on the ground, that the party cannot be supposed to have intended to act upon his legal authority. How can that doctrine be applied here? There is nothing to shew, that the sheriff did not detain the plaintiff upon the writ of attachment. Therefore, the action, if any, ought to have been an action on the case. But it does not appear that the sheriff had any notice of the nature of the contempt with which the plaintiff had been charged. Now the rule in question only authorizes the discharge out of custody for two grounds of contempt, namely, for not appearing, and for not answering. But there are a great number of contempts in the Court of Chancery; and therefore, unless the sheriff had notice of the particular contempt with which the party was charged, he is not liable to any action at all.

PATTESON, J.—The declaration here alleges generally, that the defendant assaulted and imprisoned the plaintiff; not that he detained her in custody after the lapse of the thirty days, when she was entitled to be discharged. Then, what says the replication?—not that the plaintiff was not discharged when she ought to have been; but that the defendant ought to have discharged her out of custody under the process of contempt. Now, can the sheriff be made a trespasser *ab initio*, in this case? I should say he is not a trespasser at all. But, without being bound by that opinion, on that point, he cannot be a trespasser

ab initio. I should doubt whether he is liable at all, unless some notice has been given to the sheriff of the nature of the contempt; because, as already stated by my Brother Littledale, there are but two particular contempts to which the rule applies. How is the sheriff to know for what contempt the party is in custody? It ought to have appeared on these pleadings, that the plaintiff had informed the sheriff that she was in custody for such a contempt as that she was entitled to her discharge, after the lapse of the thirty days. No such notice appears to have been given. It is not, however, necessary to say, whether the defendant is liable in any action; it is sufficient to say, that he is not a trespasser *ab initio*; and this action is not maintainable.

WILLIAMS, J. concurred.

Judgment for the defendant.

1837. } FIELD AND ANOTHER v.
June 1. } WOODS.

Banker's Cheque — Pleading and Evidence — Stamp.

In an action on a banker's cheque,—plea, denial of the making of it, the cheque being unstamped, was put in by the plaintiff at the trial, and read. The defendant proposed to give evidence in answer, to shew that it was post-dated, and, therefore, ought to have been stamped:—Held, that this defence was admissible on this plea, and that the defendant was not precluded by the fact of the cheque having been read, as the objection was not apparent on the instrument.

Assumpsit on a cheque for 30*l.*, dated June 12, 1835, drawn upon Messrs. Williams & Co., and payable to Mr. Wickings or order, and by him indorsed to the plaintiffs. Plea, that the defendant did not make the said draft or order *modo et forma*.

At the trial, in London, before Williams, J., the sittings after Hilary term in last year, the plaintiffs produced the cheque, and its execution having been proved, it was read. The defendant's counsel had, however, stated, that he was prepared with evidence to shew, that the cheque was post-dated, and, therefore, ought to have been stamped. The learned Judge said, that such evidence

was not receivable upon this issue, and directed a verdict for the plaintiff. In the ensuing Easter term, a rule nisi for a new trial was obtained, against which cause was now shewn by—

Channell.—First, it was too late to take this objection. The cheque had been read, and it is an established rule at Nisi Prius, that, after a document has been given in evidence and read, no objection can be raised to the stamp. Then, this is not a defect which vitiates the instrument. The legislature have, in some cases, expressly declared, that the instrument not duly stamped, shall be void, as in the cases of indentures of apprenticeship, in which the consideration is not duly set forth (1). The 55 Geo. 3. c. 184. s. 11 & 12, indeed, imposes penalties upon parties who issue bills of exchange not properly stamped, but does not say that they shall be void. It is true that, in *Allen v. Keeves* (2), and *Whitwell v. Bennett* (3), it was decided, that an unstamped cheque, post-dated, is void; yet since *Upstone v. Marchant* (4), *Johnson v. Garrett* (5), and *Williams v. Jarrett* (6), it may be doubted, whether those are correct decisions, because they seem to imply that the date on the bill is to be taken to be the real date. At all events, this objection is not open upon this plea. It is merely pleaded that the defendant did not make the cheque. The objection is not apparent on the instrument, like a wrong stamp, which the Court must see, but it is necessary to supply extrinsic evidence to point out the defect. The contract, in fact, is proved by the making of the note; and the defence is, in truth, an illegality in the making of that contract, which ought to have been specially pleaded—R. Hil. 4 Will. 4.

Payne, in support of the rule.—The cheque was only read, subject to this objection; and the defendant was entitled to give the evidence, which would shew that the cheque was invalid for want of the stamp, even when it came to his turn, and was not bound to interpose the evidence

during the plaintiff's case—*Jones v. Fort* (7). Then this cheque was invalid; at all events, it could not be admitted in evidence. The 31 Geo. 3. c. 25. s. 19. enacts, that no bill of exchange, &c. liable to the duties imposed by that act, shall be pleaded or given in evidence in any court, or be admitted in any court to be good, useful, or available in law or in equity, unless duly stamped. And the 55 Geo. 3. c. 184. s. 8. re-enacts, in general terms, this among other provisions. Accordingly, in *Allen v. Keeves*, and *Whitwell v. Bennett*, such a cheque as this was held to be void, and *Williams v. Jarrett* turned upon a very different point. Then it was not necessary to plead this defect specially. It is not the defendant's case, but it is a defect arising on the plaintiffs' own case. They were bound to produce the cheque; and the defendant then shewed that it could not be read. This point, however, has been decided in the Exchequer, in *Dawson v. M'Donald* (8), and *M'Donnell v. Lyster* (9).

LORD DENMAN, C.J.—I do not see how to distinguish this case from *Dawson v. M'Donald*. Here is an instrument which appears to be good on the face of it, and not to require a stamp. But, in point of fact, there was something about it which rendered a stamp requisite, and that case is an authority that the evidence thereof may be given under such a plea as the present. I cannot say that it is a wrong decision.

LITLEDALE, J.—If Mr. Channell were right in stating that the 55 Geo. 3. c. 184. did not include the provisions contained in the previous statute, there might be some doubt in this case. But it certainly does include it. This instrument would have required a stamp, except that it falls within the exception of drafts on a banker, within fifteen miles of the place where they are issued, provided that it bore date on the day when it was issued. This did not bear date on the day when it was issued; therefore, it did not fall within the exception, and ought to have been stamped. And the statute 31 Geo. 3. c. 25. has enacted, that

(1) 8 Ann. c. 9. s. 39.

(2) 1 East, 435.

(3) 3 Bos. & Pul. 559.

(4) 2 B. & C. 10; s. c. 1 Law J. Rep. K.B. 244.

(5) 2 Chitt. Rep. 122.

(6) 5 B. & Ad. 32; s. c. 2 Law J. Rep. (n.s.) K.B. 156.

(7) Moo. & Mal. 196.

(8) 2 M. & W. 26; s. c. 6 Law J. Rep. (n.s.) Exch. 10.

(9) 2 M. & W. 52; s. c. 6 Law J. Rep. (n.s.) Exch. 11.

no bill of exchange shall be given in evidence, that is not duly stamped. Then, was it necessary to plead the want of the stamp? That cannot be requisite if there be any prohibition against the instrument being received in evidence. The Judge would not receive this bill in evidence, if the issue in the cause rendered its production necessary. The issue here did so; and it transpired on the trial, that it ought to have been stamped. But, it is said, that the cheque was read in evidence, and cases were referred to, in which it has been held, that if an instrument be read in evidence, it is too late to object to the stamp. But, those are all cases where the defect would be apparent on the instrument, as on a bill of exchange or a bond. Here, the objection could not be taken, until the cheque had been read, because it depends upon an extrinsic fact, which must be proved by the defendant. He could not have prevented its being read at the time when it was read. Then, it was not necessary to plead this objection, as is shewn by the case in the Exchequer.

PATTERSON, J.—There can be no doubt that the 55 Geo. 3. c. 184. incorporates the provisions of the 31 Geo. 3. c. 25. s. 19, and here the document was given in evidence, but only subject to the objection, which was afterwards raised by extrinsic evidence. The reason for offering that evidence arises on the 55 Geo. 3. c. 184, under which all drafts are made liable to the payment of some duty, but there are certain exceptions, and on the face of it this cheque would have come within the exceptions. But, an additional fact was supplied, which shewed that it did not fall within the exceptions. Though, *prima facie*, the duty would not have been payable, yet the circumstance of its having been post-dated, rendered it liable to the duty. It cannot be said to have been given in evidence, so as to preclude the defendant from taking this objection. Then, was it necessary to plead this objection? I know nothing in the new rules which requires that it should be pleaded. It is not any matter in confession and avoidance. And we have that authority in the Court of Exchequer, which I cannot distinguish.

WILLIAMS, J. concurred.

Rule absolute.

1837. } THE KING v. THE INHABITANTS
June 7. } OF MISTERTON.

Poor Law Act—Appeal—Examination.

A pauper was removed from S. to M, and a copy of his examination was sent with him, which stated that he was hired by Mr. D. P. to serve him for a year, that he went into his service, and that he afterwards, on the application of his master, went and lived with Mrs. P. during the remainder of his year. A notice of appeal was served, and stated, that, on the facts set out in the examination, the pauper did not gain a settlement:—Held, that the respondents could not, at Sessions, give evidence to shew that D. P. hired the pauper as the agent of his father; that the latter died, and that Mrs. P. was his widow, so as to enable them to contend that a settlement was gained.

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 107.]

1837. } CLAY v. STEPHENSON.
June 8. }

Evidence—Commission to Foreign Court.

A commission directed to the Judges of a Court at Hamburgh, directed them to examine certain witnesses, reduce their examinations into writing on paper, and return the same to the Court of King's Bench. They returned a copy of the depositions, certified by an officer of the court to be a correct extract:—Held, that this was not a proper return, and that the copy of the depositions was not receivable in evidence.

Money had and received to the plaintiff's use.

Plea—The general issue.

At the trial, before Denman, C.J., at the York Summer Assizes, 1835, the plaintiff sought to recover a sum of money, which he had paid to the defendant, in respect of damage sustained by a vessel which the plaintiff had chartered with a covenant to insure, but which covenant he had neglected to perform. Standing, therefore, in the situation of an underwriter, he had been called upon by the defendant to pay a sum of 520*l.*, as his contribution to the loss. It appeared, that the vessel being in the

Hull river, had been voluntarily run on a bank, to avoid an impending storm, and had thereby received the injury. The vessel was laden with a valuable cargo of goods, belonging to merchants at Hamburg; and it was represented to them by the defendant, that this was a case of general average, and they paid their contributions to them, in respect of their different interests. No information of these payments was given to the plaintiff; but it was represented to him, that it was a case of particular average; and, upon that representation, he paid the money. Having ascertained that the defendant had received these sums from the Hamburg merchants, he brought the present action, to recover that money, on the ground that it had been paid under a misrepresentation, and in ignorance of the real facts of the case. The defendant contended, that it was not a question of general average; that the plaintiff had no right to recover money which had been paid by third persons to him, perhaps erroneously; and that the plaintiff either had a knowledge of, or full means of knowing, the real facts before he paid. To prove the case for the plaintiff, depositions, taken under a commission at Hamburg, were given in evidence, to which various objections were taken. The commission was issued by this Court, directed to the Judges of the Chamber of Commerce of the city of Hamburg, or any two or more of them; and directed them, on or before the 11th of July ensuing the date thereof, to examine certain persons, upon interrogatories on their oaths: and then it contained this direction—"And that you do take each their examinations, and reduce them to writing, on paper or parchment; and when you shall have so taken them, you are to send the same, without delay, to our Court of King's Bench, closed up under the seals of any two or more of you, distinctly, plainly set, together with the interrogatories, and the writ to be filed of record." They were also directed to swear the interpreters and clerks faithfully to interpret and write the depositions of the witnesses before they were taken. To this commission a return was made, entirely in the German language, which was headed thus:

"This is an extract of the minutes to

which the certificate indorsed on the commission refers.—D. F. Worlée, Assistant Actuary.

"On this day, Wednesday, the 15th of July, 1835, before Messrs. G. G. F. Schmidt and D. F. Weber, members of the Court of Commerce at Hamburg, who, by an order of the same Court, dated 11th of July, 1835, granted, at the request of Dr. M. Pohls, on behalf of R. Clay, the younger, of Goole, were appointed as commissioners; whilst, by the same order of the Court, D. F. Worlée, the Assistant Actuary, one of the sworn officers of the Court, was added to the commission, for the purpose of keeping the minutes."

The depositions were then set out in German. The return concluded, "Whereby this act was closed and signed by the commissioners. (Signed on the minutes), G. G. F. Schmidt, Judge of the Court of Commerce; D. F. Weber, Judge of the Court of Commerce; D. F. Worlée, Assistant Actuary."

"The correctness of this act, and that the same entirely agrees with the original minutes, is hereby attested. (Signed)—

"D. F. Worlée, Assistant Actuary."

On the commission itself, was indorsed this certificate:

"The Court of Commerce of the free and Hanseatic town of Hamburg certifies (or attests) the execution of the herein-demanded examination of the witnesses Langnese and Precht, by referring to the extract of the minutes annexed herewith.

"G. F. Worlée, Actuary Assistant."

The Lord Chief Justice received the depositions in evidence, and directed a verdict to be taken for the plaintiff, but gave the defendants' counsel leave to move to enter a nonsuit. In the ensuing term—

Wightman obtained a rule nisi, for a nonsuit or a new trial; first, on the ground that the evidence was inadmissible, as the commission had not been properly executed or returned. He objected, that the examination of the witnesses was not taken in proper time, the commission having directed that the examination should take place on or before the 11th of July, whereas it did not take place till the 15th. Secondly, they appear to have been examined in German, and that examination was put down, and returned in German

to this Court; whereas their answers ought to have been interpreted at the time, and the translation sent to this country. Thirdly, that the commissioners had not returned the examinations, but only copies. The second ground of his rule was on the merits of the case, which were not ultimately disposed of. On a former day in this term, cause was shewn by—

Cresswell, Alexander, and Cleasby, who contended, that the evidence was properly received. The time when the witnesses were examined was not material, and, therefore, the date of the 11th of July was only directory; but, if it were compulsory, in effect it has been attended to, because it is clear the commissioners began to act on the 11th. Then the examination of the witnesses was correctly taken in German, and returned in that language. The writ does not require them to be interpreted into English, as in *Atkins v. Palmer* (1); and, as the depositions must be translated before they are transmitted to the jury, it is not of any importance whether they be translated abroad or in England.

[*PATTESON, J.*—They are to be filed of record in this court, and the Court does not understand the German language.]

Lastly, the commissioners have returned a proper document. The actual depositions have become records of the Court of Commerce, and were there retained; but the commissioners have sent over an examined copy, properly certified by their own officer. There is no doubt this is a correct copy; and the Court will, therefore, give credit to it. If it be argued, that the minutes of the examinations taken by the commissioners at the time are to be sent, *Atkins v. Palmer* is an authority to the contrary.

(The argument on the merits is omitted, as there was no decision thereon.)

Sir F. Pollock, Wightman, and Cowling, in support of the rule, relied upon the objections already stated. In regard to the time, it was like a reference where the award is to be made before a certain day—the arbitrator cannot make his award after that day. And as to the case of *Atkins v. Palmer*, it is distinguishable,

because there the commissioners did return an original, whereas it is admitted that a copy only has been returned in the present case.

The COURT intimated a strong opinion that the objection as to the time of the execution could not prevail; but—

Cur. adv. vult.

On this day—

LORD DENMAN, C.J. delivered the judgment.—We decide this case on one short ground: the principal evidence produced in the cause was the depositions. The commission required that the examinations of the witnesses should be taken and reduced to writing on paper, and that *the same* should be returned. Now, it is quite clear that *the same* were not returned, but an extract made by a clerk. We think we ought not to inquire whether it was made by a proper officer or not. We send a commission, requiring a certain thing to be returned: the thing we require ought to be returned. The copy, therefore, was not receivable in evidence; and there must be a new trial.

Rule absolute.

1837. { THE KING v. THE MAYOR, ALDERMEN, AND TOWN COUNCILLORS OF WINCHESTER.
June 9. }

Corporation—Mandamus to admit.

The alderman and assessors, who presided at an election of councillors for a ward in a municipal corporation, declared three persons to have been elected, and the mayor appointed a time for them to make the declaration required by the act, which they did. The assessors afterwards declared two other persons to have been elected:—Held, that the Court could not grant a mandamus to the corporation to admit these two last, as the office was now full.

At the last municipal election for town councillors of the city and borough of Winchester, it was assumed that three councillors were to be elected for the ward of St. John in that borough, in the room of two councillors, who went out by rotation, and one who had been previously elected

(1) 4 B. & Ald. 377.

an alderman. There were five candidates, Littlehales, Benny, Wells, Earle, and Dummer; and the alderman and assessors of that ward declared, on the 2nd of November 1836, that the three first were duly elected. On the 5th of November following, the assessors of that ward published a declaration, wherein they stated, that having been advised that the burgesses could not vote for more than two to supply the places of two councillors, they had examined the voting papers, and, excluding all who had voted for more than two, they found the majority in favour of Earle and Dummer, and declared them to be duly elected. On an affidavit stating these facts, and also that the said Earle and Dummer duly qualified, and accepted office as councillors, *The Attorney General* had obtained a rule nisi for a mandamus to the mayor, aldermen, and councillors, to admit the said Earle and Dummer to act and vote as councillors and members of the town council. Affidavits were filed in answer, from which it appeared that, on the 2nd of November, the declaration was made that Littlehales, Benny, and Wells were duly elected, and the mayor appointed the 4th for the newly-elected councillors to appear at the Guildhall to accept office, and make the declaration required by the act, and a notice was sent by the town clerk to each to that effect. On that day Littlehales and Wells attended, accepted the office, and made the declaration. Benny was from home on the 4th, but returned on the 5th, and attended at the town clerk's office at ten o'clock in the morning, and there made the declaration. About two o'clock on the same day, the assessors declared Earle and Dummer duly elected. It was sworn that the three had acted and voted as councillors.

Sir W. W. Follett and Crowder now shewed cause.—The office is now full, and even if there be ground for a *quo warranto* to determine the validity of their election, there is nothing which warrants the Court in issuing the mandamus to admit. Messrs. Littlehales, Benny, and Wells had made the declaration, and have accepted the office, and have voted and acted as councillors.

The Attorney General and Erle, contra.—No doubt, under the old system, when

a member of a corporation had been admitted, the Court would not grant a mandamus—*The King v. the Mayor of Colchester* (1). But then the admission was a certain form, and when it had taken place the party was in the office. Now, however, no such ceremony exists. The person elected is only required to make a declaration of his acceptance of office before two aldermen or councillors, according to the 5 & 6 Will. 4. c. 76. s. 50. The mayor has no peculiar right to admit, but the party who has the greatest number of legal votes shall, according to section 35, be deemed to be elected. That is all that is requisite to put the party in the office, if he think fit afterwards to make the declaration. That has been done by the present applicants, as well as by the parties who now oppose the rule. They are only in colourably, and it is not denied that their election is invalid; therefore the Court will now grant this writ.

LORD DENMAN, C. J.—I find that, according to the 35th section, the aldermen and assessors have ascertained who have been elected, and have declared that certain persons have been elected; and I find that every one of them has accepted the office at the time appointed by the mayor. The officer, who ought to declare the result of the election, has done so, and the parties have made the declaration, upon accepting the office, which they were bound to do. If this be not enough, the office never can be full; and it would always be necessary to bring parties before us, on a rule in the alternative either for a *mandamus* or a *quo warranto*. Nothing would be so absurd. Here the place is already filled up, and declared to be so by the only competent authority.

LITLEDAL, J.—The three persons who were first elected were declared to be so by the proper persons; notice was sent to them, and they have made the declaration. It is true, that under the old system a different course was pursued, and that a corporate meeting was called for the admission of the corporators. But that is now done away with; there is no corporate meeting; but the declaration may be made

(1) 2 Term Rep. 259.

before any two of the aldermen or councillors, and that has been done by these three persons, who would have been liable to a fine under the 51st section, if they had not accepted the office.

PATTERSON, J.—I agree in the judgment of the Court, on the full admission that the alderman and assessors have declared persons to have been duly elected who had not the majority of votes, because the act of parliament has intrusted to them the power of determining who is the party elected. And it is no part of the duty of the town council to depute any precise members of their body to admit the persons elected to make their declaration.

WILLIAMS, J.—If this rule were granted, the line between *quo warranto* and *mandamus* would be broken. On a fair interpretation of this act of parliament, it seems to me that these parties are fully in the office. It is enacted, that they shall be deemed to be elected. True it is, that certain things are to be done by them, or they will incur a penalty. But what remains to be done by these parties? The argument really comes to this, that there is nothing which fills an office at all, a most inconvenient doctrine.

Rule discharged, with costs (2).

The Court afterwards granted an information in the nature of a *quo warranto* against these persons (3).

1837. } THE KING v. THE JUSTICES OF
June 12. } DERBYSHIRE.

New Poor Law Act—Statement of Grounds of Appeal.

The grounds of appeal must not be stated generally; but particulars must be given, so as to afford to the opposite party a reasonable means of inquiry.

Therefore, where a pauper was removed, on a hiring and service in the appellant parish in 1816, a statement of the grounds of appeal, which stated generally, that the pauper had gained a settlement by hiring

(2) See *The King v. the Corporation of Oxford*, ante, p. 103.

(3) The 1 Vict. c. 78. s. 11. has rendered the election of the first three persons valid.

and service in the parishes of C and B, subsequent to the alleged settlement in the appellant parish, but gave neither names nor dates,—was held to be insufficient.

The statement of the grounds of appeal, signed by the overseers, without the churchwarden, is valid.

[For the report of the above case, see 6 Law J. Rep. (n.s.) M.C. p. 140.]

1837. }
June 12. } HITCHCOCK v. WAY.

Statutes—Prospective Enactment.

A bill of exchange, drawn for a wager on a horse race, which was void by 9 Anne, c. 14, had been indorsed to a bond fide holder for value, who sued the drawer, and the cause was at issue before the 5 & 6 Will. 4. c. 41. was passed, but the trial took place after:—Held, that that statute did not entitle the plaintiff to recover.

Assumpsit on a bill of exchange for £200l., drawn by one Hopkinson upon the defendant, payable to the drawer's order three months after date, indorsed by Hopkinson to Beavan, and from Beavan to the plaintiff. The declaration was filed in Michaelmas term, 1831.

Plea—Non assumpsit.

At the trial, before Coleridge, J., at the Guildhall sittings in last Trinity term, it was proved, that the bill in question had been given to secure the payment of a wager won on a horse race, but the plaintiff was a *bond fide* holder for value. For the defendant it was contended, that the bill was void by the 9 Anne, c. 14; but the plaintiff relied on the 5 & 6 Will. 4. c. 41. The learned Judge directed a verdict to be entered for the plaintiff, but gave the defendant leave to move to enter a nonsuit. In the same term—

Andrews, Serj. obtained a rule accordingly; against which, in last term, cause was shewn by—

Maule and Humphrey.—The 5 & 6 Will. 4. c. 41, which passed before this case was tried, rendered this bill valid at the time of trial. The 1st section (1) applies to all

(1) Which, after reciting the provisions of various statutes rendering bills and notes void,

bills or notes then unpaid. Its language is altogether general and unrestricted; and there is no proviso in the act to limit its application, and provide for bills or notes drawn or made before the passing of the act. The act is remedial, and is intended to remove what was unquestionably an injustice. The 2nd section is, by its terms, prospective only, and shews, that the attention of the legislature was drawn to the case of existing instruments. But the present enactment repeals the statute of Queen Anne; consequently, the Judge at the trial could no longer take any notice of it. The decisions on the 9 Geo. 4. c. 14. s. 1, *Fowler v. Chatterton* (2), and *Hilliard v. Lenard* (3), and that of *Charrington v. Meatheringham* (4) on the last Highway Act, 5 Will. 4. c. 50, support the ruling of the learned Judge. See also *Surtees v. Ellison* (5) on the Bankrupt Act, 6 Geo. 4. c. 16.

[LORD DENMAN, G.J.—You may also cite *Freeman v. Moyes* (6).]

The Attorney General, Sir W. W. Follett, and S. Martin, in support of the rule.—The statute only applies prospectively to securities given subsequent to the passing of the act. Here, when the bill was drawn, it was void: so when it was in-

enacts, "That so much of the hereinbefore recited Acts, 16 Car. 2, 10 Will. 3, 9, 11, and 12 Ann., 5 Geo. 2, 11 & 12 and 45 Geo. 3, and 6 Geo. 4, as enacts that any note, bill, or mortgage shall be absolutely void, shall be and the same is hereby repealed; but nevertheless every note, bill, or mortgage which if this Act had not been passed would, by virtue of the said several lastly hereinbefore mentioned Acts, or any of them, have been absolutely void, shall be deemed and taken to have been made, drawn, accepted, given, or executed for an illegal consideration, and the said several Acts shall have the same force and effect which they would respectively have had if, instead of enacting that any such note, bill, or mortgage should be absolutely void, such Acts had respectively provided that every such note, bill, or mortgage should be deemed and taken to have been made, drawn, accepted, given, or executed for an illegal consideration: Provided always, that nothing herein contained shall prejudice or affect any note, bill, or mortgage which would have been good and valid if this Act had not been passed."

(2) 6 Bing. 258; s. c. 8 Law J. Rep. C.P. 30.

(3) Moo. & Mal. 297.

(4) 2 M. & W. 142; s. c. 6 Law J. Rep. (N.S.) Exch. 23.

(5) 9 B. & C. 750; s. c. 7 Law J. Rep. K.B. 335.

(6) 1 Ad. & El. 338.

dorsed, when the action was commenced, and when the plea was pleaded. The plaintiff's right to recover must be determined by the pleadings, and it cannot be material what may be the law as to the particular transaction at the time of the trial. The statute of Anne is repealed; but it cannot be considered as repealed with reference to instruments which had already been invalidated by it. Indeed, the 2nd section of the act throws light upon the construction of the prior section. The former, which is in terms prospective, provides, that if the drawer or maker pays the value of the bill to the indorsee, he shall recover the amount from the party to whom the bill is given. If, in the present case, the plaintiff shall recover, the defendant will not be able to avail himself of this provision, which was evidently intended to be relative to the former. The cases which have been cited on the 9 Geo. 4. c. 14. have no application. That statute did not apply to contracts, but to evidence only, which distinction was pointed out by Lord Tenterden himself in *Ansell v. Ansell* (7). The principle is, that neither a new law, requiring new forms, will render a previous contract invalid—*Gilmore v. Shuter* (8), nor will a new law, repealing previous provisions, render valid a contract previously void. Indeed, *Jaques v. Wilky* (9) is an express authority, that a contract declared to be void by a statute is not made good by a repeal of that statute. *Paddon v. Bartlett* (10) was cited.

[PATTESON, J.—In *Bac. Abr.* 'Statute,' C, it is laid down, that it is generally true, that no statute is to have a retrospective effect beyond the time of its commencement.]

Cur. adv. vult.

On this day, the judgment of the Court was given by—

LORD DENMAN, C.J. [who stated the facts of the case, and continued]—After issue was joined, the 5 & 6 Will. 4. c. 41. was passed, which is both a repealing and an enacting statute. It begins by setting out

(7) Moo. & Mal. 299.

(8) 2 Lev. 227; 1 Ventr. 330.

(9) 1 H. Bl. 65.

(10) 3 Ad. & El. 884; s. c. 4 Law J. Rep. (N.S.) Exch. 335.

in detail a variety of statutes, which it repeals, so far as they make any instruments void; and enacts, that such instruments shall be deemed to have been given on an illegal consideration. The plaintiff has argued, that it is to have effect at the time of the trial, and many cases were cited in support of that doctrine; but they all turned upon the particular wording of the acts of parliament on which they were decided. And it is enough to say, that we find no such words in the present statute as will warrant us in giving the effect to it which the plaintiff requires. We are of opinion, that the law in force when the action was commenced must prevail, unless the legislature express a contrary intention: we should have been glad to have decided otherwise if we could.

Rule for entering a nonsuit absolute (11).

1837. }
May 26. } MECHELEN V. WALLACE.

Statute of Frauds—Contract for an Interest in Land.

A party agreed by parol to take a house, which was partly furnished, and was to be completely furnished by the lessor, at a certain rent:—Held, that this was an entire contract relating to an interest in land; and that, therefore, as there was no note in writing, no action was maintainable against the lessor for not completing the furnishing of the house in a suitable manner.

Assumpsit. The declaration stated; that the plaintiff was desirous and intended to hire and take as tenant, a furnished house and premises, for a ladies' boarding-school; that the defendant was possessed of a house, partly furnished, and was desirous that the plaintiff should take and hire that house and furniture, at the rent of 170*l.* for the house and furniture, and all other furniture necessary for completely furnishing the same; and thereupon, in consideration that the plaintiff would take possession of the house so furnished, and would, if the furniture necessary for the com-

pletely furnishing the same should be sent into the said house within a reasonable time, become the tenant to the defendant of the said house and premises, with all the furniture aforesaid, at the rent aforesaid, and pay the rent from a day agreed upon, the defendant promised within a reasonable time after the plaintiff should have so taken possession of the said house and premises, to send into the house all the furniture necessary for the completing of the furnishing of the house, of good quality, and suited for the purpose. Breach, that although the plaintiff would have become tenant as aforesaid, and paid rent, if the defendant would have sent in the furniture, yet the defendant did not send in good and suitable furniture, and the plaintiff was prevented from having the school;—with an allegation of special damage.

Plea—That the promise in the declaration mentioned was and is part and parcel of a contract, made by and between the plaintiff and defendant, concerning the said tenement, and the interest relating to the same, as in the said declaration appears; and that neither the said contract nor any memorandum or note thereof was or is in writing, signed by her the said defendant, or any other person thereunto by her lawfully authorized. Verification.

To this plea the plaintiff demurred, and assigned various causes of demurrer.

J. Henderson, in support of the demurrer.—No doubt where a party contracts to do certain things, some of which are within the statute, and others are not affected thereby, yet, if they altogether form the entire consideration for the contract, it will be invalid, unless the provisions of the statute be complied with—*Earl of Falmouth v. Thomas* (1), *Chater v. Beckett* (2), and *Thomas v. Williams* (3). But, where the two parts can be separated, and each forms a distinct contract, the statute does not vitiate the whole—*Wood v. Benson* (4), and *Mayfield v. Wadsley* (5).

(1) 1 Cr. & Mee. 89; s. c. 2 Law J. Rep. (N.S.) Exch. 57.

(2) 7 Term Rep. 201.

(3) 10 B. & C. 664; s. c. 8 Law J. Rep. K.B. 314.

(4) 1 Cr. & Jer. 94; s. c. 1 Law J. Rep. (N.S.) Exch. 18.

(5) 3 B. & C. 357.

(11) See *Warne v. Boreford*, 6 Law J. Rep. (N.S.) Exch. 192, and *Vallance v. Siddal*, post.

[PATTESON, J. referred to *Harvey v. Graham* (6); and—

[LORD DENMAN, C.J. to *Head v. Baldry* (7).]

Here, the supply of the furniture is quite distinct from the taking of the house. The contract, as far as it concerns the defendant, cannot be concerning any interest in land, because she was simply to supply furniture. But it is not shewn that the defendant was bound by the contract for the hiring of the house; and unless there were such a contract, the case is not within the statute.

Maule, contra.—This is an interest in effect for the letting of a house, together with furniture either then in it, or to be supplied to it. It is one entire contract, relating to an interest in land, and quite distinguishable from the cases cited, where there were distinct contracts. Indeed, this Court has already decided, that this contract was invalid in *Mechelen v. Wallace* (8). It resembles *Bird v. Higginson* (9).

Henderson, in reply, stated, that the case was not decided upon this point, when before the Court on the former occasion.—[He was stopped by the Court.]

LORD DENMAN, C.J.—The bare statement of the case shews, that this is a contract relating to an interest in land.

LITTLEDALE, J.—This is a contract for the house and the furniture altogether.

PATTESON, J.—The statute enacts, "that no contract or sale of any interest in land shall be valid, unless there be a note in writing." The plaintiff certainly made a contract for an interest in land, whatever the defendant may have done.

Judgment for the defendant.

1837. } LANE AND ANOTHER V.
May 30. } GLENNY.

Attorney—Pleading.

In an action on an attorney's bill, the objection that no signed bill has been delivered,

must be pleaded specially, otherwise it cannot be taken at the trial.

This was an action on an attorney's bill, to which the defendant pleaded only the general issue.

At the trial, before Lord Denman, C.J., at the Westminster Sittings after Michaelmas term, 1835, an objection was taken to the bill of the business done by the plaintiffs, which had been delivered to the defendant, that there was no mention of the court in which the business had been done. His Lordship directed the verdict to be entered for the plaintiffs; but gave the defendant leave to move to enter a nonsuit. In the ensuing term,—

Mansel obtained a rule nisi, citing *Lester v. Lazarus* (1).

Crowder now shewed cause.—This objection, if it be one, is not open to the defendant, not having been specially pleaded. It has been decided by Parke, B., in *Moore v. Dent* (2), that the want of a signed bill cannot be urged as an objection, unless it be specially pleaded. And such also appears to have been the opinion of the Court of Common Pleas, in *Beck v. Mordaunt* (3).

Ball and Mansel, in support of the rule.—According to the report of that case in 4 Dowl. P.C., Park, J. denied the proposition that this defence was not open upon the general issue. It is part of the plaintiff's case to produce the bill; and if it be not duly signed, he cannot recover. It is like the case of an apothecary, who must prove his certificate in every action, though there be no plea of the want of a certificate—*Morgan v. Ruddock* (4).

[LITTLEDALE, J.—The attorney may make a contract, though he may not bring an action to charge his client until he has delivered a signed bill. The apothecary, unless he be qualified, cannot make a contract.]

But there is no promise by the defendant, upon which his liability arises, until the bill has been delivered according to the statute.

(1) 2 Cr. M. & R. 665; s. c. 5 Law J. Rep. (N.S.) Exch. 13.

(2) Moo. & Rob. 460.

(3) 1 Bing. N.C. 140.

(4) 4 Dowl. P.C. 311; and see *Shearwood v. Hay, and Wills v. Langridge*, 5 Law J. Rep. (N.S.) K.B. 124.

(6) 5 Ad. & El. 61; s. c. 5 Law J. Rep. (N.S.) K.B. 235.

(7) Decided in Hilary term last, see post.

(8) 6 Nev. & Man. 316.

(9) 2 Ad. & El. 696; s. c. 4 Law J. Rep. (N.S.) K.B. 124.

LORD DENMAN, C. J. — It seems to have been decided, that this objection must be specially pleaded, and we are not disposed to disturb those decisions.

LITTLEDALE, J. — It is immaterial what are the pleas in actions brought by apothecaries; even though there be a plea of payment, they must prove their certificate.

PATTESON, J. — Those cases were decided upon the words of the act of parliament (5), which are very strong, and provide, that no apothecary shall be allowed to recover his charges, unless he shall, on the trial, prove that he was duly certificated.

Rule discharged.

1837. } SIR FRANCIS BURDETT v.
June 3. } WITHERS.

Landlord and Tenant—Repairs.

The declaration stated, that the defendant became tenant to the plaintiff of certain premises, and promised to keep them in good repair,—breach, that he did not keep them in repair. *Plea, payment into court of 5*l.*, and no damages ultra:—Held, that evidence of the state of the premises when the defendant took possession, was admissible for the defendant.*

Assumpsit. The declaration stated, that, whereas the defendant was tenant to the plaintiff, of certain farms, buildings, &c., upon (amongst others) the terms, that the defendant should, during the tenancy, keep all the said premises of every description in good and sufficient repair, at his own expense, the defendant, in consideration thereof, promised, &c. Breach, that the defendant did not keep all the premises of every description, or any of them, in good and sufficient repair at his own expense; but, on the contrary, the defendant, after he became tenant, and during the continuance of his tenancy, &c., wrongfully, &c., suffered and permitted all the premises of every description to be and continue, and the same were, for and during all that time ruinous, prostrate, and in bad and untenable repair, &c., for want of

good and sufficient repairing thereof; and afterwards wrongfully yielded up the same so ruinous, &c.

Plea—Payment of 5*l.* into court, and no damages *ultra*, and issue thereon.

At the trial, before Alderson, B., at the Spring Assizes, in 1836, for Berkshire, it appeared, that the defendant had been the tenant of the plaintiff, of a cottage and some premises, and, when he left them, certain repairs were requisite, which, according to the estimate of a surveyor, would have cost upwards of 100*l.* The defendant proposed to give evidence of the state of the premises when he took possession of them; but the learned Judge thought that that evidence was not admissible on the issue, and refused to receive it, and the plaintiff recovered a verdict. In the ensuing term,—

Cooper obtained a rule *nisi* for a new trial, on the ground, that this evidence was improperly rejected, citing *Gutteridge v. Muniyard* (1), and *Harris v. Jones* (2).

Ludlow, Serj. now shewed cause, and, referring to *Stanley v. Tomgood* (3), endeavoured to support the ruling at *Nisi Prius*; but—

Per Curiam.—The state of the premises when the defendant obtained possession, was clearly material on this issue, and the evidence ought to have been received.

Rule absolute.

1837. } WARRE AND OTHERS, EXECU-
June 5. } TORS OF WARRE, TREASURER
OF THE LONDON DOCK COM-
PANY, v. CALVERT, EXECU-
TOR OF R. LAYCOCK.

Principal and Surety—Pleadings.

A builder contracted with a company to do certain works within a specified time, and by the contract he was not to be paid any thing until one-eighth of the work had been done, and then he was only to receive three-fourths of the value of the work so performed; and two sureties entered into a bond to secure his performance of the contract.

(1) 1 Moo. & Rob. 334.

(2) Ibid. 173.

(3) 3 Bing. N.C. 4.

(5) 55 Geo. 3. c. 194. s. 21.

The company advanced him money before the one-eighth of the work was performed, and to a greater amount than the value of the work done at the time of such advances. He did not complete the work, and the company were obliged to employ other persons to complete it; but the sum which they paid did not exceed the contract price:—Held, that the sureties were not liable on the bond to make good the loss to the company, arising from their overpayment to the builder, such payment not being according to the terms of the contract.

The company declared on the bond; the surety pleaded non est factum, and the plaintiffs suggested the breach of the contract, and averred that the loss was sustained by reason of the non-performance of the contract by the builder:—Held, that the sureties were at liberty to shew the above facts in reduction of damages, and that the plaintiffs were only entitled to nominal damages.

Debt on bond for 5,000*l.*

Plea—*Non est factum testatoris.*

The plaintiffs suggested that the bond was given to secure the due performance of a contract, entered into by one R. Streather, for certain works, under a contract set out in the suggestion, and which has already been printed in the report of the case of *Crowfoot v. the London Dock Company* (1), by which Streather was to have completed the work by a certain time, which time was enlarged by an agreement entered into by the company under their seal, and which was also set out; the work was not performed within the enlarged time, but Streather left it incomplete, having received 48,155*l.*, and the company were obliged to employ other persons to finish it, to whom they paid a large sum of money, and thereby sustained damage to the amount of 12,000*l.*, by reason of the non-performance of the work by the said R. S.

At the trial, before Lord Denman, C.J. at the Sittings in London, after Hilary term, 1836, the plaintiffs recovered a verdict, and the damages were taken by direction of his Lordship at 1*s.* In the ensuing term—

Sir F. Pollock obtained a rule nisi for a new trial, when, at the suggestion of the Court, the following facts were stated in the shape of a case, which came on to be argued this day.

On the 29th of September 1829, Mr. Streather entered into the contract, mentioned in the pleadings, with the London Dock Company, to execute the works required in the formation of an entrance from the river Thames at Shadwell to the eastern dock of the company. The contract was in writing. On the 2nd of November, Mr. Streather entered into the bond sued upon, for the due performance of the contract, and the defendant's testator and another were the sureties. The directors appointed that the works should be commenced on the 28th of December 1829, and the same were commenced accordingly, and should therefore have been completed on the 28th of December 1830, but Mr. S. having applied, with the consent of his sureties, for an extension of the time, the directors agreed to allow him an additional term of three months, until the 28th of March 1831, and a memorandum of agreement, under seal, was executed by the said R. S., his sureties, and the treasurer of the company. On the 28th of March 1831, a considerable part of the works remained unfinished, and Mr. S. having become embarrassed in his circumstances, and being unable further to prosecute the works, his men withdrew on the 18th of April. On the 21st a commission of bankruptcy was issued against him, and the works were ultimately completed by the company. The plans of the works were from time to time altered by the directors, pursuant to the power reserved to them, the result of which alterations was, that an additional sum of 3,731*l.* 16*s.* became payable to the said R. S., over and above the contract price of 52,200*l.* Between the 18th of May 1830 and the 25th of March 1831, inclusive, Mr. S. received from the company advances or payments to the amount of 48,155*l.* 0*s.* 9*d.* After he left the premises the company completed the works, at an expense of 18,875*l.* 3*s.* 3*d.*, according to the scale of prices in his contract. There were on the premises, when he left them, materials to the amount of 1,209*l.*, of which 893*l.* had been supplied on the cre-

(1) 2 Cr. & M. 637; s. c. 4 Law J. Rep. (N.S.) Exch. 267.

dit of the company, and were paid for by them; the residue was supplied on the credit of Streather. The company used all these materials in completing the works, and were subsequently compelled to pay the assignees of S. the value of the part supplied on his credit. The amount of the work done by Streather at the time when he left the premises was 36,489*l.* 10*s.*

Sir F. Pollock, for the plaintiffs.—The company are entitled to recover the whole penalty of the bond, and even then will be great losers. Mr. Streather did not fulfil his contract; he did not perform the work he contracted to do, and the company have been compelled to complete it themselves. The bond is therefore forfeited, and the plaintiffs would be entitled to recover the whole penalty. But it is said, that they have no claim against the surety, because the company paid the principal the money that was payable under the contract; and it is contended, that the company have thereby released the sureties—that they have neglected to protect themselves, as they might have done by retaining the money in their own hands. That is no answer in this case; certainly not in a court of law, nor on these pleadings. Suppose the defendant had pleaded *non damnificatus*, could he have said that the company had not been damaged because they had paid Streather as the work proceeded? Surely not. Then the defendant's situation is the same at present. The only question is, what is the amount of the damage which the plaintiffs have sustained. That is clearly more than the amount of this bond. But *Law v. the East India Company* (2) was cited, where it was held by the Master of the Rolls, that where the obligee pays the principal, the surety cannot afterwards be called upon. In the first place, it is to be observed, that upon the facts of that case, it appears that the principal had fully discharged his duty, and therefore the remark was not necessary for the decision. But, secondly, that may be the rule prevailing in equity, whereas the present proceedings are at law, and it is not shewn that there is any such rule in these courts. If, therefore, the condition of the bond be considered,

and the subject-matter of the contract, the company have a right to maintain this action. Assuming, however, that this might be a defence, it ought to have been pleaded specially in bar of the action. It cannot be a ground for reducing the damages: if it afford any answer at law, it must be by way of plea.

The Attorney General, contra.—The direction in this case was right, and the plaintiffs were not entitled to more than nominal damages. The testator was a surety for the due performance of the work. Now, the company have not been damnified by the non-performance of the work, but in consequence of their having advanced 48,000*l.* to Streather when he had only performed work to the value of 36,000*l.* The loss which they have sustained arises from their own conduct in paying him too much money, instead of retaining a part of the money due for the work already performed. If they had done so, as by the contract they ought to have done, they would have possessed a fund sufficient to indemnify them against the loss arising from the non-performance of the work at the contract prices. This action is brought on a contract to which there were three parties—the company, Streather, and his sureties. It is not enough to shew that Streather has broken his contract, and that the company are losers; but it must also be shewn that they are not losers through their own default or imprudence. If they do not shew that, although in point of fact the contract was not performed in time, and therefore there is no complete defence in point of law, they have no right to more than nominal damages. As to the necessity of pleading the matter specially, that could not be done, since it does not afford a complete defence. All that could be done was to contest the amount of damages alleged to have been sustained. On referring to the mode in which the advances were made in this case, as detailed in the award set out in *Cromfoot v. the London Dock Company*, it will be seen that they were not at all consistent with the terms of the contract. The company were not to advance beyond three-fourths of the value of the work done, and not without certificates from their engineer. It was on the security of this contract that

the sureties became responsible, and if the company have not acted upon it, the sureties cannot now be charged. Suppose they had advanced the whole 52,000*l.* to Streather before the work was begun, and he had absconded, could they have called upon the sureties? Certainly not. The present case only differs from that in degree. Then the case of *Law v. the East India Company* is completely in point.

Sir F. Pollock replied.

LORD DENMAN, C.J.—I did not wish to be bound by the opinion which I formed at *Nisi Prius*, but was anxious to have the case considered by the Court. I had not any doubt then, neither have I now. After hearing the facts of the case, it is clear to me that the loss did not accrue to the company in consequence of the non-performance of the contract, which constitutes the breach of this bond, but because they made advances to the contractor without the knowledge of the sureties. They cannot, therefore, now call upon those sureties.

LITLEDALE, J.—There was a stipulation in the contract as to the mode of payment, namely, that three-fourths only was to be advanced upon the value of the work done. Work was done to the value of 36,000*l.*; according to the contract only 27,000*l.* ought to have been advanced, whereas they actually advanced 48,000*l.*; and it appears that the money they paid for completing the contract after he left off, was not more than he would have been entitled to receive under his contract. It appears to me that the money which they advanced was not paid under the contract. Then are the sureties liable? When sureties enter into a bond for the due performance of a contract by a principal, they have a right to see it duly performed by both parties, and if the one choose to act differently from its provisions, he cannot afterwards come upon them. It may be true, that the surety did know in the present instance, that the advances had been made. If he did, that knowledge was accidental, and can make no difference in the rights of the surety. What was the statement of the breach? That Streather did not perform his engagement, and then the time was enlarged by a new agreement:

not that that would have made any difference—*Littler v. Holland* (3): but it is alleged that he did not perform the work within the stipulated time. Still they are not damnified, for if Streather had performed, they must have paid him as much as they have paid for this work. It is said that this ought to have been pleaded, but it could not. It could not have been pleaded that they were damnified through their own default, for that did not cause the breach of contract. The only ground on which I proceed, however, is, that the advances made by the company were voluntary, and cannot be recovered from the sureties.

PATTESON, J. stated the pleadings, and continued:—The question is, whether, on this assignment of breaches, the company are shewn to have been injured by the non-performance of the contract. I am of opinion that they have not shewn it. The alteration of the time is not material for our consideration, because the defendant has admitted the breach. It was clear that there had been a breach, for Streather had not performed his contract. The plaintiffs were therefore entitled to recover. But the question is, as to the amount of damages. It is said, if they were to retain one-fourth of the price as their security, why should they take this bond? I can see this reason—that they might have some person to look to in case the work was not performed, and they were compelled to employ others to complete it, and have to pay them a higher price. There is no inconsistency, therefore, in their taking this bond. Then the contract is, that the work should be performed within a certain time; that Streather should not have a right to call for any payment until one-eighth of the work was completed, and then should only receive one-fourth of what was done. Now, the payments which have been made in this case, may have been on account of the contract, but the surety has a right to say, that they were not made according to the contract. He is only answerable when the parties have acted conformably with the contract. It seems, therefore, to me, in this case, that there is no damage arising from the breach of this contract, and there-

fore that the verdict for 1s. is perfectly right.

WILLIAMS, J. — Suppose there be a breach of the contract by the non-performance, the company have not been damnified, for the 36,000*l.* and the 18,000*l.* would not have exceeded the money payable to Streather under his contract. Then the advances were not made conformably to the contract. There bought only to be nominal damages.

Rule discharged.

1837. } THE KING v. THE RECORDER
June 6. } OF POOLE.

Borough Rate—Notice of Appeal.

A notice of appeal against a borough rate according to 5 & 6 Will. 4. c. 76. s. 92. must state expressly that the appellant is a party aggrieved, or that must appear by inference.

Therefore a notice of appeal which began, "I, F. T. being a burgess, and being called upon to pay a borough rate, do give you notice," and contained no other allegation of grievance, was held to be insufficient.

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 119.]

1837. } THE BARON AND BARONESS DE
June 9. } RUTZEN v. LLOYD.

Costs when Rule abandoned.

A plaintiff having obtained a verdict, the defendant applied for and obtained a rule for a new trial. The plaintiff drew up the rule, and served it upon the defendant, whose attorney wrote a letter, saying, "that as the Court had decided the merits of the case against him, he should not avail himself of the privilege of the new trial:"—Held, that the plaintiff was entitled to sign judgment, and to the costs of the trial.

Case for disturbance of the plaintiffs' market. The cause was tried before Gurney, B., at the Spring Assizes, in 1834, for Pembrokeshire, when a verdict passed for the plaintiffs. The defendant obtained a rule nisi for a nonsuit, which was discharged in last Trinity term, but a new trial was granted, on the ground, that some

evidence was improperly received. The plaintiffs' attorney drew up that rule, and served it upon the defendant, whose attorney shortly afterwards wrote a letter to the former, containing these words:—"My client will not avail himself of the privilege of a new trial, the points relating to the nonsuit having been decided against him." Thereupon, in Michaelmas term last, a rule nisi was obtained by the plaintiffs to discharge the rule for the new trial, to deliver the postea to the plaintiffs, and that they should be allowed to sign judgment and tax their costs thereon; against which—

E. V. Williams now shewed cause.—This application cannot be sustained. The rule for the new trial was made absolute, without any mention of the costs of the former trial; therefore, according to the rule Hilary, 2 Will. 4. No. 64, they could not be allowed to the plaintiff, even though he succeed. Then, how can the conduct of the defendant's attorney, in declining to go on with the case, render his client liable to pay them? The defendant is willing now to retire from a useless litigation, and, therefore, does not avail himself of the privilege granted by the Court. Suppose, instead of abandoning the rule, the defendant had applied to withdraw his plea, and suffer judgment by default, he would not have been liable to pay the costs—*Peacock v. Harris* (1). The plaintiffs ought to have applied to have that rule rescinded, or might, if they had thought fit, have gone to trial, and used this letter as an admission against the defendant; but they have no right to come with such a motion as the present.

Cresswell, in support of the rule.—The defendant rejects the benefit conferred upon him by the Court, and in effect gives up the contest. He cannot use the rule of court merely to protect himself from the costs of the action, to which he is properly subject. Now, the practice of this court, which is not affected by the new rule, has always been, that where the party, in a case like this, abandons or confesses the action, he is liable to pay the costs of the first trial, though nothing may have been said about it in the rule for the

(1) 1 Nev. & P. 240; s. o. ante, p. 14.

new trial—*Hankey v. Smith* (2), *Booth v. Atherton* (8), *Smith v. Haile* (4), *Bird v. Appleton* (5), *Robertson v. Liddle* (6), *Jackson v. Hallam* (7), and *Elvin v. Drummond* (8).

[PATTESON, J.—In *Peacock v. Harris*, the defendant did intend, in the first instance, to avail himself of the rule for the new trial, and a second notice of trial was given.]

That is the distinction between it and the present case.

LORD DENMAN, C.J.—My first impression was, that the defendant having abandoned the rule, it was as though no rule had been granted; and, therefore, the plaintiffs were entitled to the *postea*. I must freely own, that my mind has fluctuated during the discussion. It seems a hardship that the defendant should be put in a worse situation than he would otherwise have been in, by giving notice of his intending to abandon the rule. And I cannot very easily get over it. Neither is it easy to distinguish this case from *Peacock v. Harris*. However, the circumstance of the plaintiffs having drawn up and served the rule, and the defendant having then given notice that he would not avail himself of it, shews, that the defendant has abandoned the rule; and, therefore, that the plaintiffs ought to have their costs. It seems, by the cases, that it is to be treated as though the defendant admitted, that he only succeeded on the rule through some technical point which he gives up.

LITLEDALE, J.—It appears to me, that this rule must be made absolute. If there had been no application to the Court, the plaintiffs would have had their costs. Can the defendant, by obtaining this rule, which he afterwards abandons, deprive the plaintiffs of those costs? As to *Peacock v. Harris*, if the application to withdraw the plea had been properly brought before the Court, I do not know that the defendant might not have been made to pay the costs. But the record, in fact, was altered in that

case, and assumed a different form. Not so here. And I decide upon the ground, that the defendant has abandoned his rule and withdrawn himself from the defence. Therefore, I think, the rule should be made absolute.

PATTESON, J.—This was the defendant's rule, and it was for him to draw it up. If neither he nor the plaintiffs had done so, there would have been no rule at all, and the plaintiffs would have been entitled to judgment. But instead of the defendant, the plaintiffs drew it up. The defendant says, "I will not have it; I will not avail myself of the privilege of the new trial." The plaintiffs then wish to be in the same situation as if the rule had never been drawn up, and they ought so to be. Such a determination will not be inconsistent with *Peacock v. Harris*. There, the rule was served and acted upon, and a new notice of trial given. The defendant then applied to withdraw his plea, and a favour was granted to him. Here, however, no advantage was intended to be given to the defendant. The case of *Robertson v. Liddell* depends on a different principle, for there the parties had agreed that the facts of the special case should be stated as on a trial. Therefore, it was the same as though the case had been reserved on the first trial. But *Jackson v. Hallam* does seem at variance with the decision in *Peacock v. Harris*. The defendant gave a *cognovit*, and I cannot see any difference between that and the withdrawal of the defendant's plea. I do not know how to reconcile them.

WILLIAMS, J.—The circumstances of this case are peculiar. It is certainly hard, that if the defendant had been obstinate, and had chosen to go down again to trial, he would not have been liable to these costs. But, on consideration, it must be considered, that the defendant's conduct has placed him in the same situation as though he had never applied for the rule. Then, as the verdict would not have been disturbed, the plaintiffs would have had their costs in the ordinary course.

The Court held, however, that the plaintiffs were not to be allowed the costs of the rule, which had been made absolute for the new trial.

Rule absolute, without costs.

(2) 3 Term Rep. 507.

(3) 6 Term Rep. 144.

(4) *Ibid.* 41.

(5) 1 East, 111.

(6) 10 East, 416.

(7) 3 B. & Ald. 317.

(8) 4 Bing. 415.

1837. } THE KING v. THE INHABITANTS
May 27. } OF ARDLEIGH.

Settlement by Estate—Copyhold.

A pauper, seized in fee of freehold and copyhold lands, conveyed his freehold lands to trustees for sale, and covenanted to surrender his copyhold lands to them, or to any person whom they should appoint. The trustees were to pay his debts with the proceeds, and any surplus to him:—Held, that he gained a settlement by residing in the parish where the copyhold lands were situated, for forty days after the execution of the covenant.

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 151.]

1837. }
June 9. } GUEST v. ELWES.

Costs—on Amendment at Nisi Prius.

A plaintiff declared against a sheriff for a negligent escape, to which the defendant pleaded not guilty, and no arrest. At the trial it appeared to be a case of a neglect to arrest, and the Judge directed the fact to be stated, in order that the Court might amend under the 3 & 4 Will. 4. c. 42. s. 23, and the jury assessed the damages, the verdict being taken for the defendant on the issues joined. The Court ordered the judgment to be entered for the plaintiff:—Held, that he was entitled to the general costs of the cause, and the defendant to the costs of those issues on which he had succeeded.

The circumstances of this case are stated in 5 Law J. Rep. (N.S.) K.B. 184, and the present question arose as to the costs of the action. After the judgment given by the Court, the *postea* was drawn up as follows: "The jury, as to the first issue joined between the parties, say, that the defendant is not guilty of the premises within laid to his charge *modo et forma*; and as to the second issue within joined, that the defendant did not take and arrest the said J. H. *modo et forma*, and thereupon the Judge, before whom the said issues came on to be tried, to wit, Sir E. H. Alderson, having, according to the form, &c., directed the jurors to find the facts according to the evidence, the jurors aforesaid, upon their

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oath did further find and say, according to the form of the statute, that the defendant had been guilty of a negligent omission to arrest the said J. H., and they assessed the damages, which the plaintiff had thereby sustained, at 30*l.*; and it now appearing to the said Court here, that the variance between the mode of stating the cause of action, in the declaration mentioned; and the cause of action as it appeared upon the finding of the said jurors, is immaterial to the merits of the case, and that the mis-statement of the said cause of action in the said declaration, was and is such as could not have prejudiced the defendant in the conduct of the defence to the said action, and that, according to the very right and justice of the case, the plaintiff ought to have judgment to recover his said damages—therefore," &c. On the taxation of the costs, the Master allowed to the plaintiff his full costs, in the same manner as if he had succeeded on both the issues, and also his costs of the motion above reported, but did not allow any costs to the defendant. In Michaelmas term last—

W. J. Alexander obtained a rule nisi; that the taxation of costs might be set aside, and that the Master should tax the defendant his costs of the cause, or of all the issues found for him, and deduct the same from the plaintiff's costs; against which, cause was shewn in last term by—

R. V. Richards, who contended, that the taxation was correct. The amendment took place under the 3 & 4 Will. 4. c. 42. s. 23, which would have authorized the learned Judge in imposing upon the plaintiff the terms of paying the defendant's costs, but he did not think right to do so. Then the Court have affirmed the decision of the Judge, and have given judgment for the plaintiff. The costs follow as a necessary consequence of that judgment. Such was the opinion of the Court in this case, as it is reported in 6 Nev. & Man. All the costs which have been incurred were equally necessary for the issue on which the plaintiff ultimately succeeded, as those which were joined before the trial. Then as to deducting the costs of the defendant from those of the plaintiff, the rule Hilary, 2 Will. 4. No. 74. is not applicable, because that provides for cases where some of the

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issues are found for one side, and some for the other. Here they have all been found one way; but though found for the defendant, they were not material to the merits of the cause.

Sir W. W. Follett and Alexander, in support of the rule.—The defendant having succeeded upon the issues joined in this cause, is entitled to recover his costs. If the Judge had ordered the record to be amended, he might have directed the plaintiff to pay the costs, but he could not have ordered the defendant to do so. He did not, however, act upon that section, but referred the case to the Court, according to section 24.

[PATTESON, J.—The Court cannot amend the record.]

So it has been decided, and therefore the issues joined now stand for the defendant. The object of the legislature has not been fully worked out, for no provision has been made for the costs. The defendant claims his costs under the 23 Hen. 8. c. 15, for the verdict has been found for him.

[PATTESON, J.—He has not got the verdict. The Court did not set aside the verdict which had been found; but the whole record was taken together.]

The finding, as it now stands, cannot affect the other issues on the record, and the defendant has succeeded on the issues which have been joined. In the cases of amendment, the Court make the plaintiff pay the costs of the defendant before they allow the amendment. The same principle ought to apply. *Doe v. Webber* (1) is an authority for the defendant's right to recover his costs. Supposing there had been two counts, one for an escape, and the other for the neglect to arrest, as the defendant would have succeeded on the former, he would have recovered his costs thereon. Is he to be in a worse situation now, when the plaintiff has altogether failed? Then the plaintiff is not entitled to the costs. The statute of Gloucester gives to a plaintiff, who recovers damages, the costs of his suit. Here the plaintiff has not had a suit or a writ on which he has recovered. In the ordinary cases of amendment there

is a relation to the writ, but that is not the case here. Again, to enable a plaintiff to recover his costs, the jury must find the costs in their verdict—*Haynes v. Guie* (2). They did not, and could not, do so in this action upon the special finding; and the Court cannot give judgment for them.

Cur. adv. vult.

On this day—

LORD DENMAN, C.J. said—The plaintiff in this case succeeded in his new cause of action. We think that he is entitled to the general costs of the cause, and the defendant to the costs of the issues on which he has succeeded; and that the costs of this application and of the argument should be borne by them mutually.

1837. } WATTS v. FRASER AND AN-
June 9. } OTHER.

Libel—Evidence.

A defendant, in an action of libel, in mitigation of damages proposing to prove a provocation, by the publication of libels by the plaintiff in newspapers, produced single copies from the Stamp Office, and the affidavits there filed of the proprietorship:—Held, that, if this was admissible evidence to establish that the plaintiff was the publisher of the particular papers, it was necessary for the defendant to go further, and prove that other papers were published, so that he might have seen them, and been thereby provoked; since the Court could not presume, that, because one was published, others were.

The printing of a newspaper does not of itself raise an inference of publication.

This was an action against the defendants, who were the publisher and printer of *Fraser's Magazine*, for a libel. The first count complained of a libel, in November 1834, upon the plaintiff, as the editor of the *Literary Souvenir*, which, it was alleged, had injured that work. The second was for a libel, in June 1835, on the plaintiff, in his individual character, accompanied by a personal caricature.

Plea—The general issue.

(1) 2 Ad. & El. 448; s. c. 4 Law J. Rep. (N.S.) K.B. 71.

(2) Yelv. 107.

On the trial, before Lord Denman, C.J., at the sittings in Middlesex after Michaelmas term, 1885, in order to reduce the damages, the defendants tendered in evidence certain newspapers, called *The Alfred*, *The Old England*, and *The United Service Gazette*, of which the plaintiff was alleged to have been either the editor or joint proprietor, wherein certain articles had appeared, which were said to be libels upon the defendants, or the persons who wrote in *Fraser's Magazine*. The certified copies of these newspapers, with the affidavit of the proprietorship from the Stamp Office, were produced, and offered in evidence, to prove that the plaintiff had published those papers which contained the libellous strictures upon the defendants' magazine. His Lordship, however, refused to receive them for this purpose. As to the *Alfred*, a witness stated, that the plaintiff was the sole proprietor of it, and had employed him to print it; but he was not able to prove the publication of any paper of the particular date, containing the libel alleged, besides the one which had been deposited at the Stamp Office. It was contended, that, as it was not known that any others were published, it was not shewn that the libel found its way to the defendants so as to operate as a provocation. His Lordship was of this opinion, and rejected the evidence of this newspaper. The jury found a verdict for the defendants, on the first count; and for the plaintiff, on the second, with 150*l.* damages. In the ensuing Hilary term—

Erle obtained a rule *nisi* for a new trial, on the ground of the rejection of this evidence.

The Attorney General, Sir F. Pollock, and *Barstow*, now shewed cause.—This evidence was properly rejected. The defendants rely on the 38 Geo. 3. c. 78. s. 9(1),

(1) Which enacts, "That all such affidavits and affirmations shall be filed and kept in such a manner as the said commissioners shall direct; and the same, or copies thereof, certified to be true copies, as thereafter is mentioned, shall respectively in all proceedings, civil and criminal, touching any newspaper, or other such papers as aforesaid, which should be mentioned in any such affidavits or affirmations, or touching any publication, matter, or thing contained in any such newspaper, or other paper, be received and admitted as conclusive evidence of the truth of all such matters set forth in such affidavits or affirmations as are thereby required to be therein

and say, that the evidence was rendered admissible by that act. It does not, however, apply to such a case as the present. This was not a proceeding, civil or criminal, touching the newspapers mentioned in these affidavits. All that the affidavit could have proved was, that the plaintiff was a proprietor of the papers at the time when it was made; but this could not prove that he continued to be the proprietor of them, or that he published the particular newspapers complained of. If the section 11(2) be referred to, it will be seen, that the party for whom this evidence is supplied is the plaintiff, informant, or prosecutor, or person seeking to recover the penalties given by the act. The defendants, however, do not, in any way, fall in with this description, and are not included in the enumeration of the parties for whose benefit the provision is made. The legislature do not appear to have considered the case of a defendant requiring to give evidence of a publication of a newspaper by the plaintiff. It is right to observe, also, that this provision is not a perpetual privilege: after the

set forth against any person who shall have signed and sworn or affirmed such affidavits or affirmations; and should also be received and admitted in like manner as sufficient evidence of the truth of all such matters against all and every person who shall not have signed, or sworn, or affirmed the same; but who shall be therein mentioned to be a proprietor, printer, or publisher of such newspaper or other paper, until the contrary shall be satisfactorily proved."

(2) Which enacts, "That it should not be necessary, after any such affidavit or affirmation, or a certified copy thereof, should have been produced in evidence as aforesaid against the persons who signed and made such affidavit, or are therein named, according to this act, or any of them, and after a newspaper, or other such paper as aforesaid, shall be produced in evidence, intitled in the same manner as the newspaper, or other paper mentioned in such affidavit or copy, is intitled, and wherein the name or names of the printer and publisher, or printers and publishers, and the place of printing shall be the same as the name or names of the printer and publisher, or printers and publishers, and the place of printing mentioned in such affidavit or affirmation for the plaintiff, informant, or prosecutor, or person seeking to recover any of the penalties given by this act, to prove that the newspaper or paper to which such trial relates was purchased at any house, shop, or office, belonging to or occupied by the defendant or defendants, or any of them, or by his or their servants or workmen, or where he or they, by themselves or their servants or workmen, usually carry on the business of printing or publishing such paper, or where the same is usually sold."

lapse of two years, the publication was to be proved in the usual way.—(See section 17.) If, however, it be contended, that this particular paper, lodged at the Stamp Office, must be taken to have been published by the plaintiff, there is no evidence; and the Court cannot presume that any others were published. If so, the defendants do not shew that any copy of these papers came to them, and could not, therefore, have been provoked by them to the composition of the libels complained of.

Erle, in support of the rule.—The Court will infer, that several newspapers were printed, and not one only; and that they were circulated; and if so, that the defendants most probably saw a copy—as in the case of the hand-bills.

[**LORD DENMAN, C.J.**—You refer to *Johnson v. Hudson* (3).]

It is not there required to be shewn, that the defendant publishes the identical hand-bill which is produced; but it is presumed, that, if he has distributed or circulated a number generally, he has published the one which is produced. But it is necessary to prove, that the plaintiff was the publisher of the different newspapers; and it is submitted, that the defendants are entitled to avail themselves of the 38 Geo. 3. c. 78. If they be so, they tendered sufficient evidence of the publication. It is clear there is nothing which, in the terms of the act, excludes a defendant; he may be damnified by the publication as much as a plaintiff; and it is equally desirable that the one should have the means of proving the publication with facility as the other. Now, it appears that the statute imposes upon the publisher the duty of depositing a copy of each impression at the Stamp Office; and if a party goes there and finds a copy, corresponding in name and date with that of which he complains, he may, under section 17, apply to the commissioners to produce it at the trial, and they must so produce it. Now, that section is general; and there is nothing to prevent a defendant from availing himself of the provision. The 9th section enacts, that the affidavit shall be conclusive evidence of the publication, in all proceedings, civil and criminal, touch-

ing any newspaper. It is argued, that this is restricted to the cases provided for by the 11th, namely, where the plaintiff or prosecutor seeks to avail himself of the proof. But *The King v. White* (4) establishes, that the proof is complete on the 9th, and that the 11th is not requisite. Then the statute provides, that the production of the affidavit shall be sufficient proof of the publication by the party who makes it, not merely of the paper deposited, but of all those which are circulated. If the enactment is not to have that effect, it will be useless. Indeed, this, being an enactment respecting newspapers, necessarily implies that it is to be extended to a great number of papers, and not to be confined to the one deposited,—though the deposit of the newspaper at the Stamp Office has been held, of itself, to be a publication, even in criminal cases—*The King v. Amphlet* (5). But it appeared in evidence, that the plaintiff had employed a person to print one of these newspapers; and the printing of a newspaper has been held to be, in legal construction, a publication. For, in *Baldwin v. Elphinstone* (6), where the plaintiff alleged, that a defendant printed a certain libel in a newspaper, the declaration was held good, on a motion in arrest of judgment, on the ground that there was no allegation of a publication. From the evidence of the printing, the Court can infer a publication by the plaintiff of the different copies printed, some one of which might have found its way to the defendants before the publication of their libels.

Cur. adv. vult.

LORD DENMAN, C.J. now delivered the judgment of the Court.—A motion was made in this case for a new trial, on the ground of the rejection of evidence; and we have taken time to consider the points which were argued. It is necessary to look at the nature of the evidence proposed to be given, and also at the object with which it was offered. It was to shew, that the defendants published the libels complained of in this action, in consequence of great provocation given by the plaintiff to the defendants, by the publica-

(4) 10 East, 98.

(5) 4 Barn. & Cross. 35.

(6) 2 W. Bl. 1038.

(3) 5 Law J. Rep. (N.S.) K.B. 95.

tion of other libels. It is evidently of the essence of that evidence, that it should be shewn to have come to the actual knowledge of the party alleged to have been provoked before the libels had been published. If there be a total absence of that proof, the evidence must be wholly unavailable. That principle, however, cannot decide the present application; because, before it came to the proof of that, I was of opinion, that the evidence tendered was not admissible, as it was not shewn that there was any other newspaper, besides the one produced, which could have found its way to the defendants. The Court are of opinion, that I was right in so deciding as to the two newspapers. But as to the other, it has been argued, that, from the printing of the newspaper, which is a thing meant to be published, the Court can infer that several were sent into the world. But we think, that, though we have no doubt upon the point, we cannot draw that inference; and that, in the absence of all evidence as to the fact, we could not direct a jury to infer that duplicates of the newspaper produced were actually published. One authority, namely, *Baldwin v. Elphinstone*, was cited, in which the Court make several intendment, which go a great way. They say, indeed, that printing in a newspaper is a publication. That is an inference which we cannot draw; and we cannot hold, that, as a matter of law, a printing of a newspaper is necessarily a publication of it. That is not an authority on which we can safely rely; and therefore this rule must be

Discharged (7).

1837. { DOE d. J. B. EDWARDS, H. JEL-
June 10. { LY, CLERK, R. TUCKER, AND
OTHERS, v. GUNNING AND
OTHERS.

*Evidence—Proof of Executor's Title—
Stamp on Administration—Ejectment.*

To prove the title of an executor, it is not necessary to produce the probate, or to account for its absence, but the production of

(7) The statute 38 Geo. 3. c. 78. has been repealed by the 6 & 7 Will. 4. c. 76, which, however, re-enacts most of the provisions contained in the former.

the original will, with the act of the Court decreeing the probate, will be sufficient.

And where no book was kept by the Court, but a minute of the granting of the probate was written at the foot of the will,—held, that the production of the will with such minute by the officer of the court was sufficient evidence of the executor's title.

An exemplification from an Ecclesiastical Court, of the grant of an administration de bonis non, recited the grants of two prior administrations:—Held, that it was properly stamped with one stamp of 3l.

The lands sought to be recovered in an ejectment were described as situate in the county of S., but no parish or place was mentioned:—Held, on motion in arrest of judgment, (Littledale, J. dubitante,) that the declaration was good.

Ejectment for lands in Somersetshire.

At the trial, before Bolland, B., at the Spring Assizes for that county in 1836, it appeared, that the lessors of the plaintiff claimed the property in question from one Thomas Higgins, who devised it to his son for life, remainder in tail to his daughters. His son mortgaged the property, and created a term of 1000 years, on the 6th November 1794, which became vested in one Grace Green, who, on the 18th of February, 1805, made her will, and appointed one John Padfield to be her sole executor: her will was proved in the Archdeacon's Court, at Wells, August 15, 1814. On the 15th of January 1830, John Padfield made his will, and appointed J. B. Edwards, and two other persons, executors of his will, which was proved by J. B. Edwards alone, in the same court, October 22nd, 1830. In 1815, a farther charge appeared to have been created, and a deed was made, by which the term was to have been assigned by Padfield to one John Tucker, the mortgagee under the new charge; but that deed was not executed by Padfield. John Tucker appeared to have died in 1826, and administration *cum testamento annexo* was granted to his widow, Sarah Tucker, J. B. Edwards assigned the term to her on the 28th of February 1835; and on the 18th of June following she made her will, which was proved in the Prerogative Court of Canterbury by Harry Jelly, her executor. On the 6th of April 1836, admi-

nistration *de bonis non* of the said John Tucker was granted to Robert Tucker. Upon the trial, however, to prove that John Padfield was the executor of Grace Green, and that J. B. Edwards was the executor of John Padfield, the lessors of the plaintiff produced the original wills from the registry of the Archdeaconry of Wells. Upon the former will was indorsed these words—"Proved, &c., 5th of August, 1814, before the worshipful J. Turner, clerk, M.A. Surrogate, &c., by the oath of John Padfield, the sole executor above named—effects under 2,000*l.* sealed." There was a similar indorsement on the will of Padfield. It was proved by a clerk from the registry office, that there was no other act of court or record of the granting of probate besides this note. An objection was made, that this was not proper primary evidence of the will; that either the probate ought to have been produced, or shewn to have been lost. The learned Judge overruled the objection, but reserved the point. To prove the demise of Robert Tucker, an exemplification of the administration *de bonis non* of John Tucker, dated March 31, 1836, and granted by the Prerogative Court of Canterbury to R. Tucker, was produced, stamped with a stamp of 3*l.* It recited the previous grant of the administration *cum testamento annexo* to Sarah Tucker; and it was therefore objected, that it ought to have had another stamp. But this objection was also overruled; and the plaintiff recovered a verdict upon the demises of Edwards, Tucker, and Jelly. In the ensuing Michaelmas term—

Barstow obtained a rule *nisi* to enter a nonsuit on these two objections; and also to arrest the judgment, on the ground that no parish was mentioned in the declaration in which the lands were situate. Against which cause was shewn on a former day by—

Erle and *Fitzherbert*.—First, there was sufficient proof of the wills of Green and Padfield. They were produced with the only record, which, according to the practice of the Ecclesiastical Court of Bath and Wells exists, of the granting of probate. Now, a will may be proved, either by the production of the probate itself, or the act of court by which the probate is

decreed—*Cox v. Allingham* (1), *Gorton v. Dyson* (2).

[LITLEDAL, J.—There the will itself was put in as secondary evidence.]

Secondly, the exemplification was properly stamped. The 55 Geo. 3. c. 184, schedule, pt. ii. requires, that an Exemplification under the seal of any of the Ecclesiastical Courts of any record or proceeding therein, should bear a stamp of 3*l.*; and that stamp was imposed upon the exemplification produced. It is said, that it recited two previous grants of administration, and that no stamp was shewn in respect thereof: but still it is nothing more than an exemplification of the actual record of the last grant of administration.

[LORD DENMAN, C.J.—If it does not operate as a proof of those prior administrations, it is said that the case is not proved.]

It is not necessary to prove them: it is quite sufficient to shew that John Tucker had the term vested in him, and that Robert Tucker, one of the lessors of the plaintiff, was his administrator *de bonis non*. The record proves that he was, and states in what manner he became so; but the deduction of his title was not material to the plaintiff's case. Thirdly, there is no valid objection to the declaration at this stage of the proceedings. The premises in question are stated to be situate in the county of Somerset; that is sufficient. In *Cottingham v. King* (3) it was held, on a writ of error, that it is sufficient, in a count in ejectment, to state the county in which the lands are situate, without naming the parish. See also *Goodtitle v. Walter* (4). When the jury came *de vicineto*, it was necessary to allege a vill for venue; but that is not required now, when they came *de corpore comitatus*—*Ware v. Boydell* (5). The case of *Doe v. Bath* (6) was cited, when the rule was granted; but there no description whatever was given—not even the name of the county was mentioned.

Barstow, in support of the rule.—First, the evidence of the wills of Grace Green

(1) Jac. 514.

(2) 1 Brod. & Bing. 219.

(3) 1 Burr. 623.

(4) 4 Taunt. 671.

(5) 3 Mau. & Sel. 148.

(6) 2 Nev. & M. 440.

and John Padfield was insufficient, being offered as primary evidence. *Cox v. Allingham*, however, is relied on, where the Master of the Rolls (Sir T. Plumer) held, that the act book of the Prerogative Court, containing the entry of a will having been proved, and of probate having been granted, was admissible evidence of the title of the executor, without accounting for the non-production of the probate. But that decision cannot be supported. The well-established rule is, that the character of an executor is to be proved by the probate, though there is a distinction in regard to the character of an administrator, because he derives his authority from the decree of the Court of the Ordinary. Wherever title is claimed under the executor, the probate is the primary evidence of his title. All the ancient authorities establish this proposition. In the two cases of *Elden v. Kiddall* (7), and *Davis v. Williams* (8), evidence was offered of administrations, and they do not apply to the case of an executor. Therefore, the question turns upon the propriety of the decision in *Cox v. Allingham*. The Master of the Rolls supports his judgment by the authority of 1 *Phil. Evid.* p. 317, 3rd edit (9), where it is expressed, that an original will cannot be read in evidence, if produced by the officer, unless it bears the seal of the court, or some other mark of authentication. For that position *The King v. Barnes* (10) is cited; but it does not warrant the inference, that a will, if authenticated by the seal of the Court, is evidence equivalent with the probate. There indeed the probate itself was produced. The cases of *Hoe v. Nathrop* (11), and *The King v. Haynes* (12), were referred to as authorities to prove that an examined copy of the probate might be given in evidence, without producing the probate itself. But in neither case does it appear, that the dicta (for they are nothing more) apply where the probate is in existence. Then *Shepherd v. Shorthose* (13) proves, that if the probate be lost, an exemplification by the Ecclesiastical Court may be produced,

but does not go farther. *Noel v. Wells* (14), *Allen v. Dundas* (15), and *Kempton v. Bayfield* (16), shew that the probate is the true evidence of the title of the executor, and therefore must be considered as the primary evidence. There was no ground alleged for the admission of secondary evidence in the present case; and therefore the wills were not proved. Secondly, the exemplification was not duly stamped. It, in effect, operated as three administrations, and ought therefore to have contained a stamp applicable to each; and the party cannot, by putting all of them on one piece of parchment, evade the payment of the several stamps: it is not a judgment of the Court, but a copy of the several acts of the Court. Thirdly, the declaration is defective, and so uncertain, from the want of the description of the situation of the land, that no proper effect can be given to the judgment. In *Doe v. Bath*, all the previous decisions were cited, and it affords a strong authority in the present instance. That the name of the parish is material, appears from *Doe d. Marriott v. Edwards* (17), where a variance from the description was held to be fatal; but Parke, J. allowed an amendment to be made. If this is to be considered as some description, it is clearly too wide.

Cur. adv. vult.

DOE d. BASSETT AND WOOD v. MEW.

This was an ejectment also, tried at the Spring Assizes, in 1836, for Hampshire, before Littledale, J., when the lessors of the plaintiff, in proof of their title to a portion of the lands claimed in this ejectment, shewed, that there was an outstanding term, which had vested in one William Rayner, who died in 1823, and had appointed Wood, one of the lessors of the plaintiff, to be his executor: his will was proved in the Ecclesiastical Court of the diocese of Bath and Wells, but the probate was not produced. Instead thereof, an officer from the registry of the diocese was called, who brought the will itself, at the foot of which was this entry:—

(7) 8 East, 187.

(8) 13 East, 232.

(9) Page 398 of 5th edit.

(10) 1 Stark. N.P.C. 243.

(11) 1 Lord Raym. 154.

(12) Skin. 584.

(13) 1 Stra. 412.

(14) 1 Lev. 235.

(15) 3 Term Rep. 125.

(16) Ca. Temp. Hardw. 108.

(17) 6 C. & P. 208; s. c. 1 Moo. & Rob. 318.

"19th day of September, 1823.

"Maria Rayner, William Wood, and F. Wood—the above-named executors were duly sworn well and faithfully to administer the goods, chattels, and credits of the above-named William Rayner, the testator, deceased. They further made oath, that all the goods, chattels, and credits of the said testator, at the time of his death, did not amount in value to 1,000*l*. And they lastly made oath, that the contents of the paper writing hereunto annexed, and to which they have severally subscribed their names, are true. Before me, G. Richards, Surrogate.

"23rd September, 1823, probate passed the seal to Serle.—C.W."

This last line was written by C. Woolrich, the deputy registrar, and Serle was a proctor. No book was kept, nor was there any other entry than this, of the granting of the probate. It was objected, that this was not admissible in evidence, except as secondary evidence, and that the probate itself ought to have been produced, or its absence accounted for: but the learned Judge overruled the objection, reserving the point; and the lessors of the plaintiff recovered a verdict. In the following term—

Butt obtained a rule *nisi* to enter a nonsuit; against which, on a former day—

Erle shewed cause, and relied upon *Elden v. Kiddall*, *Davis v. Williams*, and *Cox v. Allingham*; contending, that the granting of the probate being an act of the Court, an examined copy of those records, or the records themselves, are admissible to prove the act done by the Court, as well as the probate of the will.

Butt, *contra*, urged the distinction between the granting of the probate and of the letters of administration; and argued, that here, there being no probate act book, there were no records of the Court, which fact distinguished the case from *Cox v. Allingham*, where the books regularly kept were produced from Doctors' Commons: here there was nothing more than a memorandum or entry of the clerk.

Cur. adv. vult.

LORD DENMAN, C.J. now delivered the judgment of the Court.—In the case of *Doe d. Bassett v. Mew* the same point arose as had been decided in the Court of Chan-

cery in a case of *Cox v. Allingham*, which was cited in the argument, which was also decided upon several earlier authorities in this court. We think that this authority ought not to be disturbed; and, therefore, this rule must be discharged. There was another point in *Doe v. Gunning*—namely, that the exemplification was not properly stamped. It was stamped with a 3*l*. stamp only, though it contained two other administrations. That, however, was merely accidental, and it was only matter of recital, and we do not think that the objection can prevail. There was another point, also, which was taken in arrest of judgment—namely, the omission of the parish in the declaration: We are of opinion, however, that this is immaterial, and the rule will be discharged.

LITLEDAL, J.—I have great doubt on the last point, because there is no opportunity of demurring to the declaration.

Rules discharged.

1837. } THE KING v. THE POOR LAW
June 12. } COMMISSIONERS OF ENGLAND
AND WALES. (*In re* THE
WHITECHAPEL UNION.)

New Poor Law—Unions—Power of Commissioners.

The Poor Law Commissioners under 4 & 5 Will. 4. c. 76. s. 26, have power to unite parishes having local acts for the government of the poor, with other parishes, without the consent of the trustees or guardians, or rate-payers of such parishes.

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 114.]

1837. } THE KING v. THE JUSTICES OF
June 12. } CORNWALL.

Poor—Appeal, Notice of—Time.

Where the Sessions were holden within twenty-one days after the order of removal had been sent from the removing parish,—Held, that it was not necessary to serve a notice of appeal for those Sessions.

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 118.]

1837. }
 April 28. } SMITH v. DIXON.*

Pleading—Duplicity—Pleas amounting to the General Issue.

The plaintiff declared, that the defendant bargained for and bought of the plaintiff a quantity of trees, not less than 5,000 nor more than 6,000, to be well taken up by the plaintiff at the usual time of the year, and to be delivered to the defendant within a reasonable time; and it was averred, that the plaintiff well and properly took up for the defendant 6,000 trees, being not less than &c., and offered to deliver them to the defendant, but he refused to accept them. Second plea, that the plaintiff did not well and properly take up for or offer to deliver to the defendant 6,000 trees, being &c.:—Held, that this plea was bad for duplicity, but not for putting in issue the delivery of the precise number of 6,000 trees.

Third plea, that it was the duty of the plaintiff, according to the usage of trade, and according to the contract, to have abstained from taking up the trees until he received notice from the defendant to do so. Fourth plea, that the trees bargained for were trees growing in a certain nursery ground, and that the trees taken up by the plaintiff, and offered by him to be delivered, were not the trees growing in that nursery ground, nor the trees for which the defendant bargained. Both pleas held to be bad, as amounting to the general issue.

Assumpsit. The declaration stated that the defendant, on the 6th of August 1835, bargained for and bought of the plaintiff a large quantity, that is to say, not less than 5,000 nor more than 6,000 oak trees, being not less than two and a half feet nor more than three feet in height, at &c., and also 10,000 oak trees, being not less than one and a half nor more than two feet in height, at &c.; the said oak trees respectively to be well taken up by the plaintiff, at the usual and proper time of the year for taking up oak trees, and within a reasonable time afterwards to be delivered by the plaintiff to the defendant's order, at Bishop Brig, in the county of Lincoln, and to be paid for by the defen-

dant to the plaintiff, on the delivery thereof as aforesaid; and in consideration thereof, and that the plaintiff then promised the defendant to take up the said oak trees as aforesaid, and to deliver the same to the defendant in the time and at the place aforesaid, the defendant promised the plaintiff to accept the said oak trees, and pay for the same on the delivery thereof. The plaintiff then averred, that afterwards, on the 10th of February 1835, he well and properly took up for the defendant 6,000 oak trees, being not less than &c., and 10,000 oak trees, being not less than &c., of the value of 30*l.*, which said 10th of February was the usual and proper time of the year for taking up oak trees as aforesaid; and although, within a reasonable time, the plaintiff offered to deliver the said oak trees to the defendant, the latter refused to accept the said trees, or any part thereof.

Pleas—first, non assumpsit; second, that the plaintiff did not well and properly take up for, or tender or offer to deliver to the defendant, or his order, at Bishop Brig, 6,000 oak trees, being not less than, &c., and 10,000 oak trees, being &c., *modo et forma*, concluding to the country; third, that it was the duty of the plaintiff, according to the usage and custom of trade, and according to and in compliance with the terms of the supposed contract of bargain and sale, in the declaration mentioned, to have abstained from taking up, or offering to deliver to the defendant the oak trees, or any of them, until the defendant should have given him an express order so to do, or until a reasonable time for his giving such express order should have elapsed. Averment, that the defendant had not given any such order, nor had a reasonable time elapsed, whereby the trees would have been of little or no value to the defendant if he had accepted them. Verification. Fourth, that the oak trees, which the defendant bargained for and bought of the plaintiff, were oak trees then being and growing in a certain nursery ground of the plaintiff, &c.; and that the oak trees, which the plaintiff so took up and offered to deliver in the manner in the declaration mentioned, were not the same trees which the defendant had bargained for and bought, nor were they the trees which, at the time

* This case was decided in Easter term.

of the bargain and sale, were growing in the said nursery ground of the plaintiff at &c. Verification. To the three last pleas the plaintiff demurred specially, and assigned numerous causes of demurrer; and the defendant joined in demurrer.

Archbold, in last term, argued in support of the demurrer.—First, the second plea is bad for duplicity. The defendant has traversed the well and properly taking up of the trees, and also the offering to deliver them to the defendant. Those are two distinct facts, which the plaintiff alleged, and only one of them could have been traversed in a single plea. It is like the instance given in the *Doctrina Placit.* 135, from *Dyer*, 242, a, where the defendant pleaded *Nul tiel arbitrament fait ou deliver a lui*, and the plea was held to be double. Again, the defendant has made the properly taking up of the trees a material allegation, which he had no right to do, because the contract was only for the taking up and delivering of the trees—*Hume v. Liversidge* (1). A third objection to that plea is, that the defendant, by his traverse, has made the number of 6,000 trees material, which he had no right to do. If the plaintiff delivered less than that number, he would fail on this issue, whereas, it is clear he ought to recover *pro tanto*. The third plea is bad, as amounting to the general issue. The defendant sets up a contract different from that which the plaintiff has declared on, and alleges that there was a certain custom or usage of trade, not stating what trade, which alters the effect of the contract. If he is entitled to set up that usage, he will defeat the plaintiff on the plea of non assumpsit. *Greaves v. Ashlin* (2) shews that this usage of trade cannot be given in evidence to contradict the contract. The fourth plea evidently amounts to the general issue.

The Court offered to allow both parties to amend, and the case stood over for a few days, but, as the amendment could not be effected,—

Wightman argued in support of the pleas.—First, as to the duplicity. The whole is but one allegation in effect. The taking up is necessary for the delivery,

and the delivery is involved in the taking up. *Webb v. Weatherby* (3) is analogous. There the defendant pleaded a payment in satisfaction; and the plaintiff in his replication, denied the payment and receipt of the money in satisfaction; and the Court held, that the replication was not double. Then, secondly, the plaintiff has made the number of 6,000 trees material, by his express averment of having delivered them. He has tendered a precise issue, and has no right to complain that the defendant has followed it. Here the plaintiff might have stated, that he had delivered a certain number, not less than 5,000 nor more than 6,000, viz. 6,000; and though the omission of a *viz.* will not render a number material if it really be not so, yet here the number is material, because the plaintiff does not otherwise bring himself within the terms of the contract. See *Symonds v. Knox* (4), *Arnfield v. Bate* (5), *Crispin v. Williamson* (6), 2 *Wms. Saund.* 291, c. The third plea cannot be supported; but the fourth is good. This is not an action for goods sold and delivered, but for not accepting certain trees. The defendant says, you did not tender the trees which I bargained for. He admits the contract, but denies the performance.

The Court were clearly of opinion, that this was a bad plea, as amounting to the general issue, being in effect a plea of a variance between the contract set out, which was for the delivery of trees generally, and that which the defendant alleged, namely, for the delivery of trees out of a particular nursery ground.

Archbold replied,—and the Court took time to consider the objections to the second plea, and now the judgment was delivered by—

LORD DENMAN, C.J. who, after stating the pleadings, observed, that there were two principal objections to the plea. First, that the defendant had improperly traversed the precise number of trees which were taken up; and, second, that the plea was double. On the first ground, we think the plea is good; the plaintiff has made

(1) 1 Cr. & M. 332; s. c. 2 Law J. Rep. (N.S.) Exch. 104.

(2) 3 Campb. 496.

(3) 1 Bing. N.C. 502.

(4) 3 Term Rep. 68.

(5) 3 Mau. & Selw. 173.

(6) 8 Taunt. 112.

the number material, by not averring that the number was within the contract. It is only by taking that number to be material that the declaration can be supported, for without it we cannot see any averment of the performance of the condition precedent, to take up the trees within the prescribed limits (7). But on the other ground the plea is bad, and we think it is double. The well and properly taking up of the trees depended on the time and manner in which it was done, and is not necessarily connected with the subsequent offer to deliver. If the plaintiff failed to prove the well and properly taking up of the trees, the defendant would be entitled to a verdict, though there had been an offer to deliver. On the other hand, if he fail to prove an offer to deliver, the same consequences will follow, though he establish that the trees were well and properly taken up. Formerly, the plea of non assumpsit would have put in issue both facts, but now all the facts must be specially pleaded. There must, therefore, be—

Judgment for the plaintiff.

1837. }
June 12. } THE KING v. HEWITT.

Writ de contumace defective, when quashed.

Where a writ de contumace capiendo had been filed in the court, and delivered to the sheriff, and the defendant was arrested on it, the Court quashed it, for a defect in it, without compelling the defendant to sue out a habeas corpus.

In Trinity term, a writ *de contumace capiendo*, directed to the sheriff of Nottinghamshire, commanding him to take one J. Hewitt, was quashed, because he was described as "J. H. now or heretofore of Crofton Hall, in the parish of Orpington, in the county of Kent." The writ had been filed in the Court of King's Bench, and delivered to the sheriff.

Sir W. W. Pollett, who shewed cause, admitted, that after the decision of *The*

King v. Ricketts (1), the writ could not be supported, but contended, that the Court would not now quash the writ, though that might have been done before it had been delivered to the sheriff; the proper course was to sue out a *habeas corpus*, and the Court, on the return, might discharge the party, as in *The King v. Dugger* (2).

Sir F. Pollock and J. W. Smith argued that the Court would not drive the party to that expensive and dilatory process, when it appeared clearly that the writ was bad. And—

The Court were of that opinion, and—

The writ was quashed.

1837. }
June 12. } THE KING v. THE TRUSTEES OF
THE MILDENHALL SAVINGS
BANK.

Mandamus—Savings Banks—Reference to Arbitration.

Where the clerk to a savings bank embezzled money of the bank, and a depositor was thereby prevented from drawing out his deposit, the Court granted a mandamus to the trustees and managers to appoint an arbitrator to settle the dispute as to his right to recover against them under the 9 Geo. 4. c. 92. s. 45.

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 136.]

1837. }
June 12. } EMERSON v. SALTMARSH AND
OTHERS.

Sewers—Assessment.

A sewer-rate assessed on a township generally is bad.

Replevin for distraining the plaintiff's goods in his dwelling-house, in the parish of Elviagton, Yorkshire.

The defendants avowed and made cognizance under the authority of a commission of sewers; and at the trial, before Parke, B., at the York Spring Assizes, 1835, a verdict was found for the plaintiff,

(7) See *Marks v. Lahee*, 3 Bing. N.C. 408; s.c. 6 Law J. Rep. (N.S.) C.P. 69.

(1) 6 Law J. Rep. (N.S.) K.B. 172.

(2) 5 B. & Ald. 791.

damages 8*l.*, subject to the opinion of the Court upon a

CASE.

The plaintiff, at the time of the distress, was constable of the township of Elvington; and was then, and had been for 14 years previously, an occupier of about 44 acres of land in that township. The defendants were the commissioners of sewers appointed by a commission dated July 12, 1833, for Howdenshire, and the west parts of the East Riding of Yorkshire, within which parts the township of Elvington is locally situated. The commission, which was pursuant to the 23 Hen. 8. c. 5, was set out in the case. On the 14th of December 1833, the commissioners held a court of sewers, and made a rate and assessment for the raising of a fund to pay off and discharge the charges and expenses remaining unpaid, attendant upon or incurred in the execution of the commission of sewers, dated 5th August 1828, and also the charges and expenses of the solicitation and suing out of the commission, dated 12th July last, also unpaid, and such subsequent charges and expenses as shall attend and be incident to the execution or in respect of the same commission; and it was ordered, that the constables and constable of the several townships in the assessment thereunder written particularly mentioned, should, on or before the 1st of March next, pay the several and respective sums of money in such assessment particularly rated, assessed, or imposed upon each and every of the said townships for the purposes aforesaid.

Then a long list of townships was set out, with the sums assessed, and, among the rest, Elvington, 4*l.* On the 26th of April 1834, the commissioners of sewers ordered the plaintiff, described as the township constable of the township of Elvington, to appear and shew cause why he had not paid the rate. The plaintiff appeared personally to shew cause, and refused to pay the rate, whereupon his goods and chattels were distrained, by virtue of a warrant from the defendants.

The earliest commission of sewers for the district in question, which is preserved amongst the proceedings of the court, was in the eighth year of the reign of Queen Anne; and similar commissions (in the

whole amounting to fourteen,) appear to have been granted from time to time, till the commission by which the present defendants were appointed commissioners. It also appears by the books of the commissioners, that from 1725 to the present time rates or assessments have been made by the commissioners acting under the said commission upon the same townships; and in the same relative proportions as the assessment of the 14th December 1823, but for different amounts. It further appears, by the same books, that the following payments of rates have been made by or for the township of Elvington—that is to say,

	£.	s.	d.
In 1725, Elvington	1	0	0
1728, Elvington	1	0	0
1748, Elvington	1	0	0
1759, Elvington	1	6	0
1828, Elvington	2	0	0
1831, Elvington	4	0	0

And that the two last of those payments were made after orders of Court for the payment thereof made, and under threat of a distress upon the constable. It also appears from the books and proceedings of the commissioners, that an order was made on the 22nd of August 1778, requiring the attendance of several inhabitants of Elvington and other places at the next court of sewers, to shew cause why their assessments had not been paid; and that, by an order of the Court, dated the 24th of October, in the same year, a warrant of distress for levying a rate was issued against the inhabitants of Elvington.

From 1725, to the commencement of the present action, no instance, with the above exception, has been produced or proved, wherein disobedience to an order made upon the constable, for the rate laid by the commissioners upon the entire township, has been followed by a warrant of distress upon his goods and chattels; but no entry or account of the receipts of the rates, from 1778 until the appointment of the present clerk in 1831, has been kept; and no instance has been produced or given of disobedience by a constable to any order of the commissioners for the payment of a rate until the occasion of the present distress.

The case then set out a number of other

facts, which did not bear upon the general question ultimately raised and decided by the Court. On a former day in term—

Alexander argued for the plaintiff, and urged, that the rate was bad, being on the township generally. *Callis on Sewers*, p. 122, considers this question, and ultimately gives it as his opinion, indeed, that a township may be assessed and rated. But there is no judicial decision to that effect; and, however great his authority may be, it is not infallible. The 28 Hen. 8. c. 5. s. 2. creates the powers which the commissioners enjoy, and gives them power to assess and rate persons after the quantity of their lands, by the number of acres, according to each person's portion. That does not authorize the imposing a rate on a township or district. Then there are various cases upon this point where it has been considered. In the case of *The Isle of Ely* (1) it is said, by Coke, "to have been clearly resolved, that the tax generally of a several sum in gross upon a town is not warranted by the commission, but it ought to have been particular upon every owner or possessor of lands." And in *Hatley v. Sir J. Boyer* (2) it was held, that the commissioners of sewers cannot tax a whole township. So also in *The Custodes v. the Inhabitants of Outwell* (3), it was laid down, that a rate on a town is not good, unless there be a custom to support it—see also *Roll. Abr. 'Sewers,' Vin. Abr. 'Sewers,' B.* Again, in *Bow v. Smith* (4), cited also in *Vin. Abr. 'Sewers,'* the Chancellor determined, that the assessment by the commissioners should be on the particular lands. *Callis*, in his Appendix, p. 352, 353, gives forms of the assessment, and of the order to pay, and in both the rate is made upon the particular individual. In *Whitley v. Fawcett* (5) it was held by Bacon, J., that a distress upon one acre of land for all the tax was bad. The 3 & 4 Will. 4. c. 22. does not affect this question: Then, if the plaintiff was not liable for the township rate, he is not individually liable, because his lands were on an ascent.

(This point, as well as others, which

were argued upon the particular facts of the case, was not considered by the Court in their judgment, and therefore the argument is omitted.)

Cresswell, contra.—If this be an improper mode of rating, it has continued for a great number of years undisputed. In truth, however, it is not a bad assessment: *Callis* decides in favour of this rate, after examining all the authorities. He cites a case (*Sir P. Conisby's case*) where a rate was laid on a town, and held to be good; and this was a decision by Lord Coke prior to the case reported by him in 10 *Report*. In *Com. Dig. 'Sewer,' E, 2*, under the head "How Assessed," it is laid down, "So also the assessment may be charged in general upon such a town, who may afterwards apportion it among themselves," and *Callis* is quoted. In *Moor*, 825, the decree of the Privy Council is set forth, which declares, that such a rate may be made upon a town. It is stated also in *Callis*, p. 218, that if a township be assessed by a law of sewers, and the goods of one of the inhabitants be taken for the cess, he may have process to compel the others to contribute; so that there is a remedy for the individual who may be called upon to pay the rate. The case cited from *Cro. Jac.* is that of a fine laid by the commissioners, which is clearly distinguishable from the present case, where the rate is laid to pay the general expenses of the commission, and not for any particular works which produce only a partial benefit. This is, indeed, more in the nature of an acre-rate, decided to be good in *The case of the level of Hull* (6), which also determined that the rate might be made retrospectively. It was there held, that a rate of 9d. per acre on 1,312 acres was valid, though it was objected that the occupiers ought to be rated by name. And there is no want of analogy to support the rate upon the township. *Callis* cites from the *Doctor and Student*, fol. 74, an instance in which a whole township was amerced; and he mentions several others where assessments are made upon townships generally. If, then, the general rate be valid, the warrant of distress upon the plaintiff's goods is also legal.

(1) 10 Co. Rep. 141.

(2) Cro. Jac. 336.

(3) Styles, 179—191.

(4) 9 Mod. 94; s.c. 2 Eq. Abr. 206.

(5) Styles, 12.

(6) 2 Stra. 1127.

Alexander replied, and cited *The Commissioners of Sewers v. Newbury* (7), where it was said that an acre-tax was not good.
Cur. adv. vult.

The judgment of the Court was now delivered by—

LORD DENMAN, C.J.—The question, in this case, is, whether a rate or assessment can be made by the commissioners of sewers upon a whole township. The commission of sewers requires the commissioners of sewers to inquire, by the oaths of honest and lawful men of the shire or place where such defaults or annoyances be, through whose default the same have happened, who holds any lands, tenements, common, &c., or may have hurt, &c., by the said walls, ditches, sewers, &c., and all those to tax, assess, charge, &c., after the quantity of their lands, tenements, rents, by the number of acres, &c., after the rate of every man's portion, profit, &c., by such ways and means, &c. as shall seem most convenient for redress of the premises, &c. Such being the effect of the commission in the case of *The Isle of Ely*, it is stated to be "clearly resolved, that a tax of a several sum in gross upon a township, is not warranted by the commission of sewers; but it ought to be particular, according to the express words, upon every owner or possessor of lands and tenements severally." That, indeed, was the case of a new river; but, still the resolution of Lord Coke, and the two Judges, to whom the decree of the commission of sewers was referred, must be considered as authority. In *Moor*, 824, at the meeting of a board of the Privy Council, a full report, upon the authority of the commissioners of sewers, was made by Chief Justice Popham: "that they cannot lay a tax or rate upon any hundreds or towns, or the inhabitants thereof; but, upon the first presentment, to charge every man in particular, according to the quantity of his land." The same resolution was laid down in *Helley v. Sir John Boyer*.—See also the case in *Styles*, 139. Several other cases will be found in *Vin. Abr.* tit. 'Sewers,' and *Com. Dig.* same title; and reference is made to several cases in *Fraser's* edition

of *Coke's Rep.*, in the case of *The Isle of Ely. Callis*, in p. 121, and following pages, says, that "a rate or assessment may be made upon a township generally, and the persons liable may afterwards apportion it amongst themselves;" though he also says, in another place, that "the commissioners may assess particular individuals;" and he cites a number of instances to prove it. The cases he cites are cases of assessment upon towns, or amerciaments upon towns or other districts, but are not assessments made by commissioners of sewers where their duty is prescribed by the commission itself. *Comyn*, indeed, in his *Digest*, tit. 'Sewers' (E) 2, says, "The assessments may be charged in general upon such a town, who may afterwards apportion it among themselves;" but the only authority he cites for that is *Callis*; and *Callis* afterwards says, "an assessment upon a town generally, if it be not afterwards apportioned, is not good;" and it does not appear that there is any other direct authority for the validity of an assessment upon an entire township, but what is derived from *Callis*. We think the other several authorities outweigh his. The case in *Strange*, 1127, was cited in support of the assessment; but that appears to have been an assessment of 9d. an acre on 312 acres; and we must suppose the commissioners considered what lands were liable; and there, the question appeared to have been, whether it should have been on the occupier. But, supposing it did support *Callis's* opinion, it could not be a sufficient answer to the other authorities. It is said, this is the course which has been pursued, since 1725, with regard to these particular sewers. That may be; and, perhaps, upon the whole, it may be found more convenient to let the land-owners settle the apportionment among themselves, and the constable afterwards collect it in the manner most convenient, so as not to trouble the commissioners to fix the proportion annually for the assessment. A course of practice, however, cannot vary the law of the case; and, upon the whole, we are of opinion, that a general assessment cannot be supported: therefore, the judgment must be

For the plaintiff.

(7) 3 Keb. 827.

1837. } THE KING v. THE JUSTICES OF
June 8. } WARWICKSHIRE.

New Poor Law Act—Appeal—Notice.

A notice of the grounds of appeal, against an order of removal, signed by the majority of the overseers, and served upon one of the overseers of the respondent parish, is good.

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 113.]

1837. } WILLIAMS v. BYRN.
June 6. }

Contract of Hiring and Service.

A engaged to serve B, as a newspaper reporter, for one whole year from a certain day, and so from year to year, reckoning each year from that day, as long as they should respectively please, at a weekly salary:—Held, that the service could only be determined by a notice terminating with the current year of the hiring; and therefore, that a notice alleged to be usual and reasonable, given in the middle of a year, was insufficient.

Assumpsit. The declaration stated, that whereas, in consideration that the plaintiff, at the request of the defendant, would enter into the employ of the defendant, in the capacity of a reporter of the proceedings in the House of Commons and House of Lords, and furnish reports of such proceedings and other articles to the defendant for the purpose of publication in a public newspaper of the defendant, called the *Morning Post*, for one whole year from a certain day, to wit, from &c.; and so from year to year to the end of each year, commencing whilst the plaintiff should be so employed by the defendant as aforesaid, and reckoning each year to commence from a certain day, to wit, the 20th day of May therein, for so long as the plaintiff and defendant should respectively please, at and for a certain salary or wages, to wit, a salary or wages at the rate of 5*l.* 5*s.* per week for and during each session of parliament, and at the rate, to wit, of 2*l.* 12*s.* 6*d.* per week for and during the remainder of the year—

the defendant undertook, and then promised the plaintiff to employ him according to this agreement; and, although the plaintiff, confiding &c., did afterwards enter into the employ of the defendant, in the capacity aforesaid, and on the terms aforesaid, and continued in the employ of the defendant in the capacity aforesaid, and on the terms aforesaid, and furnished such reports and other articles to the defendant, for the purpose of publication in the said public newspaper for a long space of time, to wit, for two years then next following, and also for part of another year after that time, to wit, until the 24th of October 1835; and although the plaintiff was ready and willing, and offered to remain and continue in the employ of the defendant, in the capacity aforesaid, and on the terms aforesaid, and to furnish such reports and articles as aforesaid, for the purpose aforesaid, for the remainder of the said last-mentioned year so commenced as aforesaid; yet the defendant refused to suffer the plaintiff to continue in his employ, and wrongfully discharged him therefrom, without any reasonable or probable cause.

Plea—that, before the discharge of the plaintiff, to wit, on &c., the defendant, being desirous to determine and put an end to the agreement, and his employ of the plaintiff in that capacity, tendered and offered to pay to him a large sum of money, to wit, &c. as salary and wages, the same being more than the amount of the salary and wages to which the plaintiff would have been entitled, if a *reasonable and usual notice* of determining the agreement and employ of the plaintiff had been given to him by the defendant, and required the plaintiff immediately to quit his employ, and gave, at the same time, a *reasonable and usual notice* of his intention, in case the said tender and requisition were refused, to determine the agreement and employ of the plaintiff, to wit, at the end of three weeks from the 3d of October instant; that the plaintiff refused to accept the sum so tendered; and therefore, the defendant, at the expiration of the time, refused to employ the plaintiff; and that he is willing to pay the said sum of &c. if the plaintiff will accept it. To this plea there was a demurrer.

W. H. Watson, in support of the demurrer.—There is an absolute contract alleged in the declaration, and the defendant seeks to defeat it, by giving what is termed a usual notice. It is supposed that the month's notice, which is given to menial servants, would be applicable; but that is not the law in such a case as the present—*Beeston v. Collyer* (1), *Fawcett v. Cash* (2). Besides, the notice must terminate with the year of the service.

[**LORD DENMAN, C.J.**—There is no legal provision which says, that a month's notice is sufficient. It is so usual, in cases of domestic servants, that a jury would infer that it was part of the contract of the parties.]

Mansel, in support of the plea.—All contracts of this kind must be determinable on a reasonable notice; and it is for the jury to say, whether a reasonable notice has been given.

[**LITLEDALE, J.**—You are setting up in your plea a different contract from that alleged in the declaration. Here, the contract is for a service for one year; and then, from year to year; but you set up a right to dismiss on a reasonable notice.]

It would be very hard, that the defendant should be obliged to continue the plaintiff in his employ after his services have become useless. In *Beeston v. Collyer*, Burrough, J. seems to intimate, that a contract of this kind may be put an end to on reasonable notice.

LORD DENMAN, C.J.—I have no doubt in this case. The plaintiff states, in his declaration, that he was engaged for one whole year, and from year to year, as long as the plaintiff and defendant should please. The defendant does not deny that; but states that he offered him more than enough to cover his wages till the expiration of the notice, and then gave him a usual and reasonable notice to quit the employ. But what is there to shew, that that is any part of the contract between them? If the defendant meant to say, that it would be desirable that the service should be determined on a reasonable notice, he

should have qualified, what I apprehend is an absolute contract; and then it would have been a question for the jury to say, what the contract was between the parties. That is the real question in all these cases, though, in many, the notice has become so common as to be almost a matter of law.

LITLEDALE, J. stated the contract as set out in the declaration, and observed:—At the end of each year a new engagement for the whole of the ensuing year was made, so that the moment that any one was commenced, the engagement was to continue to the end of it. And it could only be determined by a notice terminating at the year, as in the case of houses and lands. Now, the defendant says he gave a reasonable notice in the middle of the year. That is not enough, the contract not being subject to that condition; and therefore, whether the plea would be good, on general demurrer not specifying what is meant by a usual notice, is immaterial. The notice, however, must expire at the end of the year. The case has been referred to that of a menial servant, where the service is determined by a month's notice; that is not the present case; and even there, we could not decide it, as a pure matter of law on the record, without an averment of the custom.

PATTESON, J.—What is the legal consequence of the contract stated in the declaration? It is contended, that the jury ought to determine what was a reasonable notice; and that might be so, if the parties had agreed that it should be put an end to on a reasonable notice. But the contract was for one whole year, and then from year to year; and it is plain that the service was to begin on the 20th of May in each year, and when it had begun, it was to continue for the whole of that year. The legal consequence is, that it can only be determined adversely by a notice terminating at the end of some one year. Here, certainly many months' notice were requisite, though we are not called upon to determine what length of notice must be given.

WILLIAMS, J.—The notice should have terminated at the end of the year.

Judgment for the plaintiffs.

(1) 4 Bing. 309; s. c. 5 Law J. Rep. C.P. 180.

(2) 5 B. & Ad. 904; s. c. 4 Law J. Rep. (N.S.) K.B. 113.

1836. }
 June 10. } JONES v. RICHARD AND
 1837. } OTHERS.
 May 3. }

Right of Common—Exclusive Pasturage—Evidence.

In replevin for sheep, the defendants made cognizance as bailiffs of the tenant of a messuage and land called B, and prescribed, that the occupiers of B. had the sole and exclusive right of pasture and feeding of sheep on L, the locus in quo, as to the said messuage belonging and appertaining. By another cognizance, they alleged a right of common over, and as appurtenant to B. Both rights were traversed in pleas in bar. At the trial, it appeared that L. was a mountain sheep-walk, over which no act of ownership was proved, besides the feeding of sheep. The defendants abandoned their alleged right of common; and the jury having had the distinction between a privilege and a right of soil pointed out to them, found a verdict for the defendants, and that L. was part of the farm of B.—The Court held, that upon this evidence and finding, the cognizance could not be supported, and granted a new trial.

On the second trial, to prove the right to the exclusive pasturage, the defendants gave evidence of the occupiers of B. having taken sheep to tack, and depastured them on L. The Judge told the jury, that this looked like a usurpation upon the lord, and that they were not to give any attention to it as an exercise of this right:—Held, that in reference to the particular right claimed in the action, he was justified in such direction.

Replevin. The defendants made cognizance, first, as the bailiffs of Elizabeth Davies, of the taking of the plaintiff's sheep and lambs as a distress, and prescribed for a right of common in the occupier of Blaenmeryn, to have common of pasture in, upon, and throughout, a piece of land called Llechweddcarrgdiu, for all the sheep and lambs levant and couchant in and upon Blaenmeryn at all times of the year; and justified the taking of the plaintiff's lambs and sheep as disturbing the right of common. Secondly, they prescribed for the occupiers of Blaenmeryn to have the sole and exclusive right of

pasture and feeding of sheep and lambs in and upon the piece of land called Llechweddcarrgdiu, as to the said Blaenmeryn belonging and appertaining.

Pleas in bar, first, traversing the rights of common claimed; secondly, that the plaintiff, as the occupier of a messuage, called Tycoch, for thirty years next before the commencement of this suit, and before the said time when, &c., had used and actually enjoyed of right, without interruption, and claimed of right, common of pasture in and upon Llechweddcarrgdiu, for all his sheep and lambs levant and couchant, &c., and justified the putting of his cattle thereon in exercise of this right. The replication traversed this right.

The cause was first tried before Williams, J., at the Spring Assizes for Cardiganshire, in 1835, when it appeared, that the Blaenmeryn property consisted of a house, some enclosed land, and a tract of unenclosed mountain land forming sheep-walks; and the lessee of Blaenmeryn claimed a right in the Llechweddcarrgdiu as one of those sheep-walks. The defendants gave evidence of an exclusive pasturing on that tract, where the plaintiff also sought to establish his right of common appurtenant to Tycoch. The defendants gave in evidence no other exercise of ownership; but the witnesses described the mountain land, which was Llechweddcarrgdiu, as having been claimed by the occupier of Blaenmeryn, as he claimed the rest. The Judge thought that, according to the evidence, the sheep-walk belonged to, and was part of, one of the contending tenements; but he left it to the jury to say, whether the Llechweddcarrgdiu belonged to the farm of Blaenmeryn, or there was a right of common of pasture over it. The jury found for the defendants, saying, that it was part of the farm, and that there was no right of common for Tycoch; and the verdict was taken for the defendants. In Easter term, 1835—

R. V. Richards obtained a rule *nisi* to enter a verdict for the plaintiff, on the ground that the defendants had not proved the right claimed in their cognizance; or for a new trial, if the meaning of the verdict was, that there was a right of pasture over the *locus in quo*, on the ground that it was against evidence; or that the verdict

should be confined to the issue upon the first plea in bar: and then, as the defendants claimed to have land appurtenant to land, the plaintiff would be entitled to judgment *non obstante veredicto*, upon the authority of *Buszard v. Capel* (1).

In Trinity term, 1836, cause was shewn by—

Chilton, J. Evans, and E. V. Williams.

—The real dispute between the parties was as to the right of common, and not as to the ownership of soil. It is not unusual in Wales, to find an exclusive right to a sheep-walk as belonging to one party, while the ownership of the soil is in another. No doubt the evidence of the exclusive right of pasturage is very like the proof of soil and freehold, yet, when that is not set up, a party ought not to be prejudiced by the jury finding an interest that is not claimed: indeed, if there had been a claim of the right to the soil, it never could have been said that this would have been satisfactory evidence. But it is said, that this is claimed as a right appurtenant to the farm, and the jury have found that the place in question was part of the farm. Now, the term *appertaining* is not very clear; and the jury may have meant nothing more than that there was a right belonging to the farm. As to the meaning of the word, *Yates v. Clincard* (2), and *Hill v. Grange* (3), may be referred to; and it will appear, that it will bear the signification of *usually occupied therewith*, and then there will be no difficulty in applying the term to a right of common. *Buszard v. Capel* is distinguishable, because there the distress was made upon land expressly claimed as appurtenant to land. As to the entering of judgment *non obstante veredicto*, there is no defect in the cognizance, which shews that the plaintiff is entitled to it—*Potter v. North* (4), *Hoskins v. Robins* (5), *Co. Litt. 122 a*, note *b*.

[PATTERSON, J.—The same sort of right seems to have been claimed in *Davies v. Pierce* (6), though in a different way.]

J. Wilson, R. V. Richards, and James, in support of the rule.—The defendants claimed the land, or a right of common, in another's soil, and the jury have found the former; but the claim is of something appurtenant to land, and no corporeal thing can be appurtenant to another corporeal thing—*Co. Litt. 121, b*; and no one can claim land by prescription—*Bro. Abr. 'Prescription'*, pl. 19, '*Trespas*,' pl. 122. Here, there was an exclusive right of pasture; and that constitutes a tenement—*The King v. Piddletrenthide* (7), *The King v. Tolpuddle* (8), *Burt v. Moore* (9). In *Capel v. Buszard* (10) it was held, that the exclusive use of the land is a grant of the land itself. As to any construction of the word "appurtenant" which might be given in the case of deeds, it cannot be applied in the present case, where the question arises on the pleadings. The jury having had their attention drawn expressly to the distinction, found, that the soil belongs to the occupiers of Blaenmeryn.

Cur. adv. vult.

In the same term, judgment was delivered by—

LORD DENMAN, C.J.—[After stating the pleadings, he continued:—] Upon the trial, the jury have negatived the claim of the plaintiff, in respect of Tycoch, as we think, upon satisfactory evidence. The second avowry was abandoned by the defendants. With respect to the first, the learned Judge, early in the cause, intimated an opinion, that the evidence on each side tended to prove, that the "sheep-walk" in question *belonged* to one or other of the contending tenements, and was a part of it, as much as the house or buildings belonging to either, according to the language of the witnesses. The case, however, was permitted to go on, to give the defendant an opportunity of having a verdict entered for him on the second avowry, in case the jury should think, contrary to the opinion of the Judge at the trial, that the evidence might support that avowry. The evidence was accordingly left to the jury, which was a special one, with remarks upon the dis-

(1) 3 B. & C. 141; s. c. 6 Law J. Rep. K.B. 267.

(2) Cro. Eliz. 704.

(3) Plowd. 170.

(4) 1 W. Saund. 350, 353, n.

(5) 2 W. Saund. 324, 328, n. 13.

(6) 2 Term Rep. 53.

(7) 3 Term Rep. 772.

(8) 4 Term Rep. 671.

(9) 5 Term Rep. 329.

(10) 6 Bing. 150; s. c. 3 Y. & J. 344.

inction between the right to the *soil itself*, and any right of common or right of pasturage *in respect of it*; and the jury were requested to say, whether, upon the evidence, they were of opinion, that the place in question, the Llechweddcarrregdio, belonged to Blaenmeryn as an integral part of it, like the house and buildings themselves, or whether they thought the defendants had a right of common or pasturage over it. The jury found for the defendants, that the Llechweddcarrregdio was part of the farm of Blaenmeryn, and no right of common for Tycoch. Upon this evidence and finding, we think that the first avowry cannot be sustained. Then, as to the application to enter a verdict for the plaintiff, notwithstanding the verdict found, as it has been, for the defendants, it is to be observed, that the plaintiff, as to the right set up by him, viz. the right of common for Tycoch, has entirely failed; and therefore we do not think it right that he should be allowed to succeed in the cause, though, as has been stated, he had established no right; but the same has been, and we think properly, negatived by the jury. There must, therefore, be a new trial.

The cause was tried again at the last Spring Assizes, when it was shewn that the defendants did not claim the soil in Llechweddcarrregdio; and the right of common of the plaintiff being again disposed of, the question in the cause was, as to the exclusive right of the occupier of Blaenmeryn farm to depasture sheep and lambs thereon. Among other evidence, on the part of the defendants it was shewn, that the occupiers of that farm had been accustomed to take the cattle of other persons to tack, and had depastured them among their own sheep upon that spot. The learned Judge told the jury, in his summing up, that this tacking looked like a usurpation upon the lord, and that they ought not to pay any attention to it, as proving any exercise of this peculiar right. The jury found for the plaintiff.

Chilton, on a former day in this term, moved for a rule to set aside this verdict, and complained that the Judge had misdirected the jury in telling them that this tacking was a usurpation. If the lord had

granted out the exclusive right of pasture, it was perfectly immaterial to him, whether the grantee depastured with his own cattle or those of other persons. He might depasture to an unlimited extent with his own cattle, and those which he took on tack were his for the time. He also urged that the verdict was against the evidence.

LORD DENMAN, C. J.—There was no misdirection in the opinion of the learned Judge, in regard to this tack, and there will be no rule in that respect. But we will consider whether he was right in the effect which he gave to that evidence.

Cur. adv. vult.

LORD DENMAN, C. J., on this day, delivered the judgment of the Court.—In this case, Mr. Chilton moved for a rule for a new trial on several grounds, which we disposed of on the motion, and we took time to consider the following:—The issue on which the cause turned was, whether the occupier of a farm, called Blaenmeryn, was entitled to the sole exclusive right of pasture and feeding of sheep and lambs on the *locus in quo*, as appertaining to that farm. In support of this right, the defendants, on the trial, gave important evidence of feeding the sheep of other persons, which had been taken in on tack, and the learned Judge, commenting upon this evidence in his summing up, stated to the jury, that although they ought not to dismiss it from their consideration, because, whether lawful or not, it might be very cogent to prove the existence of the right claimed, yet it did not appear to him that it could properly be considered as done in the exercise of that right; that even if the right existed, the tacking appeared to him to have been a usurpation upon the lord's grant, for as that extended only to the exclusive feeding of sheep and lambs by the occupier of Blaenmeryn, as appertaining to his farm of Blaenmeryn, the lord had reserved to himself all other modes of enjoying the produce of the land, and was entitled to eat by the mouths of beasts or horses whatever the sheep and lambs on Blaenmeryn did not consume. It was contended, and we think with justice, that this mode of characterizing the evidence was calculated to weaken its due effect upon the

jury, if it were entitled to be considered as a lawful mode of exercising the right; and the question, therefore, which we desired to consider was, whether the learned Judge was correct in the construction which he put upon the right claimed in this record, and we are of opinion that he was. The prescription alleged in this case, is of so unusual a kind, that no decision, precisely in point, was mentioned in moving for the rule; nor have we, upon search, found any. But several cases, in which the Courts have had to consider claims to common by custom or prescription, furnish principles on which we may safely decide this. We refer to *Potter v. North*, *Hoskins v. Robins*, and the cases collected in the notes thereto. The principle seems to be to ascertain the extent of the rights conferred, and the rights reserved by the grant, and to see whether the act be in derogation of the latter. By the terms of this prescription, the grantee's right is limited to the feeding of sheep and lambs. This would be wholly insensible if the entire pasturage were granted to him in exclusion of the lord. Further, the right to feed by sheep is not limited by number, so as to make it indifferent to the lord by whose sheep the pasturage is enjoyed, but it is a grant to the occupier of Blaenmeryn, and is appurtenant to that farm. Some interest in the pasturage therefore being reserved to the lord, the questions are, what is that interest? and is the tacking relied on in derogation of it? It appears to us the most reasonable conclusion, from the premises, that the lord's interest is in the consuming, by the mouths of his cattle and horses, whatever is not required for the sheep and lambs levant and couchant on Blaenmeryn. The appurtenancy to a particular farm is not in itself equivalent to *levancy and couchancy*, nor do we rely on it as such. Our conclusion is drawn from the language of the whole prescription; and upon this, it appears to us, that the tacking of sheep is injurious to such right. The evidence in the cause, we may mention, served to shew the reasonableness of the grant thus construed. It appeared, on the one hand, to be favourable for the sheep, and convenient to the owner to have the exclusive enjoyment of certain spots at certain seasons of the year; and, on the other, that

there was, beyond that which was required for the sheep, profitable pasture for cattle. There will, therefore, be no rule.

Rule refused.

1837. } THE KING v. THE JUSTICES OF
May 25. } BERKSHIRE.

Sessions—Mandamus—Game.

The Sessions, on the hearing of an appeal against a game conviction under 1 & 2 Will. 4. c. 32, refused to allow evidence to be given by the appellant, to shew that the land did not belong to the persons alleged in the conviction, and confirmed it. This Court refused to grant a mandamus to the Sessions to hear the appeal.

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 156.]

1837. } ARCHER'S EXECUTORS v.
June 1. } MARSH.

Covenant—Impolitic Consideration—Restraint of Trade.

A covenant, by which certain persons, who were carriers from London to Cambridge, Norwich, and various parts of the county of Norfolk, agreed that neither they, nor their heirs nor executors, should carry on so much of their trade, as extended from Swaffham, and places contiguous thereto, to London, and from London to Swaffham, the consideration for this agreement being the payment of one-third of the carriage of all butter carried along the line of road:—Held, not illegal.

Covenant on a deed-poll dated January 17, 1814, executed by the defendant, which, reciting that the defendant and others had carried on the trade or business of carriers from London to Cambridge, Norwich, and various other parts of the county of Norfolk and elsewhere, under the firm, &c., and being desirous of disposing of part of such concern, they, in 1812, entered into a treaty with Thomas Archer (the testator) for the disposal of such branch or part of their said business, as extended to or from Swaffham, Mundford, Mildenhall, and the several other

parishes or places contiguous or near thereto, or to either of them, to London, or from London thereto, to any or either of such towns or parishes, or any parishes or places contiguous or near thereto, which were considered as belonging to their "Swaffham Waggon Concern," and which it was their intention to give up to Archer; and it was stipulated that the said Messrs. Marsh should not, neither should any or either of them, nor the heirs, executors, or administrators of them, or any or either of them, at any time thereafter, *exercise the trade or business of a common carrier* from any of such places to London, or from London to any such places as were formerly considered as belonging to their Swaffham concern; and reciting also, the Messrs. Marsh had accordingly resigned such part of their said business to the said Thomas Archer, who had, from that time, continued to carry it on,—it was witnessed, that for the considerations therein mentioned, the Messrs. Marsh severally and respectively covenanted, that they would not separately, or in partnership with any person, or by their partners, agents, or servants, take in or convey any goods or articles of any description whatsoever from London, to any or either of such towns, parishes, or places whatsoever, or any other parish or place contiguous or near thereto, and as were formerly connected with the said Swaffham waggon, and usually carried thereby, or take in or convey any butter, goods, or other articles of any description whatsoever, from Swaffham, &c., or any place contiguous or near thereto, to London, upon any account or pretext whatsoever, which said places were formerly connected with their Swaffham concern, and for the relinquishment of the carriage to which they had received the consideration before mentioned. Breach—that the Messrs. Marsh took in and conveyed goods from London to Swaffham, &c., and from Swaffham and other places, and, among the rest, from Beachamwell, contrary to the tenor and effect of the said deed-poll and covenant.

The defendant set out the deed upon oyer, from which it appeared, that the consideration for the covenant by Messrs. Marsh, was the testator's agreement to pay 1s. per firkin upon all butter carried by

him in the space of one year, such being one-third of the carriage of such butter, which was recited to have been paid accordingly. The defendant pleaded to the breach of covenant for taking in and carrying goods from Beachamwell to London, that the Messrs. Marsh took in and carried no other goods than rabbits, and that rabbits were not usually carried by the Swaffham waggon, or connected with the said Swaffham concern, and that the carriage of rabbits was not any part of the said branch of business relinquished by Messrs. Marsh, or for the relinquishment of which they had received the compensation in the deed mentioned. Verification.

The plaintiffs demurred to this plea. In Michaelmas term last—

Wightman argued for the demurrer.—The plea is no answer to this action. The defendants are not at liberty to carry any thing on this road, and there is no exception of rabbits. But the declaration will be objected to: and it is said, that the breach is not well assigned; because the covenant is not to carry goods as common carriers, whereas, it is said, that the breach extends to all modes of carrying. If that be a defect, it can only be taken advantage of on special demurrer, and of course is cured by pleading over. There cannot, however, be any doubt that the breach really means that the defendants have carried as common carriers. Another objection is taken to the covenant itself, and it is said to be illegal, the object of the parties being to create a restraint of trade. But, the deed does not fall within those cases, in which the Courts have held that the restriction is too general. The defendants were not prevented from carrying on this trade everywhere, but are only restrained from a particular district—namely, from the Swaffham line. Besides, there is an adequate consideration, inasmuch as the testator was to pay to the defendants 1s. for every firkin of butter he should carry. Now, many authorities establish that the restriction must be limited, either in point of time or of place, but it need not be of both—*Mitchel v. Reynolds* (1), *Chesman v. Nainby* (2), *Bunn v. Guy* (3), *Davis v. Ma-*

(1) 1 P. Wms. 181.

(2) 2 Stra. 739; s. c. 3 Bro. P. C. 342.

(3) 4 East, 190.

son (4), *Homer v. Ashford* (5), *Gale v. Reed* (6), *Leigh v. Hind* (7). If the restriction be not general, the law holds the covenant to be good. *Horner v. Graves* (8) indeed is an authority to shew, that a restriction from a district may be illegal, if the district be unnecessarily extensive; but that was a very different case from the present; the limit there was a district of 200 miles, whereas, here, it is only of one line of road.

[PATTESON, J.—All these authorities were cited lately in the case of *Hitchcock v. Coker*.]

That case is now before the Court of Exchequer Chamber, standing for argument (9).

Wallinger, contra.—First, the plea is an answer to the part of the declaration to which it is pleaded. The deed is very artificial, and many of the expressions vague: but, from the whole, it is clear, that nothing was parted with or intended so to be, but what constituted the Swaffham waggon concern: that for this only was the consideration paid or agreed to be paid, and this only did Archer take, and the covenant was only not to carry those things that had been relinquished. The plea states, that the carriage of rabbits was no part of such concern so relinquished or paid for; and, as the demurrer admits these facts, the declaration is answered; besides, the words, "butter and other goods," mean other goods *ejusdem generis*—i. e. heavy and fit for slow waggon carriage; not those which require quick transfer in vans and light carriages, such as game, &c. Secondly, there is no sufficient breach in the declaration: it only charges defendant with having carried and conveyed, contrary to the form of the covenant. Now, the business parted with was the trade of common carriers, as the recital states; and the legal meaning of the covenant (from the context) is, that defendant should not carry as such, or for hire; and unless he has done this, there is no breach of covenant. The defendant may have done all the declaration charges against him,

and yet not have broken his covenant, as, by carrying in his own private carriage, or not for hire. A certain distinct breach, and the manner of it, must be alleged, or it will be bad, even where plaintiff demurs to defendant's plea—*Warn v. Bickford* (10); and adding the words, "contrary to the form of the deed," &c., will not help—*Anonymous* (11), *Clayton v. Kynaston* (12), *Knight v. Keech* (13). Thirdly, the deed declared on is illegal, being in unreasonable restraint of trade. It was said in *Mitchel v. Reynolds*, that, in these cases, the distinction is not between promises and bonds, but whether with or without sufficient consideration: and, in *Horner v. Graves*, Tindal, C. J. says, that in *Mitchel v. Reynolds* the agreement was held good, because not unreasonable as to time or distance. The restraint here is entirely unlimited in point of time; and, in no case has such a restraint been held valid: in *Hitchcock v. Coker* the restraint was for defendant's life, and held bad; and, in *Chesman v. Nainby*, it was limited to plaintiff's continuing in business during defendant's life. *Gale v. Reed* does not shew that an unrestrained covenant is good; on the contrary, the covenant there was not held good, until, by reference to the recitals, the Court had construed it into a restrained covenant: here, the recital of the agreement of 1812 is as large as the covenant of the deed of 1814, and, therefore, will not restrain it: besides, in *Gale v. Reed*, the restraint was only for the life of the defendant, and the case did not (as appears from 2 *W. Saunders*, p. 156, n.) give entire satisfaction. The consideration here is 1*s.* a firkin for butter, taken by Archer, during one year (and which otherwise defendant would have taken); the restraint is perpetual on the defendant, his heirs and executors, &c. *for ever*, not even limited to the time during which Archer, or any of his representatives, might carry on the trade: it is, therefore, unreasonable and illegal; and, even if it could be restrained into a covenant for so long a time as Archer and his representatives should carry on the trade, still this declaration would be bad, for it

(4) 5 Term Rep. 118.

(5) 3 Bing. 322; s. c. 4 Law J. Rep. C.P. 62.

(6) 8 East, 80.

(7) 9 B. & C. 774.

(8) 7 Bing. 735; s. c. 9 Law J. Rep. C.P. 192.

(9) See 6 Law J. Rep. (N.S.) Exch. 266.

(10) 7 Price, 550.

(11) Sir W. Jones's Rep. 125.

(12) Salk. 573.

(13) 4 Mod. 188.

contains no statement that he or they were carrying it on.

LORD DENMAN, C.J. now delivered the judgment of the Court.—This case arose on a covenant entered into between the plaintiffs and the defendants, that the latter, for considerations specified, should relinquish to the former a certain portion of their carrying trade, and abstain from exercising it within certain limits. The breach alleged was, that the defendants had still continued it; and, as the defence rested on the supposed illegality of the agreement, as in restraint of trade, which nearly resembled the case of *Hitchcock v. Coker*, decided in this court in last Easter term, and pending in the court of error at the time of the argument, it was determined to postpone our judgment till that case should be finally determined. The particular objection to that agreement, which was common to the present case and that above mentioned, was, that the restraint was more extensive than was necessary for the full protection of the plaintiffs, the purchasers of the good-will of the business. The court of error has reversed our judgment, on the principle, that the restraint of trade in that case could not be really injurious to the public, and that the parties must act on their view of what restraint may be adequate to the protection of one, and what advantage a fair compensation for the sacrifice made by the other. We may observe that our own opinion, when *Hitchcock v. Coker* was under discussion, leaned much the same way: but we thought ourselves bound by the authority of *Horsler v. Graves*, where the Common Pleas entered into an inquiry into the terms of the contract between the parties. That case appears to be overruled by the late decision in error. We not only bow to its authority, but think that, in this respect, it establishes a more correct, and a much more convenient rule of law. Our judgment, therefore, must be for the plaintiff.

whose servant gave a verbal representation, upon which goods were supplied. B. paid over the proceeds of those goods, which were sold under such circumstances as to raise a strong suspicion of fraud, to C. in discharge of prior liabilities:—Held, in an action by A. against C, for the value of those goods, that evidence of the verbal representation was not admissible; and, there not being evidence of fraud in C. independently thereof, that the action was not maintainable.

Assumpsit for money had and received to the plaintiff's use.

Plea—Non assumpsit.

At the trial, before Lord Denman, C.J., at the Guildhall Sittings after Michaelmas term, 1835, the facts proved were these:—The plaintiff, a wholesale silk-merchant in the city, was applied to in November 1834, by a Mrs. Barnes, to supply her with goods. He required a reference, and she gave the name of the defendant, a draper, in King-street, Covent-garden. Application was made accordingly at his shop, and a person, named Hobson, who turned out to be his shopman, made a verbal representation as to her character, upon which the plaintiff acted, Hobson having at the time authority from the defendant to give her a good character. The learned Judge refused to allow evidence of that representation to be given, as it was not in writing, considering that the 9 Geo. 4. c. 14. s. 6. prevented him. It was then shewn that Mrs. Barnes received a quantity of goods from the plaintiff, which she disposed of by sale or pledge; that she had been trusted by the defendant to some extent, but was greatly in his debt, and he had ordered that her credit should be stopped before the communication was made by Hobson. The proceeds of various sales by Mrs. Barnes were traced to Hobson, and the present action was brought to recover the value of the goods, upon the ground, that, under the circumstances of this case, Mrs. Barnes must be taken to have been engaged by the defendant to obtain credit from the plaintiff, and from the goods supplied on that credit to pay the debt due to him. The Chief Justice, however, was of opinion, that, in substance, this was an action on the representation made by the defendant's foreman, and therefore the statute applied, and nonsuited the plaintiff. In

1837. }

June 8. }

HASLOCK v. FERGUSSON.

False Representation—Evidence—9 Geo. 4. c. 14.

A. being requested to supply goods to B, required a reference, and was directed to C,

the ensuing term, a rule *nisi*, for setting aside that nonsuit, had been obtained; against which cause was shewn, on a former day in this term, by—

Sir F. Pollock, Kelly, and Arnold.—This nonsuit was right. It is sought to evade the provisions of the 9 Geo. 4. c. 14. s. 6, which provides, "that no action shall be brought whereby to charge any person upon, or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon, unless such representation or assurance be made in writing, signed by the party to be charged therewith." Now, it is manifest, that, but for the representation alleged to have been made by the defendant's shopman, as to the responsibility of Mrs. Barnes, the plaintiff can have no case. His action wholly depends upon this representation: how, therefore, can it be said, that this is not brought to charge the defendant by reason of a representation? But the case of *Abbotts v. Barry* (1) has been relied on. There, a defendant, who had fraudulently induced the plaintiff to sell goods to A, who could not pay for them, and afterwards received the proceeds on a re-sale, was held to be liable for the value of the goods. But, even if there was such a fraud established in the present case, that would be no authority for the plaintiff; because the decision was before the 9 Geo. 4. c. 14. when parol evidence of fraudulent misrepresentations might be given. That statute makes the great difference, and prevents the applicability of that case.

The Attorney General and Wightman.—It ought to have been left to the jury to say, whether the defendant had not procured the purchase of these goods for his own benefit, though on the credit of Mrs. Barnes. The whole transaction was a fraud upon the plaintiff; consequently, there was no valid sale to her, no transfer of property, and the proceeds may be followed wherever they happen to be. The plaintiff does not sue the defendant on his representation of Mrs. Barnes's character; but he says the whole was the result of a

conspiracy between Mrs. Barnes, Hobson, and Fergusson; and therefore, the question is, whether such an action as that in *Abbotts v. Barry* can be maintained, where one of the links of the case is a verbal representation of another's character. The statute now relied on was passed to correct a defect of the Statute of Frauds, which prohibited all actions on promises to be answerable for the debts of others not in writing. This was avoided by treating such promises as representations, and then the party was sued on the tort, the representation being alleged to be fraudulent. Lord Tenterden's Act was intended to enforce the real provision of the Statute of Frauds against collateral engagements. But the plaintiff contends, that this was not a collateral engagement, but, in effect, a direct liability on the part of the defendant. The representation is not the gist of the action; and the defendant is not sought to be charged by reason of his representation, but on a liability incurred by himself. Mrs. Barnes was, in effect, his agent, and the representation was only as to the character of the defendant's agent, that is, of himself. This is not, therefore, a case within the statute. The plaintiff, indeed, seeks to make the defendant responsible, as having obtained these goods through the instrumentality of Mrs. Barnes, as in *Hill v. Perrott* (2); and it is the defendant who, in fact, sets up the sale to her, although, in order to establish the fraud, it is necessary for the plaintiff to shew the fraudulent representation. He ought not, therefore, to have been prevented from giving the evidence which he proposed to give, and the nonsuit was wrong.

Cur. adv. vult.

LORD DENMAN, C.J, now delivered the judgment of the Court.—The question, in this case, is, whether there is such a reference to the statute of 9 Geo. 4. c. 14. as to render a note in writing requisite. It is an action to recover the value of goods alleged to have been fraudulently obtained by a female, who was supposed to have been put into a shop by the defendant. Upon a consideration of this case, it does not appear to involve any question of law, but

(1) 2 Brod. & B. 369; s. c. 5 Moore, 98.

(2) 3 Taunt. 274.

to turn altogether on the facts. The question is, whether, within the 6th section of the statute, this is an action brought whereby to charge a person upon the representation of the character of another. [His Lordship read the section of the statute.] It is said, that, being an action for money had and received, to recover the value of the goods, the representation of the character of the woman was only a medium of proving the fraud; but the only fact, on which the plaintiff relied to affect the defendant, was, that of the defendant having authorized his clerk to make a representation, that the woman bore a fair character. We are of opinion, consequently, that the case falls within the terms of the first part of the section; and therefore, the representation could not be proved without a note in writing. The rule, therefore, must be

Discharged.

1837. } THE KING v. THE JUSTICES OF
April 23. } STAFFORDSHIRE.

Church Rate—Appeal—Notice.

The Sessions are not warranted in requiring a notice of appeal against an order of two Justices for payment of a church rate, to be served on both Justices previous to the hearing of the appeal. If notice were required at all, service upon one would be sufficient.

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 155.]

1837. } TERRY AND OTHERS v. PARKER.
May 5. }

Bill of Exchange—Presentment.

The want of a due presentment for payment of a bill of exchange is excused by the fact that the drawer, who is sought to be made liable, had no effects in the hands of the acceptor.

Assumpsit. The first count stated, that the defendant on the 16th of May 1836, drew a bill of exchange upon one J. Twist, for 232l. 2s. 2d., payable six months after date, which he indorsed to W. L. Kirkley, who

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indorsed it to the plaintiff. Averment, that the defendant had not, at the time, any effects in the hands of Twist, and had not any reasonable grounds to expect that Twist would have any effects, or that he or any other person would pay the bill when presented for payment; and that the defendant has not sustained any damage by reason of the said bill not having been presented for payment when due, or by reason of his not having had notice of presentment and dishonour, until the notice after mentioned; that after the bill became due it was presented to the said J. Twist for payment, but he refused to pay the amount, and that after the presentment the defendant had notice of the presentment and dishonour. The second count was on the same bill, but excused the want of due notice, on the ground that the date of the bill was written in so careless and negligent a manner, that the date was mistaken for the 18th of May instead of the 16th, and the notice was given accordingly.

Pleas—To the first count, denying the indorsements; third, that one R. P. was liable to the defendant in a large sum of money; that there were accounts between P. and Twist, and that P. requested the defendant to draw upon Twist on account of his liability, and that thereupon he did draw upon him, and Twist accepted the bill on account of the said liability; that it was not presented when due, and that the defendant, by reason of the non-presentment for payment, and his not having had notice, is likely to lose the amount for which P. was liable. Verification. Fourth, that the defendant had effects in the hands of Twist when the bill was drawn. Fifth, that there were accounts between the defendant and J. Twist; that Twist accepted for good consideration between him and defendant, and that the defendant fully expected the same to be paid. The first and second pleas to the second count denied the indorsements; the third and fourth traversed the negligence imputed.

Replications to the third pleas putting in issue all the averments therein.

The plaintiffs, at the last York Assizes, before Alderson, B., having recovered a verdict upon all the issues,

Cresswell, on a former day in this term, moved for a rule to arrest the judgment,

2 K

on the ground that it was admitted in the declaration, that there was no presentment on the day when the bill became due, and that was necessary to charge the drawer. It is true that it has been settled by *Bickerdike v. Bollman* (1) and *Walwyn v. St. Quintin* (2), and many other cases, that there is no necessity to give notice of dishonour where the drawer has no effects in the hands of the acceptor, but there is no authority which has decided that it is not necessary to make a presentment of the bill for payment on the day when it falls due. In *De Berdt v. Atkinson* (3), this point might have been urged, and therefore the decision of the Court is so far against the plaintiff, but it was not, in fact, decided. As bankruptcy of the party is no excuse for the non-presentment, so, also, it should seem that even in this case the bill ought to be presented, that the drawer may have the benefit of the chance of its being paid by some one.

Cw. adv. vult.

LORD DENMAN, C.J. on this day said—The question in this case is, whether want of effects in the hands of the drawee excuses the holder of a bill of exchange from the necessity of presenting the bill for payment, as well as of giving notice of dishonour to the drawer. Many cases establish that notice of dishonour need not be given to the drawer in such a case; and the reason assigned is, because he is in no respect prejudiced by want of such notice, having no remedy against any other party on the bill. This reason equally applies to want of presentment for payment, since, if the bill were presented and paid by the drawee, the drawer would become indebted to him in the amount, instead of being indebted to the holder of the bill, and would be in no way benefited by such presentment or payment. No case directly in point seems to have been decided. The case of *De Berdt v. Atkinson* was an action on a promissory note against the payee and indorser, who had lent his name, knowing that the maker was insolvent; and it was held that he was not discharged, by the note not having been presented till the day

after it was due, and notice of dishonour not having been given for several days. But that case can hardly be supported, inasmuch as the defendant was not the party for whose accommodation the note was made; on the contrary, he lent his name to accommodate the maker. Neither is the case of *Hopley v. Dufresne* (4) an authority the other way, for although that was a case of an acceptance for the accommodation of the defendant, Lord Ellenborough nonsuited the plaintiff because the bill was presented to the acceptor's bankers after banking hours; yet that nonsuit was set aside on the ground of there being no evidence of a subsequent waiver; and the point, whether the drawer was entitled to object to the want of due presentment was not determined.

It appears to us, that the same reason applies to want of presentment, as to want of notice of dishonour, and therefore, that the same rule ought to prevail with respect to want of effects operating as an excuse; and the rule to arrest judgment must be refused.

Rule refused.

1837. }
Jan. 23. } THE KING v. MARSH.

Criminal Practice—Indictment—Amendment of Caption—Certiorari.

A clerk of the peace had returned an indictment, which had been found at a borough sessions in obedience to a writ of certiorari, but the caption of the indictment did not contain the names of the grand jury. It being alleged that more than twenty-three grand jurymen found the bill, a rule nisi for the clerk of the peace to amend his return, by inserting the names of all the grand jury, was discharged by the Court, it not appearing that there was anything remaining at the Sessions by which the amendment could be made.

The insertion of the names, though proper, is not so essential as to render the caption, where they are omitted, void. Per Lord Denman, C.J.

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 153.]

(1) 1 Term Rep. 408.

(2) 1 B. & P. 652.

(3) 2 H. Bl. 336.

(4) 15 East, 275.

1837. } MOUNSEY v. DAWSON AND
May 5. } LEWTHWAITE.

Replevin—Franchise.

Where a lord of a manor had a prescriptive right to grant replevins in the manor, —Held, that the sheriff could not replevy within it, the lord not having made default, or refused to act.

Case for a wrongful distress. The fourth count was for distraining the goods of the plaintiff, and detaining them, and selling them after the plaintiff had replevied them, and the sheriff of Cumberland had allowed the replevin.

Pleas—First, not guilty; second, that the land on which the distress was taken, was parcel of the manor of Derwentfells, in Cumberland, which is parcel of the honour and lordship of Cockermouth, of which the Earl of Egremont is seised in fee, who is also lord of the manor of Derwentfells, and that the said Earl had an immemorial right, without the interruption, calumny, or impediment of our lord the King, to have cognizance of pleas and plaints in replevins, in the courts of the respective manors and lordship, there to be holden from three weeks to three weeks, by plaints in the said courts to be instituted, and upon such plaints to replevy and to grant deliverance of goods or cattle wrongfully taken as a distress within the said honour, wherever complaint has been made in the said courts, that such goods and cattle have been wrongfully detained, in like manner as the sheriff of the county had in his county before the 52 Hen. 3, and that no sheriff nor other officer of the King, may enter within the precinct of the honour or lordship to perform any office or execution there, except in default of the bailiffs there, and that by writ of *non omittas*: that a court baron of the manor of Derwentfells has been held immemorially from three weeks to three weeks, at which plaints in replevin may be instituted, by means whereof the right of granting replevins belonged to the said Earl, who has not made any default of replevying: that the sheriff of the county did not require the said Earl or his steward to replevy the said goods, and that the said goods and chattels were not replevied by any authority, except by

the sheriff out of his county court, wherefore the defendants sold the goods which had been lawfully distrained.

Replication, admitting the seisin of the Earl of Egremont; *de injuriâ*, &c.

At the trial, before Lord Abinger, C.B. at the Cumberland Summer Assizes in 1833, the defendants recovered a verdict on the issues, with liberty to the plaintiff to assess the damages at 1*s.*, if the Court should consider her entitled to judgment *non obstante veredicto*. In Michaelmas term following,

Alexander obtained a rule *nisi* to that effect; against which cause was shewn, in last term, by—

Cresswell and *W. H. Watson*.—The plea is good. The question is, whether, where a lord of a manor has an immemorial right to grant replevin, the sheriff of the county can, without his authority, and in the absence of his bailiff, replevy goods taken in distress. The defendants contend that he cannot. It appears that, at common law, the sheriff had no authority of his own to replevy goods distrained and impounded within any liberty that had return of writs. He could only make his warrant to the bailiff of the liberty to make deliverance—*2 Inst.* 139; *Gilb. Dist.* p. 91. By the Statute of Marlbridge (52 Hen. 3. c. 21), indeed, he is empowered to grant replevin of goods distrained in any liberty when the bailiff makes default; and, independently of that statute, the sheriff has no authority to grant a plaint out of his court. It is now contended, that the sheriff has a right to grant replevins, without a writ containing a *non omittas* clause, even where there has been no default by the lord; and moreover, that, even though he might render himself liable to an action at the suit of the lord, still, that what he has done in exercise of this power, would not be void. It may be admitted, indeed, that, inasmuch as the sheriff in general has the return of the writs, he might execute any process of the King's court; and might, therefore, in obedience to any writ out of this court, grant a replevin; but he cannot do it by any inherent authority of his own office. This Court, treating him as its officer, may call upon him to act, but cannot alter his position with reference to the courts in his own county. He is, indeed, the officer of

the Court; and, where there is an exclusive liberty, the owner of the franchise is but his servant, and must make return to him—*Town of Derby v. Foxley*(1), *Com. Dig.* tit. 'Return,' (A). See also *Newland v. Cliffe*(2). According to *Fitz. N.B.* 68, the sheriff has only a right to enter by virtue of the Statute of Marlbridge; and that, as already pointed out, only exists where the bailiff of the franchise neglects his duty. Then, the authorities do not establish any right in the sheriff. In *Wilson v. Hobday*(3), the power of a mayor of a corporation to grant replevin is admitted, though there was a sheriff of the county of the same city. But *Chapman v. Wish*(4) is supposed to be an authority against the defendant. There, a replevin had been brought in the Court of Common Pleas, and the University of Cambridge claimed cognizance of the plea. The decision was against the claim, upon the ground, that it was not made in proper form; but certainly another objection was, that the university could not claim to grant replevin. That point was not decided; but it was argued, that, inasmuch as they could not grant a second deliverance of the goods, according to the Statute 2 West. 2, they could not now award complete justice to the parties. It is not clear, that the lord of the franchise might not grant a second deliverance. (See *Bro. Abr.* tit. 'Conusance,' pl. 23.) But, even if it be so, it does not prove that the sheriff can enter the liberty, in the first instance. Again, *Hallett v. Birt*(5) only decided, that, where there is a prescriptive right to grant replevins, the lord of the franchise cannot grant them by plaint out of court, because the Statute of Marlbridge only gives that power to the sheriff. All these cases admit the franchise to have existed before that statute, and there is nothing which takes it away. Assuming, however, that the sheriff had a right to grant replevins in this franchise, still the

plaintiff has no right of action. She is not damaged. If distrained upon again, she may have her remedy by an action on the case, or she may resort to her writ of second deliverance for the goods; and, if they have been removed, and an *elongata* be returned, she may have process of *Withernam*. So that there is no ground for this action against the defendants.

Alexander and Wightman, in support of the rule.—As to the last point, the answer is, that the defendants sold the plaintiff's goods, after notice that they were replevied in the sheriff's court. If that replevin was invalid, it is clear that the plaintiff has a good cause of action against the defendants. It comes, therefore, to the main question, whether the sheriff's right to grant replevin, is ousted by the franchise of the Earl of Egremont. The plaintiff contends, that it is not; and her argument is, that where there are two courts, one existing at common law, and the other by prescription, and the legislature gives additional powers to the former, so that the ancient jurisdiction, which is alone possessed by the prescriptive court, would fail to do complete justice, this latter must give way to the former. Lord Egremont can only claim according to his prescription, but the sheriff has had greater powers given to him by the Statute of Marlbridge. That act remedied the inconvenience which arose, in consequence of the sheriff not being able to enter a liberty to grant replevin, without a *non omittas* clause inserted in the writ; and, by that statute, he is empowered to do so, and also to grant replevin out of court. Again, by the statute 1 West. 2. c. 2. (13 Edw. 1. c. 2.), he may break open houses to make delivery of cattle impounded therein; and the writ of second deliverance is to be directed to the sheriff, only out of the court in which the replevin is, that is one of the King's courts—see 2 *Inst.* 340. By 1 & 2 P. & M. c. 12. s. 3, the sheriff is required to appoint deputies in his county, to grant replevins. These powers are not, however, given to the lords of any franchise, and in all these respects, the prescriptive court becomes an inferior jurisdiction. The lord cannot, therefore, restrain the King's subjects, and compel them to go into his court, where they cannot have complete justice—see

(1) 1 Roll. R. 118.

(2) 3 B. & Ad. 630; s. c. 1 Law J. Rep. (N.S.) K.B. 179.

(3) 4 Mau. & Selw. 120.

(4) *Fitzgibbon*, 153, 294.

(5) 1 Lord Raym. 218; s. c. *Skinn.* 674; 2 *Salk.* 580; *Carth.* 380; 5 *Mod.* 252. See the differences between these reports pointed out in *Bac. Abr.* tit. 'Replevin,' (C).

per Lord K. Guildford, 2 Vent. 363. *Chapman v. Wish* is an authority; for the objections that were urged against the claim there, are the same as in the present case. So in *Hallett v. Birt*, the same doctrine prevailed; and see *Bac. Abr.* 'Replevin,' (C), 'Courts' (D), 3 Com. Dig. 'Courts,' (P), 3.

[COLERIDGE, J.—Suppose a distress to be made whilst the lord's court is sitting, can he grant replevin?]

Certainly.

[COLERIDGE, J.—Then his power is not taken away by the statute?]

No; that is not contended, but his exclusive right is. As to *Wilson v. Hobday*, it is no authority in the present case, because it only decides that the replevin in the mayor's court is valid; it does not determine whether he could grant a replevin out of court. But assuming that the replevin ought to have been granted by the lord, yet, in the present case, which is not a question between the sheriff and the lord, the replevin granted by the sheriff is not to be held to be void. Where there is an act done contrary to a prescriptive franchise, it is not absolutely void, but only voidable, as where an arrest was made within the verge of the palace—*Fitzpatrick v. Kelly* (6), or where a bail-bond was given to the sheriff of Durham, within the palatinate—*Jackson v. Hunter* (7). See also *Piggott v. Wilkes* (8). Therefore, even if the sheriff be liable to the lord for an usurpation on his franchise, the replevin, which was granted, was not void, and the defendants are liable for selling the plaintiff's goods, after notice that they had been replevied.

Cur. adv. vult.

The judgment was delivered, on this day, by—

LORD DENMAN, C.J.—This was an action on the case for various oppressive and irregular proceedings in taking a distress. There were several pleas. The jury found for the defendants on all the issues; but, as to the plea pleaded to the fourth count, a rule was obtained and argued for entering judgment for the plaintiff notwith-

standing the verdict, on the ground that the plea is bad in law. The grievance set forth in this count is, that the defendants sold the goods distrained for rent due in respect of a farm, land, and premises, after the sheriff had granted a replevin of them to the plaintiff. The plea states, that the farm, land, and premises in which they were taken, are within the honour or lordship of Cockermouth, and that Lord Egremont, as lord of the honour, had cognizance of pleas and complaints in replevin, in courts baron of the said honour, holden from time beyond legal memory, from three weeks to three weeks, where complaints in replevin may be instituted, with a power to replevy and grant deliverance of goods wrongfully distrained within the honour, such as the sheriff had before the statute of Marlbridge; and that no sheriff might enter the said honour except on default of the bailiff, by means whereof, the right to grant replevins belonged to the lord, and that he had made no default in replevying or granting deliverance in this case; with an averment, that the sheriff before replevying did not request the lord to replevy or grant deliverance, and that the sheriff granted the replevin out of his county court. The validity of this plea was argued in the most learned and elaborate manner, but rather, perhaps, as between the sheriff of the county and the lord of the honour, than with reference to the litigating parties. The plaintiff contended, that the whole record shewed her to have been aggrieved within the 1st or the 2nd clause of the 21st cap. of the statute of Marlbridge, the former providing that the sheriff may deliver goods taken and detained after plaint levied, if they are taken out of liberties; the second, that if the beasts were taken within any liberties, and the bailiffs of the liberty will not deliver them (*noluerint ea deliverare*), then the sheriff, for default of those bailiffs, shall cause them to be delivered. It was said, that the plea did not shew the goods to have been impounded within the honour of Cockermouth; and certainly it makes no direct allegation of that fact, but the cause of complaint being the sale after a replevin by the sheriff, it is sufficient if it shews facts by which the jurisdiction of the sheriff to grant such replevin is taken away, and that

(6) Cited 3 Term Rep. 740.

(7) 6 Term Rep. 71.

(8) 3 B. & Ald. 502.

objection to the sale therefore removed. The plea alleges, in the words of the statute, a taking—i. e. a distraining within liberties. The declaration has charged no wrongful removal, and we think, therefore, that the place of impounding has not been made material by either party. The taking then having been within a liberty, the sheriff acquired from the statute jurisdiction to replevy in the event there described—i. e. if the bailiff of the honour would not deliver them. By that defect of the bailiff, the sheriff is empowered to act. But, can we say that the bailiff in this case would not deliver the cattle, when the plea states, that the sheriff had not required him so to do? Coke, in his commentary on this chapter, founding himself on Fleta's authority, expressly says, "that in such case the sheriff ought to make a warrant to the bailiff of the liberty, to make deliverance; whereunto, if he make no answer, or return that he will make no deliverance, or the like, the sheriff may, by force of this statute and Westminster first, enter into the liberty, and make deliverance." This refers to the 17th chapter of Westminster the first, which enjoins the sheriff to employ force, if necessary, for rescuing distresses improperly detained, and enacts a severe punishment against the takers; but this provision is also made to take effect after the lord or taker shall be admonished to make deliverance to the sheriff. It seems impossible then to construe the word *noluerint* in the ordinary sense of a mere neglect or nonfeasance, when it evidently imports refusal to comply with a demand. Now, in this case, no demand was made, and we might propose a second question—of what default, under these circumstances, the lord of the liberty can be deemed guilty? The statute, while it represses illegal proceedings in the owners of franchises, recognizes and preserves their legitimate rights; and it would seem hard to charge them with default, where they proceed with all due diligence, according to the course and practice of their courts. If, however, the incapacity to administer a remedy as speedily as the common law would, by the hands of a sheriff, can be called a default, there can be no grievance in any particular instance, without its being made to appear that such delay has, in

fact, taken place. By possibility, the three weeks' court might have been held immediately, and so have enabled the lord to replevy as early as the sheriff could. But those inquiries are really out of the present case, which charges the landlord with oppressive conduct in selling after replevin granted, but does not shew that he ever had notice that it was granted.

It was, indeed, argued, that the sheriff may possibly have sent his warrant to the lord's bailiff (as Coke intimates he ought) consistently with the plea. This is true; but that fact cannot be inferred, when it is essential towards establishing the plaintiff's case of grievance; still less should we be justified in presuming that notice, without which the sale by the defendant is blameless. The grant of a replevin is a matter exclusively between the officer who grants it, and the owner of the distrained goods; if the distrainer is to be affected by it, he must receive notice that it has been done. Here, then, is a short answer to the plaintiff's case on the count under consideration. Perhaps his declaration was demurrable for not averring notice; the want of it might have been pleaded, and would have been a good defence. At all events, when the record fails to shew that the sheriff, who was not originally the proper officer to replevy, gave the defendant notice of his having acquired and exercised that power, the apparent right of action, whatever it may have been, vanishes from the record.

Judgment for the defendants.

1837. { THE KING v. THE VESTRYMEN
June 7. { AND VESTRY CLERK OF ST.
MARYLEBONE.

Poor Rate—Vestry Book, Inspection of.

In the parish of Paddington, there is a book, containing accounts of the rates, kept under the authority of a local act, which does not provide for its inspection, or being copied by the rate-payers:—Held, that the Court had no authority, under that act, or the 1 & 2 Will. 4. c. 60, which has been adopted by the parish, or at common law, to order the vestry to grant an inspection thereof to a

rate-payer; or to allow him to make copies of or extracts from it.

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 159.]

1837.
June 11.

THE KING, ON THE PROSECUTION OF THE GUARDIANS OF THE POOR OF THE HOLBORN UNION V. THE GOVERNORS AND DIRECTORS OF THE UNITED PARISHES OF ST. ANDREW, HOLBORN, AND ST. GEORGE THE MARTYR.

Mandamus—Return—Practice—Guardians of the Poor.

The rule of practice, that there must be eight days between the teste and return of a writ of mandamus, is applicable, where a mandamus, absolute in the first instance, is directed to governors and directors of the poor of a district, under a local act, to pay money from the poor-rates, for their proportion of expenses incurred by the guardians of a union under 4 & 5 Will. 4. c. 76.

And, if the parties who obtain such writ make it returnable at an earlier day, without the leave of the Court, the Court, on the objection being brought to their knowledge, will quash the writ of their own act.

Semble—That if there is a difference of opinion amongst the directors and governors, as to obeying the mandamus, or making a return thereto, some of them cannot make a separate return, or apply to set aside the writ for irregularity.

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 160.]

1836.* }

TIBBITTS V. GEORGE.

Insolvent—Assignment.

An action for money had and received is not maintainable by the assignee of an insolvent debtor, against a creditor, for the amount

* This, and the following cases bearing the date of the year 1836, are the cases referred to in p. 256 of the King's Bench Reports in the previous volume. Circumstances have rendered it impossible to give reports of these cases until the present time.

of dividend which he has received from a bankrupt's estate under a parol assignment of such dividend to satisfy his debt, made bona fide by the insolvent more than three months before the commencement of imprisonment, with the knowledge and assent of the solicitor under the bankruptcy.

Assumpsit for money had and received, and on an account stated.

At the trial, before Littledale, J., at the Northampton Spring Assizes, 1835, it appeared, that the action was brought by the plaintiff as assignee of Mrs. Thompson, an insolvent debtor; that in February or March 1832, a person of the name of Mercer, who was indebted to Mrs. Thompson to the amount of 400*l.*, being in embarrassed circumstances, executed a second mortgage, of an estate at Thrapston, by way of security for the debt; but soon afterwards a fiat of bankruptcy was issued against Mercer, and Mrs. Thompson delivered up the mortgage deed, and proved her debt under the commission. At that time, the defendant advanced money to Mrs. Thompson, and the latter, by parol, agreed that he should receive the dividends which would come to her from Mercer's estate. This was with the knowledge and assent of Archbald, the attorney of the assignees of Mercer. In July 1833, the plaintiff obtained judgment in an action, and issued execution for the debt and costs against Mrs. Thompson, who went to gaol, and took the benefit of the Insolvent Debtors Act, in the December following. In August 1833, previous to going to prison, Mrs. Thompson executed a regular assignment to George of the dividend which she might be entitled to under Mercer's estate. The dividend on Mercer's estate of 4*s.* in the pound, was paid to George whilst Mrs. Thompson was in prison.

The learned Judge directed the jury, that if they thought the parol agreement that George should receive the dividends which Mrs. Thompson would be entitled to under Mercer's estate, was entered into at the time when the money was borrowed, such agreement was valid and binding in point of law, and the defendant was entitled to a verdict. A verdict was found for the defendant, with leave to move to enter a verdict for the plaintiff for 80*l.*, the

amount of the sums received from Mercer's estate.

A rule had been obtained pursuant to the leave reserved, or for a new trial, against which cause was shewn by—

Adams, Serj. and Humfrey.—The jury have found that an agreement was entered into between Thompson and George, for the transfer to George of the dividend which Thompson should be entitled to under the estate of Mercer. This was at a time when Mrs. Thompson was in solvent circumstances; and the agreement, therefore, was not void as a voluntary conveyance under the 32nd section of the Insolvent Act, for it is of the very essence of this section, that the conveyance should be during the period when the party is in insolvent circumstances, and made within three months before the commencement of the insolvent's imprisonment. The agreement itself here was made whilst the party was solvent, although the authority to the assignees to pay the money to George, which was given pursuant to that agreement, was within three months of the commencement of the insolvent's imprisonment. It is not under this order that the money is paid, but by virtue of the previous agreement. As all the money would pass through the hands of Archbald, who was the attorney of the assignees of Mercer, and Archbald knew of the agreement between Mrs. Thompson and George—this was distinct notice to the assignees, and, without any subsequent order, they would be trustees to the amount of the dividend payable to Mrs. Thompson for George.

Waddington and Miller, contra, contended, that as the money was paid to George since the assignment of the insolvent's estate to the plaintiff, and the authority given in August must be admitted to be void within the meaning of the 32nd section of the Insolvent Act, it was a voluntary act done within three months of the commencement of the insolvent's imprisonment, and it was absolutely void for all purposes.

[COLERIDGE, J.—Such an authority might be fraudulent *per se*; but it might be valid as an act done in completion of a former valid agreement.]

The transfer of the property would not be complete without the order—*Buck v.*

Lee (1), for there is nothing without that order, to take the money out of the order and disposition of the insolvent. It is for the defendant, who relies upon an assignment of the debt of Thompson, to shew affirmatively and distinctly that notice was given to the assignees of Mercer; and Archbald, when he was called as a witness, was never asked the question, whether he ever communicated to the assignee of the fund the fact of the transfer of Mrs. Thompson's dividend; and the assignee himself was called, who proved payment of the sum under the order.

[PATTESON, J.—It was not necessary that there should be any express order.]

There was not a complete, or a legal or equitable assignment, without such an order to the assignees of Mercer; that alone made the transfer complete—*Carvalho v. Burn* (2). The interest in the dividend remained in the insolvent at the time when she took the benefit of the act, and passed to her assignee.

[LITLEDAL, J.—You contend, that if this agreement had been drawn up in the most regular way, and notice of the existence of it given to the assignees of Mercer, yet that the interest would not have passed under the agreement.]

Yes; on the authority of *Carvalho v. Burn*, which was recognized in a late case of *Lisle v. Guthrie* (3). If it had been an agreement to transfer the whole, that might have made a difference—*Crowfoot v. Gurney* (4).

[COLERIDGE, J.—There was an intention to transfer the whole here, because the calculation was made upon the whole amount.]

All that it could possibly amount to, would be an equitable assignment to the amount of the consideration.

[PATTESON, J.—Assume that to be so, and that the defendant could have maintained no action to recover this money against the plaintiff; yet the plaintiff would be trustee for the defendant. This is not a question between the original debtor and

(1) 1 Ad. & El. 808; s. c. 3 Law J. Rep. (N.S.) K.B. 206.

(2) 4 B. & Ad. 382; s. c. 1 Ad. & El. 883.

(3) 1 Hodg. 85; *semble* s. c. as *Leslie v. Guthrie*, 1 Bing. N.C. 697; 4 Law J. Rep. (N.S.) C.P. 227.

(4) 9 Bing. 372; s. c. 7 Law J. Rep. (N.S.) C.P. 21.

creditor, or his assignee; but between the original creditor and the assignee of the debtor. The *cestui que trust* here has received the money, when the trustee should have received it. Is there any cause of action for money had and received, by the trustee, in such a case?]

The case of *Carvalho v. Burn* is precisely the same case; and *Best v. Arghes* (5) is an authority, that an action for money had and received may be maintained by the assignee of the insolvent, under circumstances similar to the present. The case of *Rome v. Dawson* (6) is the strongest case against the position contended for on behalf of the plaintiff; but that establishes the distinction between an order in writing upon a fund, and a mere parol promise—*Ex parte South* (7). There must be an engagement to pay out of the particular fund, in order to constitute an equitable assignment—*Watson v. the Duke of Wellington* (8), where the distinction is likewise drawn between a mere notice and an order. There is no case in which a verbal assignment of a contingent fund has been held to vest the money in the assignee, without an order in writing from the party, and the assent of the party holding the fund.

Cur. adv. vult.

This case was argued in Easter term, (April 30,) and now, on the last day of Trinity term, the judgment of the Court was delivered by—

LORD DENMAN, C.J.—This was an action brought by the assignee of an insolvent debtor, to recover from the defendant a sum of money received by him under the following circumstances:—It appeared that one Mercer was indebted to the insolvent in a sum of 404*l.*, for which Mercer had given to the insolvent a mortgage on some property, subject to a prior mortgage. Mercer became bankrupt; and a commission was sued out, to which one Archbald was the solicitor. The insolvent having no means of support but the interest of this debt, was reduced to much

difficulty by the bankruptcy, and consulted the defendant, who advanced her several sums of money on the security of the debt. An agreement, not in writing, was entered into *bond fide*, (as was found by the jury, and which finding is not impeached,) by which the insolvent verbally assigned to the defendant any dividends she might be entitled to under Mercer's commission, and any money she might receive from the mortgage, for securing his advances. Archbald was present at the making of this agreement, and entirely privy to it, and advised that no writing or formal assignment was necessary, because the money must pass through his hands, and he would take care it should be paid: but it was found by the jury, that he had not communicated the agreement to Mercer's assignee. At that time the insolvent had not proved under the commission, being advised not to do so, but to rely on her mortgage. Ultimately the mortgage was found to be of no value, and the insolvent proved her debt under the commission. She afterwards took the benefit of the Insolvent Act, and subsequently received from the assignee the sum of money in question in this action, which she handed over to the defendant, and which was much less than his advances. The case was tried at the Assizes for Northampton, in the Spring of 1835, and a verdict found for the defendant.

The insolvent, previously to her going to prison, had assigned the debt by deed; but it was under such circumstances that, but for the former agreement found by the jury, the transaction would have been void under stat. 7 Geo. 4. c. 57. s. 32. The case of the defendant, therefore, rests on the original agreement found by the jury to have been *bond fide*.

Three objections were taken on a rule *nisi* to set aside this verdict. First, that the debt due from Mercer's estate was in the order and disposition of the insolvent within the 30th section of 7 Geo. 4. c. 57, for want of express notice to Mercer's assignee. Secondly, that there was no valid agreement, either at law or in equity, for want of some writing, or some express assent of the assignee of Mercer. Thirdly, that, as the insolvent had a residuary interest after payment of the defendant's advances, the whole debt passed to her

(5) 2 Cr. & Mee. 394; a. c. 3 Law J. Rep. (N.S.) Exch. 117.

(6) 1 Ves. 332.

(7) 2 Swans. 392.

(8) 1 Russ. & Myl. 602; a. c. 8 Law J. Rep. Chanc. 159.

assignee, subject to the defendant's claim or lien, supposing it to be valid.

We are of opinion, that none of these objections can be sustained, and that the verdict ought to stand.

As to the first, it is not necessary that formal notice should be given to the debtor; it is sufficient if it be shewn, that the fact of assignment was communicated to him—*Smith v. Smith* (9), and *Ex parte Watkins* (10). In this case, the knowledge of Archbald, the solicitor to the commission, is, we think, the knowledge of the assignee, and sufficient to prevent the operation of the 30th clause of the Insolvent Act.

As to the second, none of the authorities which have been cited shew that it is necessary that the assignment should be in writing in order to pass an equitable interest, although in very many of the cases there was a writing; and, as to express assent, it is undoubtedly held that, in order to give an *action at law*, the debtor must consent to the agreed transfer of the debt, and that there must be some consideration for his promise to pay it to the transferee; but in equity it is otherwise, as was expressly stated by Lord Eldon, in *Ex parte South*: and the same doctrine is to be found in many other cases. It is sufficient if there be an engagement by the debtor that a particular fund shall be charged with or appropriated to the payment of the debt. That was so in the present case; and indeed the consent of Archbald might fairly be treated as the consent of the assignee of Mercer, if that were necessary. If, then, there be a valid equitable assignment, the thing assigned would not pass to the plaintiff under the Insolvent Act, because, as has been often held, the assignee of an insolvent or bankrupt takes only what the insolvent or bankrupt is beneficially entitled to. The case of *Best v. Argles* approaches very nearly to the present case, and was decided on the ground, that the facts did not clearly amount to an assignment in equity. Perhaps we may think, that the Court might in that case have taken on them-

selves to say, that there was an assignment in equity; but, however that may be, we think that the present case is free from doubt, and that it is unnecessary to drive the parties to a court of equity.

As to the third objection, the case of *Carvalho v. Burn* is relied on; as to which it is sufficient to say, that it was an action of trover for the whole goods, on which it was said that there was a lien, or which were said to be assigned, both the produce of the goods and the debt for which there was a lien, or for which they were assigned, being uncertain in amount, and there being a clear residuary interest in the bankrupt; whereas, in the present case, the debt is certain, and the subject-matter of assignment is certain—viz. so much of the dividends, and no more, as would be sufficient to satisfy that debt. The whole of the dividends, if they had exceeded the debt, would not have passed under the assignment; and, as soon as the debt was satisfied, the remainder would be paid to the plaintiff for the benefit of the insolvent's creditors. Therefore, neither could the defendant become trustee for the plaintiff, nor the plaintiff for the defendant, and the case of *Carvalho v. Burn* is not in point. The rule must be discharged.

Rule discharged.

1836. } In the matter of RIDLEY.
April 18. }

Attorney—Admission.

A party had assumed a new name after the service under his articles was completed, and had put up his notices in that name, without reference to his former name. The Court required him to put up his notices in both names, and allowed him to be admitted at the end of the term.

This was an application by *W. H. Watson*, to admit an attorney. He had served under his articles in a different name, which, in May 1835, he had changed to that of *Ridley*, by which he had since been known. He had fixed up his notices under the name of *Ridley*, without reference to his former name. It was contended, that this was a sufficient compliance with the rule, *Trin. 31 Geo. 3.*

Cur. adv. vult.

(9) 2 Cr. & Mee. 231; 5 C. 3 Law J. Rep. (N.S.) Exch. 42.

(10) 1 Mont. & Ayr. 689; 5 C. 5 Law J. Rep. (N.S.) Bankr. 56.

LORD DENMAN, C.J., now said, that the party might fix up notices, stating both names, to remain during the residue of this term; and if no caveat was then entered, he might be admitted at the end of the term.

1836. }
April 18. } In the matter of PRANGLEY.

Attorney—Admission.

The three days notice to the Master required by the rule, Hil. 6 Will. 4, by persons applying to be admitted attornies, must be exclusive of the day on which it is given, and of the first day of the term to which it relates.

This was a similar application made by Steer. Mr. Prangley had given notice on the 12th of April of his intention to apply for admission in the next term. Term began on the 15th, and the Master, doubting whether the rule of Hilary, 6 Will. 4. s. 5, which requires three days notice before the commencement of the term, had been complied with, the Court were applied to on the first day of term. The rule, Hilary, 2 Will. 4. VIII. was referred to, as shewing that one day may be taken inclusively, and the other exclusively, and it was stated that the applicant had acted upon that rule.

Cur. adv. vult.

LORD DENMAN, C.J. now said, that, in the present case, the notices should be held to be sufficient; but that in future, there must be three clear days at the least between the day on which the notice was given, and the first day of the term to which it refers.

1836. }
EVANS v. ELLIOTT AND PATRICK.

Replevin—Pleading.

Replevin lies for cattle detained on a distress for rent, where the arrears are tendered after the distress, and before the impounding.

Declaration in replevin for taking and detaining. Avowry for rent in arrear. Plea in bar, that after the taking, and before the impounding, the plaintiff tendered the rent and a reasonable sum for the expenses, which were refused, and the defendant unjustly de-

tained the cattle modo et formâ:—Held, on demurrer, that the plea in bar was good.

Replevin for taking and unjustly detaining the plaintiff's cattle against pledges. Avowry by defendant Elliott, avowing the taking for 27*l.* being half-a-year's rent due to Elliott on a demise.

Plea in bar, that after the taking of the cattle, and before the impounding thereof, the plaintiff tendered the rent to Patrick, then duly authorized to receive it, together with a reasonable sum for the expenses, which he refused to accept, and afterwards unjustly detained the said cattle, *modo et formâ*.

Special demurrer and joinder.

J. Evans, in support of the demurrer.—The plea in bar is a departure from the declaration. It admits the taking to have been lawful, but only shews that the detaining was unlawful. The rule laid down in 2 *Inst.* 107, is this: "Before the distress, the tenant may, upon the land, tender the arrearages; and if, after that, a distress be taken, it is wrongful, and if the lord hath distrained, if the tenant, before the impounding of them, tender the arrearages, the lord ought to deliver the distress; and, if he doth not, the detainer is unlawful." See also *The Six Carpenters' case* (1), and *Selm. N.P.* 1200 (7th edit.). The proper remedy here would have been detinue.

E. V. Williams, contra.—It is uncertain, from the argument on the other side, whether the plaintiff might enter a *nolle pros.* as to the taking, or ought to have confined the plea to the detaining. But there are numerous authorities which support the position, that replevin lies in this case—*Fitz. N.B.* 69, (G); *Vin. Abr.* 'Tender,' (S), pl. 1; *Gilb. Dist.* 63; *Allen v. Bailey* (2); *Pilkington v. Hastings* (3); *The Six Carpenters' case*; and *Anscomb v. Shore* (4). The only real question, therefore, is, whether there is any informality in the pleadings; and it cannot be contended that there is. The writ in replevin always charges a taking and detaining, and the declaration follows the writ, and the plea in bar explains the declaration.

(1) 8 Co. 146.

(2) 2 Lutw. 1594.

(3) Cro. Eliz. 813.

(4) 1 Campb. 285; s. c. 1 Taunt. 261.

The wrongful detainer is a trespasser—*Vertue v. Beasley* (5); and this plea in bar is like the new assignment in trespass—*Greene v. Jones*. But, if the unlawful detainer take place after a lawful taking, the avowant cannot have judgment, because he undertakes to answer the whole charge by his avowry; and it is clear, that he cannot justify the whole.

J. Evans, in reply.—In the plea in bar, a distinction is made between the taking and the detaining of the cattle. It has been shewn that detainee will lie, and trespass; but no case establishes that replevin is maintainable for a mere detainer.

LORD DENMAN, C.J.—This appears to be a very critical objection. The plea in bar distinguishes the taking after the detainer. I do not know that the word "take" has any technical meaning, so as to be confined to the first taking. Then, as in trespass every continuance is a new trespass, so every wrongful detention is a new taking.

LITLEDALE, J., PATTESON, J., and WILLIAMS, J. concurred.

Judgment for the plaintiff.

1836. } GOODMAN v. HARVEY AND
April 28. } OTHERS.

Bill of Exchange—Protest—Title of Holder.

Where a foreign bill of exchange has been protested for non-payment, it is not necessary, that a copy of the protest should be sent to the drawer, with the notice of dishonour.

The title of the holder for value of a bill of exchange, was impeached, on the ground that his indorsee had obtained it by fraud, it being shewn that the former had taken it after it had been noted for non-acceptance:—Held, that it was not a question for the jury, whether he had been guilty of gross negligence, but whether he had taken it bona fide; though gross negligence might afford evidence of mala fides.

Assumpsit on a bill of exchange, drawn by defendants at Limerick, upon Gould &

Co., London, dated the 1st of September 1832, for 262*l.* 13*s.* 1*d.*, payable at four months, to Scott, or order, indorsed by Scott to Levy, and by Levy to plaintiff.

Plea—Non assumpsit.

On the trial, before Lord Denman, C.J., at the Sittings in London, after Hilary term, it was proved that the bill was given by the defendants, who were merchants at Limerick, to Scott, for a balance of freight. He gave it to Hudson to get it discounted, who delivered it for that purpose to Levy. He presented it for acceptance, which was refused by the drawers, in consequence of a notice from the defendants not to pay any money to Scott, or any person on his behalf, as a commission was about to be sued out against him. The bill was noted for non-acceptance and protested, but no notice of the non-acceptance was given to the defendants. Levy returned the bill to Hudson, who carried it to Scott. He, being under arrest for debt, gave it again to Hudson to raise money upon it. Hudson again placed it in the hands of Levy, who got it discounted by the plaintiff, who paid 260*l.* upon it. Levy never remitted the proceeds, but, as it was alleged, retained them in fraud of Scott. When the bill became due, the drawers, though possessed of funds, refused to pay the plaintiff, who presented it for payment, because the right to the money was disputed. The bill was protested for non-payment, and notice of the non-payment was sent to the defendants by letter, stating that the bill had been protested, but not inclosing any copy of the protest. It was objected for the defendants, first, that a copy of the protest ought to have been sent to them; and secondly, that as the plaintiff took the bill with the notary's marks upon it, he had been guilty of gross negligence, and stood in the same situation as Levy, who clearly had no right to the bill. His Lordship overruled the first objection, but, in regard to the second, was of opinion that it was valid, and offered to nonsuit the plaintiff, or leave it to the jury to say, whether the plaintiff had been guilty of gross negligence. They said that the notarial marks were sufficient notice to an indorsee that the bill had not been accepted. The plaintiff was then nonsuited. In the ensuing term—

Erle obtained a rule for a new trial.

The *Attorney General* and *Mellor* shewed cause.—First, there was no notice to the defendants of the refusal to accept, and a holder is bound to give notice of non-acceptance to the drawer—*O'Keefe v. Dunn* (1). Secondly, the letter communicating the notice of non-payment, ought to have contained a copy of the protest, this being, as appears from *Mahoney v. Ashlin* (2), a foreign bill. By the law of merchants, the protest is the only legitimate evidence of the non-payment of the bill. They referred to *Goostrey v. Mead* (3), and *Chaters v. Bell* (4); and *Robins v. Gibson* (5) was also cited.

[*PATTESON, J.*—*Cromwell v. Hyson* (6) is inconsistent with *Goostrey v. Mead*.]

[*COLERIDGE, J.*—In *Selv. N.P.* 361, there is an attempt to reconcile them.]

But, thirdly, the plaintiff was not entitled to recover, although he may have given value for the bill; he took it after it had been noted for non-acceptance, when it was as much dishonoured as if it had been noted for non-payment—*Crossley v. Ham* (7). He took it with all the infirmities which attached to it in the hands of *Hudson*, who had not given value for it, and could not have recovered. He was guilty of such gross negligence in the taking of the bill marked as it was, that he is not entitled to recover, as *Scott* had been deprived of it by fraud. The merely taking a bill under suspicious circumstances will not defeat the holder's title, yet, where he has been guilty of gross negligence, the case comes so near to one of fraud, that the holder must depend upon the title of the party from whom he received it, which, in the present case, was not valid.

Erle, contra.—The first point now mentioned, was not taken at the trial; and as to the second, there was sufficient notice of the protest in the letter which was sent. According to *Bayley on Bills*, 259, 5th edit., that was enough.

(1) 6 Taunt. 305.

(2) 3 B. & Ad. 478; a. c. 9 Law J. Rep. K.B. 264.

(3) Bull. N.P. 271.

(4) 4 Esp. N.P.C. 48.

(5) 3 Campb. 334.

(6) 2 Esp. N.P.C. 511.

(7) 13 East, 302.

[*LORD DENMAN, C. J.*—There is no doubt that the notice was sufficient.]

Then, as to the plaintiff's title. He is a holder for value. It is supposed that he was guilty of gross negligence, in taking it after it had been dishonoured, as appeared by the notarial marks. If it were requisite, to charge the drawers, that notice of the non-acceptance should have been given to them, he might possibly fail—*O'Keefe v. Dunn*; but it is clear that the defendants must have had knowledge that the bill had not been accepted. *Scott*, the payee, could therefore have recovered against the defendants; and whatever may be the question between *Scott* and the plaintiff, that cannot be urged by the defendants.—[He was stopped by the Court.]

LORD DENMAN, C.J.—I offered to submit to the jury, as the question, whether the plaintiff had been guilty of gross negligence or not. I believe we are all agreed that gross negligence, though it may be evidence of *mala fides*, yet, not being the same thing, would not defeat the right of a party to recover, who has given a consideration for the bill. We have now shaken off the last remnant of the contrary doctrine. Where the bill has passed to the plaintiff without any proof of bad faith in him, there is no objection to his title. The notarial marks, in this case, are only material, as raising a doubt as to the *bona fides*.

The rest of the Court concurred, and—
Rule absolute.

1836. } *PEACOCK, ASSIGNEE OF JONES,*
June 13. } *v. HARRIS.*

Evidence—Declarations after res gestæ.

On an issue, whether an insolvent debtor had executed a certain deed before he went to prison, with a view to petitioning the Court for his discharge,—Held, that his schedule filed in the court four months after he had executed the deed, was not admissible in evidence, in an action by the assignee against a party claiming under the deed.

Assumpsit for work and labour done, and materials supplied, by the insolvent.

Pleas—First, non assumpsit. Second, that the insolvent had assigned this among other debts, to a creditor named Worley, in satisfaction of what he owed to Worley, and that the defendant had since paid the latter. Replication—That the assignment was executed by Jones, with the intention of petitioning the Insolvent Debtors Court for his discharge. Issue thereon.

At the trial, before Bolland, B., at the Denbighshire Spring Assizes, in 1835, it was proved that the deed in question was executed on the 1st of January 1833; and on the 4th of February 1833, the insolvent went to prison, and in May filed his schedule, which was tendered in evidence, and admitted by the learned Judge, for the purpose of shewing the intention of the insolvent when he executed the deed. The plaintiff having recovered a verdict, a rule nisi for a new trial was obtained, on the ground of the admission of this evidence; against which, cause was shewn by—

J. Jervis and Welsby.—By the 7 Geo. 4. c. 57. s. 32, a voluntary deed made within three months before a party goes to prison, if made with the view of petitioning the Court for a discharge, is void. Now, the schedule was offered as a declaration of the insolvent respecting the debt of Worley, and the deed executed in his favour. It is true, that this declaration is not contemporaneous with the execution of the deed, yet it refers to it, and is sufficiently connected with it, to render it admissible when the question is, whether the deed has been executed with a fraudulent intention or not. *Ridley v. Gyde* (1), *Vacher v. Cocks* (2), *Herbert v. Wilcocks* (3), and *Newman v. Stretch* (4), are authorities to shew that the declaration was receivable in evidence, though it was made after the time when the title relied on by the other side accrued.

R. V. Richards, in support of the rule.—This declaration by the insolvent cannot be admitted, to affect the rights of the party to whom he had previously assigned all his interest. *Ridley v. Gyde* cannot be supported; and as to *Newman v. Stretch*, the declaration which was received, was

part of the *res gestæ*, and explained the act of the party, so as to shew that it amounted to an act of bankruptcy. Here the declaration was long after the deed had been executed.

Cur. adv. vult.

On the last day of the term, the judgment of the Court was delivered by—

LORD DENMAN, C.J.—The case relied upon in answer to the objection, was *Ridley v. Gyde*. But there the statement made was in explanation, and as it were a continuation of the former discourse, which led to the transaction in question. Here, the evidence is of something done under the statute *alio interitu*. And even if this were not so, a contemporaneous declaration may be admissible, as part of a transaction; but an act done cannot be varied or qualified by insulated declarations made at a later time.

Rule absolute.

1836. }
June 13. } BIRD v. HIGGINSON.

Costs—Issues—Demurrer.

To a declaration containing two counts, the defendant pleaded two pleas (one to each,) on which the plaintiff joined issue, and also a plea, to which he demurred. The plaintiff made up the issues of fact, and gave notice of trial, which a Judge refused to postpone until after the argument of the demurrer. At the trial, the plaintiff recovered a verdict with damages on one plea, and the defendant a verdict on the other. The demurrer was subsequently argued, and judgment was given for the defendant, who thus succeeded on the whole record:—Held, that the plaintiff was entitled to the general costs of the cause, including the costs of the pleadings, witnesses, and trial, on the issue on which he succeeded at the trial.

Assumpsit. The first count of the declaration was for the non-performance of an agreement. The second, on an account stated.

Pleas—First, as to the last count, non assumpsit, on which issue was joined. Second, as to the first count, that the agreement was obtained by fraud, covin, and mis-

(1) 9 Bing. 349; 2 Law J. Rep. (n.s.) C.P. 25.

(2) Moo. & M. 353.

(3) Ibid. 355, n.

(4) Ibid. 358.

representation, which was traversed in the replication. Third, that the agreement was not under seal, which was demurred to. The plaintiff made up the issue, and delivered it with notice of trial of the issues in fact, for the assizes at Dolgelly, in June 1834, which a Judge at chambers refused to postpone until after the argument on the demurrer.

The trial took place at Dolgelly, before Vaughan, J., in July 1834, when the defendant recovered a verdict on the first issue, and the plaintiff on the second for 200*l.* damages, costs 40*s.* In Hilary term, the demurrer was argued, and judgment was given for the defendant.* On the taxation of costs, the Master allowed the plaintiff, by way of increase, the general costs of the cause in the usual manner, deducting the defendant's costs of the other pleadings, the argument, &c., but suggested that so much of the *postea* as gave damages and costs should be struck out, in which case the plaintiff would be limited to those occasioned by the second plea, including the costs of the trial (unless the Court should be of opinion that the plaintiff had no right to take the record down to trial before the argument on the demurrer); and, consequently, that the defendant should have the general costs of the cause in respect of the residue of the case, including of course the costs of the demurrer and argument. In Hilary term last—

The Attorney General obtained a rule *nisi* for the Master to review his taxation by striking out the costs allowed to the plaintiff, and taxing the defendant his full costs of the third plea, including the costs of arguing the demurrer thereto, and to strike out of the allocator on the *postea* the damages of 200*l.*, marked by him for the plaintiff. Cause was shewn by—

Jervis, and *The Attorney General* was heard in support of the rule.

The Court took time to consider their judgment, and it was now delivered by—

LORD DENMAN, C.J., who, after stating the facts, proceeded as follows:—The case of *Cooke v. Sayer* (1), which has been re-

ferred to in the Master's report, and also upon the argument, is almost exactly the same as the present case. It was an action for criminal conversation. The defendant pleaded—first, not guilty; secondly, not guilty within six years. On the first plea, the plaintiff joined issue, and obtained a verdict for 50*l.* To the second plea, there was a demurrer, and judgment for the defendant on the demurrer; so that, upon the whole record, it appeared that the plaintiff had no cause of action. The issue was tried there, as it was here, before the argument on the demurrer. The question of costs was much considered by the Court of King's Bench, and they determined that the defendant was entitled to the costs of the demurrer: but, as to the costs of the plaintiff, that he should not have the costs of the trial, because he could have no judgment for the damages he had recovered, and they held that each party must pay his own costs of the trial. That case, if rightly decided, would govern the present; but, it must be observed, that in *Yates v. Gun* (2), some years before *Cooke v. Sayer*, the Court of Common Pleas, under circumstances nearly similar to *Cooke v. Sayer*, had come to quite a contrary decision. In that case, also, as in the present, the issue was tried before the argument on the demurrer, and they allowed the plaintiff the costs of the trial, to be set off against the costs of the defendant. It becomes, therefore, proper to consider whether *Cooke v. Sayer* was rightly decided.

The reason given by the Court of King's Bench in *Cooke v. Sayer*, is perfectly correct, if we look into the statute of Gloucester (3), on which they decided the case, for that statute only gives costs where damages are recovered; and, as the damages given in this case were only contingently assessed, the plaintiff, as far as the statute of Gloucester goes, would not be entitled to the costs of the trial. But the Court, though they refer to the statute of 4 Ann. c. 16, as to pleading double, do not seem to have adverted to the 5th section, which provides, "That if any such matter shall, upon a demurrer joined, be judged insufficient, costs shall be given at the discretion

* See 2 Ad. & E. 696; 4 Law J. Rep. (N.S.) K.B. 124; and 6 Law J. Rep. (N.S.) Exch. 282.

(1) 3 Barr. 753; s. c. 2 Wils. 85.

(2) Barnes, 141.

(3) 6 Ed. 1. c. 1. s. 2.

of the Court; or, if a verdict shall be found upon any issue in the said cause for the plaintiff or demandant, costs shall also be given in like manner, unless the Judge who tried the said issue shall certify that the said defendant, or tenant, or plaintiff in replevin, had a probable cause to plead such matter, which, upon the said issue shall be found against him."

Several cases have been decided, where there have been issues on double pleadings under the statute of Anne, and where the defendants succeeded on the trial of issues, which would entitle them to judgment on the whole record, but where, nevertheless, the plaintiff, who had succeeded on some of the issues, has been held entitled to the costs of those issues.

In *Jones v. Davies* (4), in an action of assault and battery, the defendants pleaded four pleas; and, on the trial, two were found for the plaintiff, without damages, and the other two for the defendants, and no certificate from the Judge that the defendants had probable cause to plead those pleas, which were found for the plaintiff. The Court held, that the plaintiff was entitled to have the costs of the pleas allowed to him, and that they should be deducted out of the defendant's costs.

In a case mentioned in *Buller's Nisi Prius* in trespass, the defendant pleaded not guilty, and several justifications. Upon the trial, the plaintiff not proving his possession of the *locus in quo*, the defendant had a verdict, and, by direction of Dennison, J., the verdict was entered upon the general issue, upon which there was a motion for a *venire de novo*, but the Court refused the motion, saying, the verdict was complete, and determined the cause; that the plaintiff was not entitled to damages, though, they said, the plaintiff might have insisted to have a verdict entered on the other issues for the sake of costs, which he would be entitled to, unless the Judge certified that the defendant had probable cause to plead such plea—*Bartlett v. Spooner*, E. 1751, C.B. (5); s. p. *Dayrel v. Briggs*, Trin. 25 Geo. 2. K.B. (6). The case of *Bartlett v. Spooner* is also to be found in

Barnes, p. 461, with some variations, but not material.

In *Duberley v. Page* (7), in an action of trespass, the defendants pleaded not guilty, and several justifications. To the replication on one of the defendant's pleas, there was a demurrer, on which the plaintiff had judgment. On the trial, the issues were found for the defendants, except as to some on which the jury were discharged from giving a verdict. The question of costs was very fully argued; and the Court held, that the plaintiff was entitled to the costs of the demurrer, though the defendants had judgment upon the whole record. So also in *Benett v. Coster* (8), where, in trespass, the defendant pleaded pleas which were found for him, and entitled him to judgment on the whole record, but several issues were found for the plaintiff, the plaintiff had his costs allowed on those issues.

In *Hart v. Culbush* (9), which was an action for a libel, the defendant pleaded the general issue, and several pleas of justification. On the trial, the jury found a verdict for the defendant on the general issue, and no evidence was given on either side as to the pleas of justification. The Master allowed the plaintiff his costs of the pleadings on the pleas of justification, and of the witnesses who were there to support them. An application was made for the Master to review his taxation, on the ground, that as the defendant had pleaded a plea that went to the whole cause of action, he was entitled to the costs of the cause, and the plaintiff to none; and it was contended, that as there was no evidence given on the pleas of justification, there could be no certificate under the statute 4 Anne, c. 16. s. 5. But Parke, J. held, that the plaintiff was entitled to the costs on those issues.

These cases shew, that the construction and practice on the statute of Anne has been, to give the plaintiff his costs on the issues found for him, whether they be issues of fact or issues of law, even though upon the other issues the judgment be such, as that the defendant has judgment on the whole record.

(4) *Barnes*, 140.

(5) Bull. N.P. 339.

(6) *Ibid*.

(7) 2 Term Rep. 391.

(8) 1 Brod. & B. 463.

(9) 2 Dowl. P.C. 456.

There are other cases of *Howard v. Cheshire* (10), and *Richmond v. Johnson* (11), where questions have arisen under the statute of Anne, with no certificate under that statute, that there was probable cause to plead the several matters; and where there has been a certificate under the statute 43 Elis. c. 6. s. 2, to deprive the plaintiff of costs, and where the conjoined operation of those statutes has been under consideration; but it is not necessary to notice the facts of these cases, as it was held, that the statute of Anne does not apply, unless one of the special pleas be found for the defendant.

Several cases have occurred as to the statute of Anne in replevin—*Bright v. Jackson* (12), *Dodd v. Jodrell* (13), *Stone v. Forsyth* (14), in which it was held, that the avowant was entitled to the costs of the issues on double pleadings in which he succeeded, unless there was a Judge's certificate that there was probable cause to plead the double pleas.

The case of *Favian v. Blake* (15) has been considered as a contrary authority. It was an action of trespass, to which the defendants pleaded the general issue and justifications. The verdict was for the plaintiff on the general issue, with 1s. damages, and for the defendants on the pleas of justification. The plaintiff applied to have his costs taxed. The Court, upon consideration, said, that the pleas of justification extended to the whole trespass; it appeared that the finding was for the defendants upon the whole record, and therefore the plaintiff was not entitled to the costs. The case is quite correct, if the decision is meant to be, that the plaintiff was not entitled to the whole costs of the cause, for, as to that, there is not the slightest pretence; and we cannot intend, from the report, that there was anything in question but the general costs of the cause. But if the application had been confined to the costs of the issue on the plea of not guilty, which was found for him, then we think, upon principle and previously decided cases, he would be

entitled, to that limited extent. The case, therefore, as now presented in the report, does not seem to lead to any definite conclusion. Then, if the plaintiff be entitled to the costs of the issue, the next question is, to what those costs extend?

In the case of *Brook v. Willet* (16), which was in replevin, the defendant was held entitled to have his costs allowed of the trial of the whole issue, which was found for him, and not of the pleadings only; and so in *Vollam v. Simpson* (17), which was also in replevin, some of the issues were found for the plaintiff, and some for the defendant; and it was held, that the plaintiff was entitled to the costs of so much of the pleadings, briefs, and witnesses, as related to the issues upon which he had succeeded, and so also the defendant as to the issue found for him.

We have noticed the two last cases as being in replevin, because in *Otkir v. Casvert* (18), which was in trespass, and where the question was, whether the plaintiff, who had succeeded on some of the issues, should be confined to having the costs of the pleadings only, the Prothonotaries differed in opinion, one thinking that he should have the costs of the trial occasioned by those issues, and the other Prothonotary thinking that he was entitled to the pleadings only, though he admitted that in replevin the practice was different. The Court took time to consider, and afterwards Park, J. said, that he had spoken to nearly all the Judges on the subject, who were all most clearly of opinion, that the costs of the issues in that case included only the costs of pleadings on those issues. And it is to be observed, that in the case of *Page v. Creed* (19), the Court said, that the statute of Anne only gave the costs of the pleadings: the case, however, in other respects, differed from that now before the Court, and we only quote it for the language used by the Court.

But in the late case of *Hart v. Cutbush*, which we have before noticed, one question was, whether the plaintiff, who had succeeded on some of the pleas, was entitled

(10) Sayer's Rep. 260.

(11) 1 East, 563.

(12) Barnes, 144, 146.

(13) 2 Term Rep. 235.

(14) 2 Doug. 707, n. 2.

(15) 11 East, 263.

(16) 2 H. Bl. 436.

(17) 2 B. & P. 368.

(18) 1 Bing. 275; 4 c. 1 Law J. Rep. C.P. 101.

(19) 3 Term Rep. 391.

to the costs of the witnesses as well as the costs of the pleadings. Parke, J. said, "The matter was very much considered by the Court in the case of *The Duke of Newcastle v. Green* (20). There, the defendant put no less than thirty-five special pleas on the record, besides the general issue. The general issue was found for the defendant, and the Duke had a verdict on all the special pleas. There, it was held, that the Duke was entitled to the costs of the pleadings, and of the witnesses in support of them. His costs exceeded those of the defendant. As to the costs of the pleadings, and the costs of the witnesses, being distinguished, there can be no reason for so doing. If the plaintiff is entitled to the costs of the pleadings, why should he not be entitled to the costs of the witnesses in support of them? The necessity of bringing them is caused by the manner in which the defendant pleads;" and he refused a rule to shew cause why the Master should not review his taxation of costs. This point was also expressly decided by this Court, after taking time to consider, and upon a review of the cases now cited, in *Spencer v. Hamerton* (21), which was argued in Trinity term last, and judgment given in Hilary term last.

We entirely concur in the view which Parke, J. took of the subject in *Hart v. Cusbush*; and then, if the plaintiff is to go beyond the costs of the pleadings, he is entitled, besides the costs of the witnesses, to the costs of the Nisi Prius record and jury, briefs, counsels' fees, and all other expenses incidental to the trial, because all these expenses are necessarily incurred for the determination of the issue; and we may observe, that in the case of *Yates v. Gun*, noticed in the early part of this judgment, the plaintiff was allowed the costs of the trial.

But then another objection is made to the plaintiff being allowed his costs—that he should not have taken down the issue to be tried till after the argument on the demurrer. But, as to that, it is quite clear that a party may either go to trial or argue a demurrer first, just as he thinks fit; and it is so stated by Buller, J. in

(20) Not reported.

(21) 4 Ad. & El. 418; a. c. 5 Law J. Rep. (N.S.) K.B. 114.

Duberley v. Page, before referred to, though he says, he always thought it better to argue a demurrer before trial, because a demurrer may put an end to the whole. But in the present case, if there was any doubt on that point, it is removed, because my Brother Patteson refused to make an order to postpone the trial of the cause till after the argument of the demurrer. On the whole of this case, we are of opinion, that the rule for the Master to review his taxation of costs must be discharged.

Rule discharged.

1836. } DOE d. OGLE AND OTHERS v.
April 18. } VICKERS.

Ejectment—Mortgagor and Mortgagee—Estoppel.

A mortgagor, after executing a mortgage, was sued in ejectment by a party having title superior to his own, who recovered a verdict against him, and executed a lease in his favour for a term of years:—Held, that he could not set up this lease as a defence in an action of ejectment brought by his mortgagee.

Ejectment for lands in Shropshire.

On the trial, at the Shrewsbury Spring Assizes for 1836, before Littledale, J. it appeared that the defendant had mortgaged the premises in question to the lessors of the plaintiff in fee, in 1824. Subsequently, the Earl of Shrewsbury and the Earl of Berwick brought ejectment against the defendant, who was left in possession, each for an undivided moiety, when a verdict was taken, subject to the award of an arbitrator, who awarded that a lease should be executed by Lord Shrewsbury and Lord Berwick to the defendant of their undivided portions, which was accordingly executed. As to one undivided portion, the defendant suffered judgment by default, and defended himself as to the other two-thirds by the production of this lease. The learned Judge held, that this lease could not be set up against the mortgagee, and directed a verdict for the plaintiff.

Talfourd, Serj. now moved for a new trial, contending, that the defendant must be considered as having acquired a new

title since the mortgage; and the mortgagees only rested upon their title, which was defeated by the ejectment. Whether, in equity, the defendant may not be regarded as a trustee for his mortgagees, or may be compelled to assign this lease to them, is immaterial, because this is simply a question at law. The mortgage cannot operate as an estoppel.

LORD DENMAN, C.J.—How can the defendant's taking a lease from a third person, after a verdict in ejectment, affect the title between himself and his mortgagees?

LITLEDALE, J.—If the defendant found that his title, at the time of his mortgage, was imperfect, it was his duty to get a good title for his mortgagees. He cannot set up his lease against them.

PATTERSON, J. and COLERIDGE, J. concurred.

Rule refused.

1836. }
April 18. } DOE, on the several demises of
JOHN MEE AND THOMAS LEIGH,
of JOHN MEE, of THOMAS LEIGH,
of T. LEIGH AND JANE L. MEE,
v. MARY LITHERLAND, RICHARD
MEE, JAMES LEIGH, AND GEORGE
LIGHTFOOT.

Ejectment—Admissions by Tenant against Landlord.

Where a party defends an ejectment jointly with others as their landlord, he is identified with them; if they are beaten he must fail: and their admissions are evidence against him as well as against themselves.

Ejectment for lands in Lancashire.

On the trial, before Lord Denman, C.J. at the last Liverpool Assizes, it appeared that one William Lightfoot, who died in 1824, held the premises in question for a term of 999 years, and John Mee and Thomas Leigh were his executors. The defendants, Litherland, Mee, and Leigh, occupied the premises as tenants to W. Lightfoot, at the time of his death, and had paid rent to the executors until August 1835. The plaintiffs then put in an admission, signed by those three, after the commission day of the assizes, whereby they acknowledged to have attorned to the

defendant George Lightfoot. This was used as evidence of a determination of their interest. It was objected to, but received by his Lordship, who directed a verdict for the plaintiff; but gave leave to the defendants to move to enter a verdict for them.

Crompton now moved accordingly.—The admission was not evidence against George Lightfoot, and therefore, as regards him, the interest of the other three has not been determined. It might possibly be evidence against the parties who signed it, of a disclaimer before the suit, though an actual disclaimer after it was commenced would not be sufficient—*Doe d. Lewis v. Lord Cawdor* (1). In *Doe d. Grubb v. Grubb* (2), the disclaimer was before the action.

[LORD DENMAN, C.J.—How does George Lightfoot defend?]

As landlord.

Per Curiam.—Then he must stand or fall with them. If they have no right, he has none; if they are beaten, he must fail; and their admission must bind him. By defending as landlord, he is identified with the tenants.

Rule refused.

1836. }
April 21. } ATKINS AND ANOTHER v.
OWEN.

Assumpsit—Money had and received.

A party received a bill of exchange to procure an indorsement upon it. He did so, and paid it in to his bankers, who gave him credit for it. He withdrew his account, but did not draw upon it specifically:—Held, that he was not liable in an action for money had and received for the proceeds before it was due.

Assumpsit for money had and received.

Plea—Non assumpsit.

On the trial, before Littledale, J. at the last Exeter Assizes, it appeared that the plaintiffs were the trustees under the settlement of a Mrs. Studly, and had advanced

(1) 1 Cr. M. & R. 398; a.c. 5 Law J. Rep. (N.S.) Exch. 232.

(2) 10 B. & C. 816; a.c. 8 Law J. Rep. K.B. 321.

some money, part of the settlement, to her husband, and, as a security for the repayment, he was to indorse a bill of exchange to them. They procured the bill and delivered it to the defendant, that he might procure the indorsement of Studdy. The defendant did procure the indorsement, and then paid the bill in to his bankers, and claimed to retain the proceeds. They had placed it to his credit, though not then accepted. He drew upon them, though not specifically upon this bill, and had overdrawn his account independently thereof. The bankers presented the bill for acceptance and subsequently for payment, but before it became due this action was brought. The learned Judge held, that this form of action was not maintainable, and nonsuited the plaintiffs, giving them leave to move to enter a verdict for them.

Crowder now moved accordingly. — Though trover would clearly have lain, yet as the defendant had obtained credit, and therefore funds, in respect of the bill, he is responsible in this form of action. There could have been no doubt, if he had procured it to be discounted, and had obtained the proceeds, he must have been liable for money had and received; so if he had pledged the bill. *Read v. James* (1), *Wilkinson v. Clay* (2), and *Andrew v. Robinson* (3) are analogous cases.

LORD DENMAN, C. J.—The conduct of the defendant has been such that I should have been happy if the rule could have been granted; but when it is clear that this action does not lie, it would be useless to grant it. An action of trover was clearly maintainable, but as we are to view this case as if the bill not yet due had been taken by the defendant, how was it a case of money had and received? The defendant received credit upon the assumption that it will be paid; should it not, he will be called upon to pay it twice.

LITTLEDALE, J. concurred.

PATTESON, J.—This, in substance, is money lent by the bankers to the defendant on the credit of the bill.

COLEBRIDGE, J. concurred.

Rule refused.

- (1) 1 Stark. N.P.C. 134.
- (2) 6 Taunt. 110.
- (3) 3 Campb. 199.

1836. }
April 22. } EVANS v. DAVIES.

Statute of Limitations—Application of Payment of Interest.

*A party indebted on a promissory note for 100*l.* and interest, was applied to within six years from the commencement of the suit by the payee's son, to let his father have a pound on the note. He paid him a pound, and said, "this puts us straight for one year's interest all but 18*s.*; some day next week I will bring it up and get a receipt." There was no evidence of any other debt:—Held, on a plea of the Statute of Limitations, that the jury were warranted in applying this payment to the note.*

Assumpsit on a promissory note, dated the 19th of November 1809, for 100*l.* payable on demand, with interest.

Plea—the Statute of Limitations. *Replication*, that the cause of action accrued, &c.

At the trial, before Williams, J., at the last Shropshire Assizes, the note was produced; there were some indorsements of interest upon it, but none within the six years; and it was proved, that in 1831 the plaintiff's son called on defendant, and said, "My father has sent me to ask you to let him have a pound." The defendant paid him one pound, and said, "this puts old Mr. Evans and me straight for last year's interest all but 18*s.*; some day next week I will bring them up and get a receipt." There was no evidence of any other debt. It was objected, that there was no connexion between the payment and the note, so as to make it a payment of interest thereon to avoid the statute. The learned Judge overruled the objection, but reserved the point, and left it to the jury to say whether this was a payment of the interest on the note; if not, the plaintiff must fail. The jury found for the plaintiff. On a former day,

R. V. Richards moved to enter a nonsuit, or for a new trial, and urged the objection taken at the trial, citing *Tippett v. Heane* (1).

Curr. adv. vult.

And now, LORD DENMAN, C. J. said, it was contended, that this case was not taken.

- (1) 1 C. M. & R. 259; s. c. 3 Law J. Rep. (n.s.) 281.

out of the operation of the statute, and *Typots v. Heane* was cited as an authority. We have consulted Parke, B. whose judgment was referred to; and we are of opinion, that the two cases are essentially different. Here the words import, that the payment was made on account of some existing debt, and there is no proof of any other debt than this note. The jury were therefore warranted in applying it to that.

Rule refused (2).

1836. }
April 29. } TINKLER v. ROWLAND.

Verdict—Discharge of Jury.

Where there were three issues in trespass, one on a public carriage-way, the second on a public bridle-way, and the third on a public footway, and the jury found a verdict for the plaintiff on the first, and for the defendant on the third; but not being able to agree as to the second, the Judge, without the consent of the plaintiff, discharged the jury from giving a verdict on that issue:—Held, that he was not justified in doing so, although the plaintiff had agreed to accept only nominal damages.

Trespass quare clausum fregit.

Pleas—First, a public carriage-way; second, a public bridle-way; third, a public footway, which rights were all traversed by the plaintiff in his replication.

At the trial, before Lord Deuman, C.J., at the Spring Assizes for Surrey in 1835, the plaintiff consented, that the damages, if any, should be nominal only. The jury found a verdict for the plaintiff on the first issue, and for the defendant on the third, but could not agree as to the second, and retired. After an absence of several hours, they returned, and stated, that they could not agree on the second issue; and one of the jury being unwell, his Lordship took the verdict on the first and third issues, and, without the consent of the plaintiff, discharged them from giving a verdict on the second issue. In the following term—

(2) See *Whitson v. Tompkins*, 5 C. M. & R. 723; s. c. 5 Law J. Rep. (N.S.) Exch. 61.

Thesiger obtained a rule nisi for a new trial, on the ground, that the Judge had no power, without the consent of the parties, to discharge a jury from giving a verdict on any one of the issues.

Channell now shewed cause, and contended, that unless the issue were material, the Judge was warranted in discharging the jury. Here, it was not material. One justification was found for the defendant, and that was sufficient for this action. All that remains undecided, are the damages and costs of the second issue. It was agreed, that the damages should only be nominal; and the costs are not of so much importance as to render it incumbent upon the Court to require a verdict on this issue. He cited *Powell v. Sonnett* (1), and *Cossey v. Diggon* (2).

[PATTERSON, J.—In *Powell v. Sonnett*, the consent of the parties was presumed, and the Court decided the case on that ground.]

Per Curiam.—This was a material issue for settling the rights in dispute between the parties; and the plaintiff, when he assented to take nominal damages, expected all the issues to be tried. The rule, therefore, must be.

Absolute (3).

1836. }
April 29. } WALLIS v. BROADBENT AND ANOTHER.

Assumpsit—Proof in, upon Non assumpsit—Landlord and Tenant.

The plaintiff stated in his declaration a contract to hold certain land on the terms of a former expired agreement, except as to the rent which was to be raised, and alleged as a breach, the non-performance of the agreement. The defendants pleaded non assumpsit. There was no proof of any express promise; but it was proposed to establish an implied contract to hold on the terms of the old lease, by evidence of the continued occupation:—Held, that it was necessary for the

(1) 5 Bing. 381; s. c. affirmed in error by the House of Lords, 1 Dow. P.C. (N.S.) 36.

(2) 2 B. & Ald. 546.

(3) See *The King v. Johnson*, 5 Law J. Rep. (N.S.) Exch. 227, and *The Marquis of Anglesea v. Dibben*, 4 Baw J. Rep. (N.S.) Exch. 278.

plaintiff to prove the terms of the old lease, and that as, when produced, it could not be read for want of a stamp, the plaintiff must fail.

Assumpsit. The declaration stated, that one Elizabeth Eldridge agreed to demise a messuage and premises to the defendants, on the 1st of November 1820, on a yearly tenancy, at a rent of 63*l.*, with certain stipulations as to repairs; that the defendants entered on the premises, and enjoyed as tenants, until her death; that she devised to Bell and the plaintiff, and that in consideration that Bell and the plaintiff would permit the defendants to occupy the premises, at the rent of 60*l.*, and on the other stipulations in the agreement, the defendants promised to abide by and perform those stipulations. Breach, non-performance of the agreement, both before and after the death of Bell.

Plea,—by Broadbent,—non assumpsit. The other defendant suffered judgment by default.

On the trial, before Tindal, C.J. at the Leicester Spring Assizes in 1835, the plaintiff offered in evidence the alleged agreement, which, appearing to be a lease, and not being stamped as such, was rejected by the Lord Chief Justice. It was then proved, that the defendant Broadbent agreed expressly with the plaintiff's agent, that the rent should be raised from 55*l.* to 60*l.*, in consideration that the defendants should be allowed to plough up certain lands. It was objected, that there was no proof of the terms on which the defendants held the premises, nor of any joint contract. His Lordship was of this opinion, and nonsuited the plaintiff, giving him leave to move to enter a verdict for such damages as the jury should assess. They found 70*l.* damages. In Easter term, 1835—

N. R. Clarke obtained a rule nisi accordingly; against which—

Miller now shewed cause.—There was no evidence of any express contract to hold on the terms of the old lease. The only proof was to hold at the rent of 60*l.*, but no reference was made to those terms. Then no implied contract arises to hold on the terms of the lease, unless it be produced; and not being stamped, it was not produceable. The defendant Broadbent

pleaded non assumpsit, but under the rule Hilary, 4 Will. 4. I. 'Assumpsit,' that plea does not admit any of the facts from which the assumpsit is to be implied. It therefore clearly put in issue the terms of the former lease. [He was stopped by the Court.]

Humfrey and *Bayley*, in support of the rule, contended, that the terms of the original lease were admitted by the plea, as much as *Mrs. Eldridge's* seisin and death. Before the new rules it was held, in an action against a tenant for breach of the agreement on which a farm was held, that a variance in the proof of the lessor's estate was immaterial—*Winn v. White* (1). And they cited—*Jones v. Brown* (2), *Barnett v. Glossop* (3), and *Frankum v. the Earl of Falmouth* (4), as decisions since the new rules.

LORD DENMAN, C.J.—It appears perfectly clear to me, that the new rules do not at all dispense with the necessity of proving the agreement. According to the declaration, the defendants promised to abide by and perform the terms of that agreement, and the defendant Broadbent pleaded that he made no such promise. The plaintiff was bound to prove that issue by the production of the agreement, which would shew the terms on which the premises were held.

LITLEDAL, J.—This plea put in issue the terms of the original agreement. There was no proof of any express agreement; and, as to the reduction of the rent, there is nothing to shew to what that applied. To prove the terms of the old agreement, it was necessary to produce it. It is said, however, that by the new rules the terms were admitted on these pleadings. Here, there was no express contract, but, it is contended, one is to be implied by law, resulting from the terms of the former holding. According to the new rule, non assumpsit puts in issue all the facts from which the contract is to be implied. It was

(1) 2 W. Bl. 840.

(2) 1 Bing. N.C. 484; s. c. 4 Law J. Rep. (N.S.) C.P. 124.

(3) 1 Bing. N.C. 633; s. c. 4 Law J. Rep. (N.S.) C.P. 174.

(4) 2 Ad. & El. 452; s. c. 4 Law J. Rep. (N.S.) K.B. 90.

therefore necessary to prove the agreement; and as it was not properly stamped, the nonsuit was right.

PATTERSON, J.—I think this nonsuit was right, on the particular evidence given in this action. The declaration alleges a contract, and the general issue pleaded to it puts that contract in issue. There was no evidence of an express contract; but it is shewn, that at one time the holding was at 55*l.*, and that it was agreed that the rent should be raised to 60*l.*, when an application was made to plough up the land, which was assented to. This is not stated in the declaration; and the plaintiff is obliged to rely on an implied contract, arising from the change of the landlord's situation. But the plea of non assumpsit puts in issue all facts from which a promise can be implied. It became incumbent upon the plaintiff to prove all the facts from which the contract could be implied, and to shew that the tenancy was to continue upon the terms of the former agreement in all respects, except as to the amount of the rent. Now, the ordinary case is, that if a lease expire, and there be a holding on, the payment of the rent raises an inference that the holding is on the old terms. The plaintiff relies upon this; but then he must prove the terms of the old lease. I do not mean to say, that on this declaration, if there had been proof of an express promise to hold on the old terms, but at the increased rent, that the terms in the lease might not have been referred to: my present impression is, that they might; but I do not wish to give any decisive opinion upon that point.

COLERIDGE, J.—I am of the same opinion, upon the distinction taken by my Brother Patteson. This is the case of a promise to be implied from facts. If, indeed, there had been an express promise to hold on the terms of the former lease, I do not mean to say that it might not have been proved by the mere production of the lease, without reference to the stamp; but, in the present case, it was necessary to prove everything from which the promise is to be implied.

Rule discharged.

1836. }
April 30. } LAWSON vs LANGLEY.

Prescription—Way.

Under a plea of enjoyment of a way for forty years, upon the 2 & 3 Will. 4. c. 71, s. 2, evidence may be given of the user at a period more than forty years back.

Trespass for breaking and entering plaintiff's close.

Plea—That defendant was the occupier of a workshop; and that the occupiers for the time being of the said workshop, for the full period of forty years next before the commencement of the suit, have actually, and as of right, and without interruption, enjoyed, and defendant, as such occupier, still of right ought to enjoy without interruption, a certain foot and horse-way over the *locus in quo*. Replication traversing the enjoyment of the right.

On the trial, before Littledale, J., at the Spring Assizes for 1835 in the county of Rutland, the plaintiff, who began, offered evidence to shew, that both beyond and within forty years before the commencement of the suit, the way had not been enjoyed. The evidence of the user beyond the forty years was rejected. The defendant likewise offered evidence of enjoyment of the way beyond the forty years, which was likewise rejected. The plaintiff having recovered—

Adams, Serj., in the ensuing term, obtained a rule *nisi* for a new trial, on the ground that this evidence had been improperly rejected.

Humfrey and G. T. White now appeared to shew cause, but were prevented from arguing the point, as—

The COURT were decidedly of opinion, that the evidence ought to have been received, whatever might be its weight; that the user of the road fifty years ago might certainly afford some evidence of its condition forty years back; and if this evidence was not received, a party might fail who could not prove a user in the thirty-ninth and fortieth years, even though he carried it back to the thirty-eighth year. They therefore made—

The rule for a new trial absolute.

1836. }
May 3. } FIOGOTT v. RUSH.

Statute of Limitations—Proviso.

Assumpsit for unliquidated damages is within the proviso in the 21 Jac. 1. c. 16. s. 7.

Where a party, while in prison, commences an action after the lapse of six years from the accrual of the cause of action, it is nevertheless preserved by the proviso in the 7th section.

Assumpsit against defendant for negligence in conducting certain proceedings in Chancery.

Plea—That the cause of action did not accrue within six years. *Replication*, that the plaintiff was in prison when the cause of action accrued, and that she commenced her action within six years next after she was at large. *Rejoinder*, that she commenced it before she was at large, and that the causes of action did not accrue within six years. *Demurrer and joinder in demurrer.*

Mansel, in support of the demurrer.—This is a case within the proviso in the 21 Jac. 1. c. 16. s. 7, the Statute of Limitations. *Chandler v. Vilett* (1) is an express authority that assumpsit is within it; and the rejoinder does not afford any answer.

Hayes, contra.—Certainly *Chandler v. Vilett* is an authority for the plaintiff, that she is within the proviso; but that was merely an action of *indebitatus assumpsit*. There is yet a question, whether it includes an assumpsit for unliquidated damages. The word "assumpsit" does not occur at all in the proviso; and, in the present feeling of the Courts as to the proper construction of the act, they will not be inclined to strain the words to include it.

[*PATERSON, J.*—In *Crosier v. Tomlinson* (2) it was held, that the words "action of trespass," in the proviso, included assumpsit.]

That was also a case of *indebitatus assumpsit*. It will be observed, that the proviso mentions specifically two instances of actions on the case—namely, *trover* and *case for words*; the omission of assumpsit for damages may not be unintentional.

(1) 2 Saund. 120.

(2) 2 Mod. 71.

Mansel.—The proviso refers to the previous enumeration in the third section, which includes this species of action. Besides, the word "trespass" includes assumpsit.

The Court held themselves bound, by the two decisions of *Chandler v. Vilett* and *Crosier v. Tomlinson*, and considered that there was no ground for any distinction between *indebitatus assumpsit* and assumpsit for unliquidated damages. But *Littledale, J.* expressed an opinion, that if it had been *res integra*, he should have decided differently.

Judgment for the plaintiff.

1836. }
May 3. } DOE d. DAWSON AND OTHERS v. PARKE.

Ejectment—Customary Freehold—Title on Bankruptcy.

A bankrupt, at the time of his bankruptcy, was in possession of customary freeholds to which he had been admitted, and which passed by bargain and sale upon surrender and admittance. The commissioners assigned the premises to his assignees, who were not admitted until after his death. They then brought an ejectment, laying demises in the name of the heir of the bankrupt after his death, and also in their own names, but prior to the date of their admittance:—Held, that they were entitled to recover on the one demise or the other.

Ejectment for lands in Cumberland, on six demises, three laid on the 10th June 1836, of which the first was in the name of John Dawson, the second of W. Blurdall, T. Bowes, and R. Mellon, the third of Blurdall and Mellon: the other three were laid on the 10th March 1832, in the same manner. On the trial, at the last Carlisle Assizes, before Parke, B., it was proved that the premises in question were customary freehold, passing by deed of bargain and sale, presented and enrolled at the manor-house with surrender and admittance. One John Dawson had been in possession from 1790, when he was admitted, until his bankruptcy in 1821, when Blurdall, Bowes, and Mellon were appointed

his assignees, and the premises were duly assigned to them by the commissioners. The defendant claimed through another party, who had come into possession in 1821. John Dawson died in 1830, leaving his son John Dawson, who was one of the lessors of the plaintiff, his heir-at-law. Bowes having died, Blurdall and Mellon were admitted in 1835. The learned Judge directed a verdict to be entered for the plaintiff on the demise of John Dawson in 1832.

W. H. Watson, on a former day in this term, moved for a new trial, on the ground of misdirection. The assignment from the commissioners shews that the bankrupt had no estate, and consequently it could not have descended upon his heir. The plaintiff produced the proceedings in bankruptcy, and cannot dispute their effect. Then the title of the assignees was not perfected before 1835; for, although the surrender and admittance relate to the bargain and sale in copyholds (1), it has never been held to be so in the case of customary freeholds, which were first noticed in the 6 Geo. 4. c. 16. The provisions of the 49 Geo. 3. c. 121. s. 10. probably apply, though the learned Judge thought that they were only for the benefit of the assignees, and that if third persons wished to set up the bankruptcy they must prove it, and the defendant was not prepared to do so.

Cur. adv. vult.

And now—

LORD DENMAN, C.J. delivered the judgment of the Court.—We do not consider that the defendant can raise any question on the stat. 49 Geo. 3. c. 121. s. 10. The plaintiff must recover in one way or the other. Either the bankrupt had not parted with the land, and then the plaintiff must recover on the demise of the heir-at-law; or he had parted with it, and the title of the assignees is good.

Rule refused.

(1) See *Parker v. Blake*, Cro. Car. 568.

1836. }
May 9. } SUMPTION V. MONZANI.

Practice.—Prisoner, Discharge of.

The 48 Geo. 3. c. 123. s. 1. does not authorize the discharge of a defendant in execution for a debt under 20l., where he has not dwelt within the walls of the prison, but has resided within the rules.

A rule *nisi* had been obtained for the discharge of the defendant out of the custody of the marshal, under the stat. 48 Geo. 3. c. 123. s. 1, he having been imprisoned for twelve months in execution for a debt not exceeding 20l. By the affidavit in answer it appeared, that during the twelve months the defendant had not been confined actually within the prison, but had lived within the rules.

Archbold now shewed cause, and contended, that the statute only applied to cases where the defendant had actually been in prison, the words of the enactment being for the discharges of defendants who have lain in prison for twelve successive calendar months. In *Bougey v. Webb* (1), *Littledale, J.* referred it to the Master to ascertain whether the defendant had been within the walls of the Fleet prison, or had had the benefit of the rules; in the former case, he would have been entitled to his discharge, in the latter not; and the rule for the defendant's discharge was never drawn up, since it appeared that he had been living in the rules.

C. C. Jones, in support of the rule, urged that, in favour of liberty, the Court would interpret the act liberally. There is similar language in the Lords' Act, 32 Geo. 3. c. 28. ss. 13, 15, 16, yet that statute has been held to apply to persons within the rules. So the 53 Geo. 3. c. 102. s. 1, and the 1 Geo. 4. c. 119. s. 4, were held to include such prisoners; whereas, the 7 Geo. 4. c. 57. s. 10. contains the words expressly, "any person who shall be in actual custody within the walls of the prison," though, from the introduction of the 12th section, it may seem that even that statute may be applicable to persons within the

(1) Reported 4 Dowl. P.C. 320, where, however, the facts do not appear to have been quite accurately stated.

rules. If not, its language is very different from the present act. In *Day v. Thomas* (2), the Court referred it to the Master, to ascertain whether the defendant had been out of the prison without a day rule, saying, that if he had, he would not have been entitled to his discharge; but that inquiry would have been unnecessary, if the construction now contended for be correct.

LORD DENMAN, C.J.—We think that the words “laid in prison” must mean an actual restraint within the walls of the prison. In *Day v. Thomas* the point does not appear to have been considered by the Court, and there were other circumstances upon which the Court proceeded. The case decided by my Brother Littledale agrees with our present view.

LITTEDALE, J. concurred.

PATTESON, J.—The words of the Bankrupt Act, 6 Geo. 4. c. 16. s. 5, are like those in this statute; but there is no case which has occurred upon it, where the circumstances have been the same, though they have been like it. Thus, there is one case, *Stevens v. Jackson* (3), where a party being ill, remained in the custody of an officer at his own house; and it was held, that such imprisonment constituted a part of the two months. So, also, there is another, where the party had the benefit of day rules during his imprisonment—*Soames v. Watts* (4). But it has never been held, that a permanent residence within the rules will constitute an act of bankruptcy.

COLERIDGE, J.—The 7 Geo. 4. c. 57. s. 12. contains the words, “during all the proceedings;” and therefore it appears that the 10th section is not necessarily to have the meaning contended for.

Rule discharged (5).

(2) Chap. Pr. K.B. 331, 2nd edit.

(3) 6 Taunt, 106.

(4) 1 C. & P. 400.

(5) The point was decided in *Gilbert v. Pape*, 2 Me. & W. 311; and see as to the interpretation of the word “imprisonment,” in the 34th section of the Insolvent Debtors Act, *Yapp v. Harrington*, 6 Law J. Rep. (N.S.) C.P. 357.

1836. } DOE d. HURST AND OTHERS v.
June 11. } CLIFTON.

Ejectment—Staying proceedings by Mortgagor.

A mortgagor cannot avail himself of the 7 Geo. 2. c. 20. s. 1, unless he actually became a defendant in the ejectment brought by the mortgagee.

And where the action was defended for his benefit, and the defendant was held to be identified with him, the statute was held not to be applicable.

Ejectment for premises in Hertfordshire.

At the trial, before Tindal, C.J., at the last Spring Assizes, the lessor of the plaintiff proved a mortgage to him by one T. N. Stubbs, in 1824, of his reversionary interest, expectant on the lives of two persons. The defendant, who was alleged to be Stubbs's tenant, but who defended for his benefit, produced a mortgage of the same premises, in 1822, to a third party; but the Lord Chief Justice held, that it could not be admitted in evidence to derogate from the effect of Stubbs's mortgage; and the Court, on a motion to enter a nonsuit, held that this was right. In last term—

Platt had obtained a rule, calling upon the lessor of the plaintiff to shew cause why the Master should not ascertain the amount due on the mortgage deed of 1824; and why the lessor of the plaintiff, on whose demise the recovery had taken place, should not accept the same, and the costs in satisfaction of the mortgage, and re-convey the premises to Stubbs. It appeared by the affidavits, that Stubbs was and had been, for several years, in India, and that he was the party who had a right to redeem the mortgage, and that there had been no bill to foreclose.

Kelly and Petersdorff now shewed cause.—This application is made upon the 7 Geo. 2. c. 20; but, as Stubbs was not the defendant, and did not come in and defend as landlord, he is not within the provisions of the statute, which expressly gives the power to the mortgagee who shall become the defendant in any action. By entering into the consent rule,

mortgagee renders himself liable to costs; but he has avoided that liability in the present instance.

Platt.—This is clearly within the equity of the statute. Here, the defendant has ended the action on behalf of the mortgagor, and was treated at the trial as assisted with him. At least, if the Court will not make this rule absolute, they will suspend the proceedings, to enable the mortgagor to take proceedings in his own name.

ORD DENMAN, C.J.—We might wish, in this case, that we had the power which we contended we have; but I think it is clear, that the applicant is not within the act, not being a defendant. Then it would be an abuse of our power, if we were to do indirectly, what we cannot do directly; and that would be the case if we were to suspend the judgment, to do what appears to be justice in this particular case.

ATTLEDAL, J.—This appears to be an able application; but the question is, whether we can grant it. The mode of proceeding is pointed out by the statute. Where an ejectment is brought, and the

party has not brought himself within the act, the Court would not be warranted in interfering. He should have made himself defendant, and thereby would have become responsible for costs.

PATTESON, J.—I do not see how it is possible for us to supply any equitable relief from our own authority. The party has not become a defendant, as required by the act.

Rule discharged.

KITCHEN *v.* SHAW.

HEAD *v.* BALDREY.

PEARSON *v.* GRAHAM.

BOWEN *v.* JENKIN.

BEVERLEY *v.* THE LINCOLN GAS-LIGHT COMPANY.

DOE *dem.* MUDD *v.* SUCKERMORE.

DOE *dem.* WINDER *v.* LAWES.

MORTON *v.* BURN.

DOE *dem.* SHERIFF *v.* COULTHRED.

SANDERSON *v.* BROWN.

VALLANCE *v.* SIDDELL.

HOLLINGSWORTH *v.* BRODRICK.

Will be reported in the next volume.

REGULÆ GENERALES.

IT IS ORDERED, That from and after the last day of this term all the offices (the Rule Office excepted), be open in term from eleven in the forenoon till five in the afternoon, and not in the evening: and that the Rule Office be open in term from eleven in the forenoon till three in the afternoon and from six till eight in the evening:

and that all the offices be open in vacation from eleven in the forenoon till three in the afternoon except between the 10th of August and the 24th of October, when they shall be open from eleven in the forenoon till two in the afternoon only.

WHEREAS by the practice of this Court, sheriffs may now be required to file writs with their fees, as well in vacation as in term time; and upon all writs filed in vacation an extra charge of 5s. 10d. is paid for the keys of the Treasury: And whereas the like charge of 5s. 10d. is also paid for all searches made in vacation for writs so filed, and upon all copies of such writs or returns:

IT IS ORDERED, That from and after the last day of this present term, such extra charge of 5s. 10d. be discontinued upon all writs filed by sheriffs in vacation, and all searches for such writs, and copies thereof, or of returns thereto: And that hereafter in vacation such writs may be filed by sheriffs, and searches made for the same, and copies of such writs, or returns thereto, made and returned without payment of the said extra charge of 5s. 10d.

END OF TRINITY TERM, 1837.

REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

Court of Common Pleas.

BY

ALEXANDER DONOVAN, Esq., BARRISTER-AT-LAW.

7 WILLIAM IV.

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CASES ARGUED AND DETERMINED

IN THE

Court of Common Pleas.

MICHAELMAS TERM, 7 WILL. IV.

1836. }
Nov. 2. } DAY V. BONIN.

Arbitration—Award, where final.

On a reference of a cause and "all matters in dispute between the parties," it is no objection to the award, that it directs a stay of proceedings, and payment of a sum of money to the plaintiff in satisfaction of all demands in the cause, if it appears from the antecedent part of the award, that the arbitrator has considered the proofs concerning the matters in difference, and that there is no other subject of dispute than that on which the action was brought.

In this action, after the plaintiff had sued out a writ of summons, and the defendant had entered an appearance, the parties agreed to refer "the cause and all matters in dispute" between them, to arbitration; and the arbitrator made his award in the following terms:—

"I, the said arbitrator, having taken upon me the burden, &c.; and having heard, considered, and examined the allegations, proofs, and answers of both the parties, touching the matters in difference between them; and having thoroughly considered the same, do thereupon make this

NEW SERIES, VI.—C.P.

my award in writing, that is to say, I do award, adjudge, and determine, that all further proceedings in the said cause shall from henceforth cease and be no further prosecuted; and that the defendant J. Bonin shall and do pay the sum of 11*l.* 5*s.* of lawful money in full of all demands in the said cause."

Hurlstone moved to set aside the award, on the ground that it was not conclusive or final, inasmuch as all matters in dispute were referred, and the award merely directed a stay of proceedings, and payment of a sum of money in full of all demands in the cause. No declaration or bill of particulars having been delivered, the cause of action did not distinctly appear; and, therefore, as it was not shewn with accuracy and precision as to what demand the plaintiff had been satisfied, the award could not be a bar to a future claim. The case resembled that of *Gyde v. Boucher*(1), where the rule for setting aside an award was made absolute, because there was no finding as to the matters in difference; and, consequently, the defendant had no protection against a second action, which it was one object of the reference to give him.

(1) 5 Dowl. P.C. 127.

TINDAL, C.J.—As it appears to me, the arbitrator here has indicated, with a sufficient degree of certainty, that he has taken into his consideration all the matters in difference between these parties, and has, in point of fact, awarded upon them all. He has not, it may be admitted, in words negatived the whole: he has apparently confined himself to the subject-matter of the cause; but he has, in substance, negatived all. It is impossible to look at the award without seeing what the intention of the arbitrator was. At the time of the submission, the 6th of August, all the matters in dispute were referred. At that time the arbitrator took into his consideration all the matters in difference. He then goes on to say, "Having considered and examined the allegations, &c. touching the matters in difference between them, I do make this my award in writing, &c., that all further proceedings in the said cause shall from henceforth cease and be no further prosecuted; and that the defendant shall and do pay the sum of 11l. 5s. in full of all demands in the said cause." Now this brings my mind to the conclusion, that there was no other cause in dispute between these parties. The material distinction between this and the case cited is, that the arbitrator there mixed up other matters, which were also in difference, and he did not make any award as to them. With regard to the hardship to which it is said the defendant may be exposed, if that on which the decision has been made, is not specifically stated, such hardship cannot, in my opinion, be said to exist, inasmuch as this award is a conclusive bar to an action up to the 6th of August, the date of the submission, for any matter in dispute then existing. There is, I think, no difficulty in the case, unless, indeed, we hunt for difficulties. The rule should be refused.

GASELEE, J.—I am of the same opinion. If the affidavit had stated, that there were other matters in dispute, there might be some ground for setting aside the award; but the award states, in an express allegation, that the arbitrator has taken into his consideration the matters in difference between the parties; and this is equivalent to saying, that there were no other matters in dispute between them.

VAUGHAN, J.—I also think that the fair

and reasonable construction to be put upon the award is, that the arbitrator took into consideration all matters in dispute between the parties.

BOSANQUET, J.—I agree. The language of Lord Tenterden in *Pearse v. Pearse* (2), which was submitted to arbitration by an order of Nisi Prius, is equally applicable here. His Lordship, in the case referred to, expresses himself thus:—"Then, if there were no other matters in difference between the parties, besides those included in the action at law and the suit in equity, the arbitrator, by his award, has decided upon these matters; the award, therefore, is good." In like manner the question here being, whether the award is conclusive on the face of it, we find that it is made "of and concerning the premises." Now, what are those premises? They are, all matters in difference. This being so, the award is, I think, conclusive, and the rule should be refused.

Refused accordingly.

1836. { PROLE AND ANOTHER, ADM-
Nov. 8. { NISTRATORS OF W. ANDREWS,
DECEASED, v. WIGGINS.

Judgment non obstante Verdicto—Administrator—Costs.

In an action of debt on a money bond, which had been given to the intestate for receiving the defendant's son as an apprentice, and teaching him the art of an apothecary, the defendant pleaded non est factum, and that, by a corrupt and fraudulent agreement between the parties, the indenture of apprenticeship, in consideration of which the bond was given, was antedated for the purpose of making an apprenticeship of two years seem to be one of five years, and thereby evading the Apothecaries Act, 55 Geo. 3. c. 194. s. 15, which requires an apprenticeship of five years. Upon verdict for the plaintiff on the first plea, and for the defendant on the plea setting out the fraudulent agreement, the Court refused to enter judgment for the plaintiff non obstante veredicto. The Court also refused to order the verdict to be entered for the defendant without costs, under the statute 3 & 4 Will. 4. c. 42. s. 31, as the

(2) 9 B. & C. 484.

*on which the motion was made did
negative, on the part of the plaintiffs, all
edge of the fraud; and more especially
the plea put upon the record contained
allegations of such fact.*

on a bond for 200*l.*, with interest,
by the defendant to the intestate, W.
Andrews, on the 23rd of March 1829.
Declaration contained two counts, de-
claring the instrument as a writing obli-
gatory, and as a deed poll.

Counts—First and second, *non est factum*;
that the said writing obligatory was
obtained from the defendant by the intes-
tate by fraud, covin, and misrepresenta-
tion whereby the said writing is void; and
that said W. Andrews, before and at
the time of making the said writing obli-
gatory, used, exercised, and carried on the
art, mystery, and profession of a surgeon,
apothecary, and man-midwife; and the said
Andrews so using, exercising, &c.,
before and before the making of the
supposed writing obligatory, &c., to
on the 10th of July 1828, at London,
was unlawfully and corruptly agreed
between the said W. Andrews and
defendant, that the said W. Andrews would
G. H. Wiggins, son of the defendant,
apprentice, to learn the art, mystery,
profession of a surgeon, apothecary, and
midwife, for the term of two years
but that in and by certain articles
agreement of apprenticeship, to be made
entered into by and between said W.
Andrews and defendant, and his son, said
G. Wiggins, it should be stated and
to appear therein, that it had been
by and between the said parties
so, that said G. H. Wiggins had been
as articulated to said W. Andrews for
term of five years, as his apprentice,
for that purpose, that such articles of
agreement should be ante-dated, in order
by such corrupt contrivance, the said
to the said agreement should fraud-
ulently and illegally procure the said G.
Wiggins to be admitted to examination
for the purpose of practising as an apothecary
upon serving an apprenticeship for
years, instead of an apprenticeship for
years, as required by the statute in
case made and provided; and it was
then agreed between the parties afore-

said, that the defendant should pay to the
said W. Andrews, the sum of 200*l.* at the
end of two years from the time the son
should go to the said W. Andrews, together
with interest for the same from the day the
said G. H. Wiggins should actually go into
the service of the said W. Andrews, and
which said sum of 200*l.* and interest, should
be secured by the said bond or obligation
in the said first count mentioned; and the
defendant further says, that in pursuance
of such corrupt contract and unlawful
agreement, so made as aforesaid, the said
G. H. Wiggins afterwards, to wit, on the
15th of July 1828, at London, entered into
the service of the said W. Andrews, as his
apprentice, as aforesaid, and for the pur-
pose aforesaid, and continued in such ser-
vice for the space of two years, from the
day and year last aforesaid; and the de-
fendant further says, that in pursuance and
consideration of such unlawful and corrupt
contract and agreement, so made as afore-
said, to wit, on the 23rd of March 1829
aforesaid, the said bond or writing obliga-
tory, in the said first count mentioned, was
executed and delivered by the defendant
to the said W. Andrews, and certain arti-
cles of agreement were then, to wit, on
the day and year last aforesaid, also made
by and between the defendant of the first
part, the said G. H. Wiggins of the second
part, and the said W. Andrews of the third,
and the same were ante-dated to the 15th
of July 1825, which said articles of agree-
ment, sealed with the respective seals of
defendant, said G. H. Wiggins, and said
W. Andrews, were had, taken, and kept
by the said W. Andrews, and therefore
cannot be produced by defendant; and in
and by the said articles of agreement, it is
fraudulently and falsely recited—"Whereas
it has been agreed between the said parties
hereto, that said G. H. Wiggins shall be
articled to the said W. Andrews for the
term of five years, as an apprentice;" and
in and by the said articles of agreement, it
is also amongst other things falsely, unlaw-
fully and corruptly witnessed, that said W.
Andrews should and would, for and during
the term of five years, teach and instruct,
or cause to be taught and instructed, for
the said G. H. Wiggins, in the art, mystery, or
profession of a surgeon, apothecary, and
man-midwife; and at the end of such term,

do all such acts as might and should be useful for the facilitating said G. H. Wiggins being duly admitted as a regular and qualified surgeon, and as in such cases were usual; and further, in and by such articles of agreement, it is made to appear that G. H. Wiggins consented and agreed to become and be, and did thereby bind himself duly to serve the said W. Andrews as his apprentice, in the art, mystery, or profession aforesaid, from the date thereof, for the said term of five years; whereas, in truth and in fact, said articles of agreement were not made or executed by said several parties thereto, on the said 15th of July 1825, but were really and actually made and executed by them respectively, with such object, and in pursuance of such corrupt agreement as aforesaid, at a subsequent time, to wit, on the 23rd of March 1829, wherefore said supposed writing obligatory in said first count mentioned, became and was wholly void in law, and this defendant is ready to verify; wherefore, he prays, &c. Similar pleas were pleaded to the count in which the instrument was declared on as a deed poll.

In his replication, the plaintiff joined issue on the first and second pleas: to the third he replied, that said writing obligatory was obtained from the defendant fairly, and for a good and valuable consideration, and not by fraud, covin, or misrepresentation, as alleged: to the fourth, that the writing obligatory was executed by defendant for a good and valuable consideration, and not in consideration of the supposed unlawful and corrupt contract. Similar replications to the other pleas.

At the trial, before Tindal, C.J., at the sittings after Trinity term, a verdict was found for the plaintiffs on the first plea, for the defendant on the fourth, and the jury were discharged as to the other issues. In this term—

Storks, Serj., moved to enter up judgment for the plaintiffs, *non obstante veredicto*.—He submitted, that even if the bond were void, the defendant ought not to be allowed to allege his own misconduct as a ground of defence. Upon this point, he cited *Doe v. Roberts* (1) and *Montefiori v. Montefiori* (2); and he also referred to

(1) 2 Barn. & Ald. 367.

(2) 1 W. Black. 363.

Hames v. Leader (3), where it was held, that fraudulent gifts are void under the statute 13 Eliz. c. 5. only against purchasers and creditors, but not against the parties themselves or their representatives;—to *Armstrong v. Lewis* (4), in which it was held, that where parties enter into a contract of partnership in violation of the law, it is void, and will confer no right on either party against the other; and to *Smith v. Garland* (5), where a court of equity refused to assist a vendor, in defeating a prior voluntary settlement made by himself.

The COURT desired to see the pleadings, for the purpose of considering the allegations contained in the fourth plea. And now—

TINDAL, C.J. said—We have looked at the pleadings for the purpose of ascertaining whether there was any precise allegation of the parties having united for the purpose and with the intention of evading the statute, which required the apprenticeship of five years; and we find that there is a distinct allegation, that though the action was brought against the defendant, on that which is apparently a money bond, the real object was to enable this young man to evade the Apothecaries Act. The agreement was ante-dated, to make that which was an apprenticeship of two years look like that of five. We find this to be the real meaning of the articles from the plea, which says, "By such articles of agreement, it was made to appear that G. H. Wiggins consented and agreed to become and be, and did thereby bind himself duly to serve the said W. Andrews, as his apprentice, &c., from the date thereof, to wit, the 23rd of March 1829, and the same were ante-dated to the 15th of July 1825, with such object, and in pursuance of such corrupt agreement," &c., that is, to afford the individual a facility of becoming an apothecary. Here, therefore, is a distinct allegation, that it was the intention of the two parties to evade the statute; consequently we have no objection to the finding of the jury in favour of the defendant; and we decide, that the plaintiff is not en-

(3) Cro. Jac. 270.

(4) 2 Cr. & Mee. 274; s. c. 5 Law J. Rep. (N.S.) Exch. 359.

(5) 2 Mer. 123.

ed to judgment *non obstante veredicto*.
 case, similar in principle to this, *Collins*
Blatner (6), was fully discussed on a
 special *non est factum*, and demurrer to the
 plea; and the decision there is approved of
 by the Court. This case is analogous to
 the case in which, where simoniacal contracts
 were set up as a consideration, they may be
 rejected by a plea. The plea upon the
 record contains the necessary allegation,
 and furnishes a satisfactory answer to the
 objection. The rule should be refused.

November 12th.—*Storks, Serj.* moved,
 for the verdict in this case should be en-
 tered for the defendant, without costs,
 under the late statute, 3 & 4 Will. 4. c. 42.
 It appeared from affidavits, that
 the plaintiffs on the record were adminis-
 trators of the deceased, who died insolvent.
 The Court inquired, if the affidavits
 contained all knowledge, on the part of
 the plaintiffs, of the fraud practised by the
 defendants. Upon being told that they did

INDAL, C. J.—It is evident that the
 plaintiffs knew of the latent defect in the
 note. They were clearly aware of the
 purpose for which the bond was given,
 namely, that of defeating an act of parlia-
 ment made for public use. I do not know
 what the Court might say to this applica-
 tion, if the plaintiffs swore positively and
 distinctly that they were unacquainted
 with the collusion between the parties;
 even then I am not prepared to say
 that the rule would be granted, when the
 plea put upon the record contains such
 positive allegations as are to be found
 here. The rule should be refused.

The other Judges concurring—

Rule refused accordingly.

1836. } JOHNSON AND ANOTHER v.
 Nov. 8. } WINDLE AND ANOTHER.

Promissory Note—Forgery—Trove.

*A title cannot be made through a forged
 indorsement to a note or instrument negotiable
 by indorsement only.*

(6) 2 Wils. 347. Vide also *Paxton v. Popham*,
 1 East, 408, and *Pole v. Harrobin*, in note, ib. p. 416.

*Consequently, if a note payable to A. or
 order, be stolen from the payee before he in-
 dorse it, and the indorsement is forged, and
 it is duly paid by the maker when due, such
 payment does not protect him; and trover lies
 against him by the payee.*

*If negligence be imputed to the payee for
 the purpose of depriving him of his remedy
 against the maker, such negligence must be
 clearly and distinctly proved.*

Trove for a promissory note for 30*l.*,
 of which the defendants were the makers,
 and the plaintiffs the payees.

Pleas—First, Not guilty. Second, that
 the plaintiffs were not lawfully possessed
 in manner and form as in the declaration
 alleged.

Issues were joined thereon, and, under
 the statute 3 & 4 Will. 4. c. 42, the parties
 agreed to submit, for the opinion of the
 Court, the following

CASE.

The plaintiffs are coal-factors; the defen-
 dants are coal-merchants. Both carry on
 business in London; the former under the
 firm of C. Johnson & Sons, the latter under
 the firm of W. & Charles Windle. The de-
 fendants are the makers of the promissory
 note before set forth; the plaintiffs are the
 payees therein mentioned. The note in
 question was made and drawn by the defen-
 dants on the day of its date, and delivered
 by them to the plaintiffs in the usual course
 of business, in part payment of part of a
 cargo of coals. The note was afterwards
 stolen from the plaintiffs; at the time it
 was so stolen there was no indorsement
 upon it. On the day when it became due,
 Messrs. ——— were holders of the said
 note for value, and the same was pre-
 sented by a clerk of Messrs. Glyn &
 Co., bankers in London, on account of
 the said holders, to Messrs. Gosling &
 Sharpe for payment. They, as the de-
 fendants' bankers, paid the note and debited
 the defendants with the sum paid. They
 afterwards handed the note over
 to the defendants, in whose possession
 it now remains. Upon the delivery of
 the note to the defendants by Gosling &
 Sharpe, and whilst it remained in the de-
 fendants' possession, and before the com-
 mencement of this suit, the plaintiffs de-

manded the note of the defendants, but they refused to give it up. Afterwards, the present action was commenced. The promissory note was never indorsed by the plaintiffs or by their authority, nor was any person ever authorized by them to receive the amount thereof. At the time the note was handed over to the defendants, the following indorsements appeared on the back of it—"By C. Johnson & Sons to Mr. J. Atkin;" "G. Wright."

All the indorsements on the note are forgeries, in the handwriting of one G. W., who, at the time the note was made and indorsed to the plaintiffs, and for some time afterwards, was a clerk in their employ. The note was stolen from the plaintiffs by G. W. whilst he was in their service. The defendants had no notice that the indorsement of C. Johnson & Sons was a forgery at the time their bankers, Gosling & Sharpe, paid the sum, nor for upwards of six weeks afterwards, when notice was given to the defendants of that fact, and when plaintiffs first discovered that the note had been stolen.

If the Court, upon the circumstances above stated, should be of opinion that the plaintiffs were entitled to the property and to the possession of the note when the same was demanded as aforesaid, and that there was sufficient evidence of a conversion by the defendants, the pleas were to be withdrawn, and judgment was to be entered for the plaintiffs by confession, damages 30*l.* and interest, with costs, &c. If the Court should be of opinion that the plaintiffs were not so entitled, or that there was not sufficient evidence of a conversion, then judgment of *nolle prosequi* to be entered.

Channell, for the plaintiffs.—The plaintiffs are entitled to the judgment of the Court, as the property in the note was never taken out of them, and never vested in the defendants. As the plaintiffs were the payees of the note, and it was payable to them or their order only, and they never indorsed or gave any authority to indorse, the question as to a greater or less degree of negligence cannot arise. The cases and the rules upon that subject apply to instruments negotiable by delivery alone, and not to instruments requiring an indorsement to make them negotiable. On the other hand, the doctrine is clearly established, that no interest can pass nor any

title be made through a forged indorsement—*Smith v. Shepherd* (1), *Cheap v. Harley*, cited in *Allen v. Dundas* (2), *Mead v. Young* (3), *Foster v. Clements* (4). No objection can be made to the form of action, as the right of property is in the plaintiffs, and the instrument found its way into the hands of the defendants, who, on demand, have refused to deliver it up.

Bayley, contra.—The questions are, whether the payment by the defendants was good and valid, and upon whom the loss should fall. The distinction laid down by Tindal, C. J. in *Lang v. Smyth* (5) applies to an instrument of this description, which may be said to be a part of the circulating medium of the country. The words of his Lordship are—"The general rule of law is, that, if I confide property to an agent, and he disposes of it without authority, I may recover it in whatever hands it may be found. There is an exception to this rule in favour of the ordinary currency of the country, which rests on the footing that the rule would be inconvenient if it had the effect of impeding mercantile transactions." It is a material question, therefore, whether the plaintiffs have lost their right of action by their own negligence; and if so, it cannot be denied, that the delay in communicating their loss for six weeks after it was discovered was gross negligence, and may have caused serious detriment to the defendants. In this respect, *Morrison v. Buchanan* (6) applies. In that case, it appeared that it was the usual course of business to deliver out bills of exchange left for acceptance, to any person who mentioned the amount and described any private mark or number upon them; and the clerk of the party leaving a bill having, by his conduct, enabled a

(1) Chitty on Bills, 287; 8th edit.

(2) 3 Term Rep. 125.

(3) 4 Term Rep. 28. In this case, Lord Kenyon differed from the rest of the Court, saying he could not distinguish this from the old case of *Miller v. Race*, 1 Burr. 452, where the innocent holder of a note, which had been taken when the mail was robbed, was held entitled to recover. That, indeed, was payable to bearer; but the same principle should govern both. Ashurst, J. was of opinion that the instrument, being made payable to order, did make a difference.

(4) 2 Campb. 17.

(5) 7 Bing. 284; s. c. 9 Law J. Rep. C.P. 91.

(6) 6 Car. & Pay. 19.

stranger to discover the mark or number, in consequence of which the bill was delivered out to him, it was ruled, that the party leaving the bill could not maintain trover against him who so delivered it.

TINDAL, C. J.—It would be attended with dangerous consequences indeed, if we were to give legality and validity to a forged indorsement upon a note or bill of exchange; and such would be the effect of our pronouncing judgment upon the present occasion in favour of the defendants. The general rule, it cannot be denied, is, that no property is or can be acquired by a forged indorsement on a bill or note; and the only argument which we have heard used for the purpose of taking this case out of the ordinary rule applicable to forgeries of this description, and preventing the defendants from being wrong-doers and guilty of a wrongful conversion as to the plaintiffs, is founded upon the gross negligence of the plaintiffs themselves. Now, the degree of negligence or carelessness of which the plaintiffs are said to have been guilty, is not stated or alleged; for aught that appears, they may have used all the precautions and all the care which men in their situation were bound to have used, and which others were entitled to expect at their hands. As it appears to me, there is no reason for making this an excepted case, and taking it out of the ordinary rule. If this case were submitted to a jury, instead of to the Court, the instances of the alleged negligence on the part of the plaintiffs should be stated with more accuracy and precision. Our judgment should be for the plaintiffs.

GASELEE, J.—The ground of the argument addressed to the Court for the purpose of inducing them to give judgment for the defendants, is the negligence of the plaintiffs. But as to this, it appears that the note was stolen by a clerk, in whose hands it was. No negligence has been proved.

VAUGHAN, J.—I am of the same opinion. Our judgment should be in favour of the plaintiffs, who have made out, to the satisfaction of the Court, every requisite which is necessary to the maintaining of an action of trover, viz. the right of property in the note in them; that such right did not pass to another; and a conversion by the defendants in appropriating the note to their own

use. It has not been proved that negligence should, with justice, be imputed to the plaintiffs. Thus the case is widely distinguishable from that cited by Mr. Bayley. Here, there has been no negligence—all due diligence has been used. It will be, perhaps, barely necessary to refer to an authority with which Mr. Bayley is familiar, for the purpose of shewing, that, in case of the loss by the owner of an instrument negotiable by indorsement only, the thief cannot be in a better situation than an innocent finder (7).

BOSANQUET, J.—The note, on the face of it, is the property of the plaintiffs; it is stolen, and it finds its way to the defendants, and when it is demanded they refuse to comply. This is sufficient foundation to maintain the action of trover. There has been, also, sufficient evidence of the conversion, and this was all which the case required. Our judgment should be for the plaintiffs.

Judgment accordingly.

1836. }
Nov. 9. } BEERE v. MOORE.

Costs—Venue—Speedy Judgment.

In an action on a bill of exchange, which had been tried as an undefended cause at the Assizes at Guildford, held, that the Prothonotary was not justified in taxing the costs as if the cause had been tried in London: but that if there was anything harsh, oppressive, or unusual, in the conduct of the plaintiff, the officer might refer the matter to the Court.

This was an action against the drawer of a bill of exchange, which had become due eleven days after Trinity term, in consequence of which, the plaintiff, to obtain speedy judgment, had laid the venue in Surrey. The cause was tried as undefended at the last Assizes, at Guildford, but the Prothonotary, on taxation, had allowed such costs only as would have been allowed if the cause had been tried in London.

The sizer moved for a rule to shew cause why the Prothonotary should not review his taxation and allow full costs, submitting,

(7) Vide Bayley on Bills, 4th edit. cap. 5, title 'Indorsement,' p. 107.

that the plaintiff had an undoubted right to lay the venue where he pleased, and that the proper course for the defendant, if he was aggrieved, was to move to change the venue.

Wilde, Serj., who shewed cause in the first instance, urged, that the principle upon which the Prothonotary had acted was just, and was calculated to protect defendants from the hardship and oppression of the venue being laid in a distant county.

The COURT said, they would inquire into the practice of the other courts in such cases, and would be guided in their determination by the result. Afterwards,—

TINDAL, C.J. said—We have made inquiries as to the practice of the other courts upon the subject which has been brought before us, and we find that they do not make the distinction on which our officer has acted; we, therefore, think, that he should review his taxation. If, upon the investigation, it should appear to him that there has been anything harsh, oppressive, or unusual, the matter may be referred to the Court.

Rule absolute, for the Prothonotary to review his taxation.

1836. }
Nov. 21. } GALE v. WINKS.

Irregularity—Distringas, Affidavit to obtain.

An application to set aside a writ of distringas, and return the money levied, by reason of the omission to indorse the amount of the debt, is not too late if made before the writ is returnable.

Although the general rule is that there must be three calls and two appointments to obtain a writ of distringas, that rule is not imperative, and does not prevent the exercise of the discretion of a Judge in vacation, conferred by section 3 of 2 Will. 4. c. 39; and, therefore, an order of a Judge in vacation, founded on an affidavit stating only two calls and one appointment, that such writ shall issue, will not be set aside for irregularity.

This was an action of debt, in which, on the 27th of October, Park, J., at chambers, had ordered a *distringas* to issue

upon an affidavit, which stated, that, on the 13th of October, a call was made at the house of the defendant, who was not found at home. The party calling left a letter for the defendant with the female servant, in which he stated the object of his coming, and that he would call again on the ensuing Saturday at a quarter before nine in the evening, for the purpose of giving him a copy of the writ of summons. He did call accordingly, and was informed by the servant, that the letter was delivered, as addressed, to the defendant, but that he was not then at home. Upon this the copy of the writ of summons was left.

The *distringas* was made returnable on the 11th of November, and a levy was made under it on the 1st: on the 8th—

Archbold obtained a rule, calling upon the plaintiff to shew cause why the writ and all subsequent proceedings should not be set aside, and the money levied returned, and why the order of the learned Judge, directing the writ to issue, should not be set aside. The objection, upon which the first part of the motion was founded, was, that the amount of the debt was not indorsed on the copy left at the defendant's house, pursuant to rule 2. of Trinity term, 2 Will. 4. and rule 5. of Michaelmas term, 3 Will. 4; and to the Judge's order he objected, that it was made contrary to the general rule and practice in all the courts, that three calls and two appointments were necessary previously to obtaining the writ.

Wilde, Serj., on shewing cause, first objected, that the application was too late, as it was not within a reasonable time after the levy—viz., the first four days of the term; but the COURT being of opinion with *Archbold*, that it was competent for the party to apply at any time before the return of the writ, he submitted that the general rule and practice of the Court did not preclude the Judges at chambers from exercising the discretion given by sec. 3. of 2 Will. 4. c. 39, if it were made out "to their satisfaction," that the defendant could not be personally served with process.

Archbold was heard in support of the rule.

TINDAL, C. J.—As it appears to me, the rule should be made absolute for setting

the writ of *distringas*, and the subsequent proceedings upon it, upon the ground, that there has not been such intervention upon the writ and the copy, as is required by parliament and the rule of court. But, whilst I come to such conclusion upon this part of the rule, I am not disposed to assent to the other part of the rule, which would set aside the order made by my Brother Park. To me, it appears, that the latter which forms the subject of this motion has been left, in a great measure, to the discretion of the Court, and, in vacating the order, to the discretion of the Judge at chambers, whether, under the circumstances submitted to him, the more efficacious rule should not be applied. As there is a general rule and practice of the Courts, that three calls and two appointments shall be made in the affidavit, I am far from saying, that on a future application to this Court, or at chambers, under circumstances like the present, where the party calling does not make three calls and two appointments, the application would be granted. The probability is, that it would not. But, the question here is, if, *rebus sic stantibus*, which did not appear to satisfy the mind of the Judge, that the more efficacious rule should be resorted to. The facts stated in the affidavit did not, in my opinion, tend to shew that such conclusion altogether unreasonable. It should be borne in mind, that the party who comes to the Court for relief, has not shown that the letter reached him. I think, therefore, that the order of my Brother Park should not be set aside.

WILKES, J.—I am of the same opinion. I have been told that three calls and two appointments are absolutely required upon motions of this nature: and, as such a rule of practice is enforced in the other Courts, it should be also enforced here. I am by no means satisfied that such a rule is necessary in this case. Looking at what was done and seeing that the party does not shew that he received the letter, I am of opinion that my Brother Park was justified in granting the order, and it should not be set aside.

ROGHAN, J.—The first part of the rule should be made absolute. As to the granting of the order, there is no imperative upon the subject. It is left to the discretion of the Court, or of the Judge, to determine whether the more stringent process is or is not required; and if, under the circumstances, such process was deemed necessary, it should issue; and this is the case, although the rule and general practice of the Courts render it desirable that there should be three notices and two appointments. For these reasons, I am of opinion, that my Brother Park's order should not be disturbed, more especially as the defendant has not sworn that the letter did not come into his hands; if it did, there would be an end of the question altogether: under the circumstances, the defendant is not entitled to favour.

BOSANQUET, J.—I am also of opinion that the rule for setting aside the writ of *distringas* should be made absolute; and that for setting aside the Judge's order should be discharged. It is certainly true, that the Courts, in the exercise of their discretion, have required three calls and two appointments to be made; otherwise they will not, in general, grant the writ. But there is no case to shew that the law has been thus limited and confined, if there should be circumstances which make it appear to the satisfaction of the Court, and to the discretion of the Judge, that the more efficacious process should issue. The matter has appeared in this light to my Brother Park; and, therefore, his order should not be set aside.

Rule absolute for setting aside the writ and levy made under it, and returning the money levied, without costs, the defendant undertaking to appear.
Rule for setting aside the Judge's order discharged.

1836. }
 Nov. 9. } DAVIS v. CURTIS.

Prisoner—Discharge—Lords' Act.

The Court will discharge a prisoner in execution under 48 Geo. 3. c. 123, although he has been previously required, upon the application of the party at whose suit he has been in execution, to give an account of his real and personal estate, and make an assignment under the compulsory clauses of the Lords' Act, and has refused to comply.

C

Where an application, under 48 Geo. 3, to discharge a defendant out of custody, is refused by reason of the omission to give the ten days' notice required by rule 90 of Hilary term, 2 Will. 4, and cannot be renewed previously to an application by the plaintiff under the Lords' Act, to compel the prisoner to deliver an account and make an assignment, the latter application will be granted.

In this case the defendant was in execution at the suit of the plaintiff for a debt less than 20*l*. The plaintiff had obtained a rule for bringing up the prisoner under the compulsory clauses, 16th and 17th of the Lords' Act, the 32nd of Geo. 2, for the purpose of getting him to give in an account, and make an assignment, as required by the statute, and the sixty days allowed by law had expired.

Andrews, Serj., November 2, moved to discharge the prisoner out of custody under the 48 Geo. 3. c. 123, he having been in confinement under the plaintiff's execution for more than a year. It appeared, however, that the notice of this application was given to the plaintiff on the 25th of October, being less than the ten days required by the 90th rule of Hilary term, 2 Will. 4. The irregularity was held fatal, and the learned Serjeant took nothing by his motion.

Upon the next day, November 3,—

Andrews, Serj. informed the Court, that the prisoner was then in attendance, having been brought up under the compulsory clauses of the Lords' Act, for the purpose of being required by the Court to give in an account of his estate, &c., and make an assignment. Such requisition, he contended, the Court were not, under the present circumstances, competent to make. The year's imprisonment had expired, and the statute was express in enacting, that the party in the situation prescribed was entitled to his discharge; and it was merely owing to the misfortune of his serving the plaintiff with a defective notice, that he was not liberated on the preceding day. The Court should, however, consider him as virtually discharged under the 48 Geo. 3, which, as made for the relief of prisoners, should be liberally construed, and they should not adopt any step which would

render him liable or obnoxious to such penal consequences as the compulsory clauses of the Lords' Act might entail upon him: he referred to *Evans v. James* (1), where a prisoner petitioned under the Insolvent Debtors Act for his discharge, and that Court did not decide on the merits of his petition, and the Court would not compel him to assign under the compulsory clause of the Lords' Act.

Mansel, contra, urged, that the Court were bound to require of the prisoner to do that which was specified by the statute, namely, to give in an account, and make an assignment. The sixty days allowed to the prisoner for the delivery and subscribing of a just and true account, &c. had expired long before his year's imprisonment had been completed. The course taken by the plaintiff upon this occasion was not new or unprecedented. That which was now contended for was done by the Court in *Langdon v. Rossiter* (2), where it was held, that a person who had lain in prison above twelve months in execution upon judgment for damages under 20*l*., was entitled to be discharged out of custody forthwith as to such execution, notwithstanding he had been previously brought up under the Lords' Act, and refused to deliver in an account, and had been in consequence remanded. To the same effect was *Ex parte White* (3).

The COURT desired that the two rules might come on together, and they would, in the meantime, take the matter into their consideration.

Nov. 9.—The motions having been accordingly called on—

TINDAL, C.J. said—We have looked into this case, and we think we ought to determine it as if we had come to our decision upon the second day of the term, when Mr. Mansel moved that the prisoner should be required to give in his account, and make an assignment under the compulsory clauses of the statute. It is, no doubt, true, that, upon the preceding day, the first of the term, my Brother Andrews moved that he should be discharged under the

(1) 1 Dowl. P. C. 260; s. c. 1 Law J. Rep. (n.s.) C.P. 79.

(2) 1 M'Clel. 6; s. c. 13 Price, 136.

(3) 1 Dowl. P. C. 66.

co. 3. c. 123, he having been in execution of the suit of the plaintiff, by whom he was brought up under the Lords' Act to make an assignment, for more than a year for a less than 20*l.*; but, as this application was not made according to the rule of court, which requires that ten days' notice be given to the creditor, it is the same as if no application had been made. Therefore, according to the maxim *tempore potior jure*, we must ask the prisoner if he is prepared to deliver himself up, and make an assignment. By act of parliament, we shall not deprive the creditors of their important right. Having first given the prisoner his election, we will make the rule for his discharge from this execution, under the authority of co. 3, absolute.

On the prisoner being asked, if he was prepared to comply with the requisites of the statute, he answered in the negative, upon which the rule for his discharge from the execution was made absolute, he was of course left liable to an indictment for refusing to comply with the statute.

6. } *In re GARCIA, A BANKRUPT.*
21. }
Habeas Corpus—Prisoner—Practice.

A party brought up on a writ of habeas corpus is not entitled to be discharged, if he is in custody of the officer to whom the writ is directed, for the cause stated on making application to the Court.

Therefore, where in the case of a bankrupt, the custody of the warden for debt, the Commissioners directed their warrant to the gaoler of Newgate to detain the bankrupt in custody until he should make satisfactory answers, &c., upon writ of habeas corpus, directed to the warden, commanding him to deliver up the bankrupt, that he might be discharged from such warrant, it appearing, on the return to the writ, that the party was in the warden's custody upon five writs, but that he was not in his custody upon the warrant, which was, in fact, not in the warden's possession, but in that of the gaoler of Newgate, to whom it was directed: the Court refused to discharge the prisoner, and handed him on the causes returned by the warden.

A motion for the discharge of a pri-

soner, brought up under a writ of habeas corpus, the party who has obtained the writ is to begin.

In this case the bankrupt was examined before the Commissioners; and his answers to inquiries respecting a sum of money, of which he said he was robbed in an omnibus, appearing unsatisfactory and inconclusive, they directed their warrant to the gaoler of Newgate, ordering him to keep the bankrupt (then in the custody of the warden of the Fleet for debt,) in his gaol, until he should give such answers as should be deemed satisfactory, &c.

Atcherly, Serj. obtained a writ of habeas corpus for bringing the bankrupt up, in order that he might be discharged from the warrant. He referred to *Crowley's case* (1), where the Lord Chancellor stated the embarrassment which an incident of this nature was sure to create,—to *Morris's case* (2), and *Ex parte Nowlan* (3). The writ was directed to the warden of the Fleet, as prayed for, and made returnable in a week.

The party being now in court, and *Wilde, Serj.* prepared to oppose his discharge, a discussion arose as to who should begin,—

Atcherly contending, that, as he had obtained the rule, the other party was, as on ordinary occasions, to commence by shewing cause.

Wilde, Serj. maintained, that it was incumbent upon the party seeking to discharge a person from an imprisonment *prima facie* legal, to state sufficient reasons. He cited *The King v. Kenworthy* (4), where, upon a prisoner being brought up on a writ of habeas corpus from the hulks, for the purpose of being bailed, the counsel, upon whose motion the writ was obtained, commenced by praying for his discharge; against which, cause was shewn.

[TINDAL, C.J.—Without assuming the facts which we know to have existed in this case, *non constat* that the counsel, who is to oppose the discharge of the prisoner, was in court when the application was made. It is, therefore, in my opinion, necessary that he should hear those arguments, which he is bound to refute,—and those reasons, to

(1) 2 Swanst. 1.

(2) 2 Jac. & Walk. 437.

(3) 6 Term Rep. 118.

(4) 1 B. & C. 714.

which it is his duty to reply. My Brother *Atcherley* should, I think, begin.]

Atcherley, Serj. then desired, that the examination of the bankrupt before the Commissioners, (which was read upon obtaining the writ,) should, with the return made by the warden and the warrant of the Commissioners, be read by the officer. This being done, it was found, that the warrant of the Commissioners was not annexed to the return made by the warden, (as it usually is,) but was handed to the officer by a person in whose custody it was; whereupon he objected to this as a fatal irregularity; and alleged, that he knew of no case in which the warrant of commitment was not annexed to and made part of the return. How else could the Court know that one was the effect of the other? There was no necessary connexion between the warrant and the return. The defect was not cured by the manual handing of the warrant by another person to the officer for the purpose of its being read.

Wilde, Serj., contrà, answered, that the bankrupt was not in the custody of the warden under the warrant, which was not directed to the warden, and had never been in his possession. It therefore could not be annexed to or incorporated with his return.—Here

The Court interposed, and said:—The warden, in obedience to the writ, has returned the causes of the party's being in his custody—namely, five writs. He also states, that the warrant of the Commissioners, directed to the keeper of Newgate, has been shewn to him; but he does not return such warrant as a cause of the party's imprisonment. In fact, the party does not appear to be in custody under the warrant at all. This application, therefore, has been prematurely made. No man is entitled to the writ, except he is imprisoned for the cause for which the writ is obtained. He cannot avail himself of the writ before he is in such custody. If we were to grant this application on a writ directed to the warden of the Fleet, would the keeper of Newgate feel justified in discharging him from his warrant, more especially when the Commissioners might have directed their warrant to the warden? Our objection is, that there is no commitment

here under this warrant. The moment the imprisonment begins under it, the application may be made. All we can do at present is to remand the party under the causes of imprisonment returned to us by the warden, as we do not see that he is actually confined under the warrant.

Atcherley took nothing by his motion (5).

1836. } STANHOPE v. FIRMIN AND
Nov. 21. } EVORY.

Attorney and Client—Authority.

Where an attorney has appeared and acted for a defendant in a suit, without his authority or consent, in consequence of which, execution has been levied on the defendant's goods, the remedy of the defendant is, as it seems, in the first instance, against the attorney, if in solvent circumstances, and not against the plaintiff on the record.

And on an application to the Court to interfere on behalf of the defendant in such a case, if it does not appear whether the attorney is solvent or not, the Court will refer it to the Prothonotary to inquire into that fact.

This was an action of replevin, in which, after a verdict for the plaintiff, the sum of 75*l.* 5*s.* 6*d.* had been realized, from an execution upon the goods of the defendant Evory. On the 12th of July last, Evory made an application to a Judge at chambers, to have the money thus levied paid back, upon an affidavit, wherein he stated, that he neither meddled with nor impounded the goods which had been distrained; that he did not know that he was made a defendant in the action; nor did he know he was liable to costs until the levy was made upon him, and that he never authorized or empowered the attorney to appear for him and defend the action. The learned Judge, with the consent of all parties, made an order, that the sheriff should retain the money until the 5th day of the present term, to enable the defendant to apply to the Court.

Wilde, Serj. having moved accordingly,

Turner shewed cause.—Assuming the statements in the defendant's affidavit to

(5) See *Ex parte Knight*, 6 Law J. Rep. (N.S.) Exch. 13.

rect, his remedy is against Wright, attorney, and not against the plaintiff record—*Latuch v. Pasherante* (1), *Anonymous* (2). It is true, that in *Anonymous* (3), where an attorney appeared, and judgment was entered against his client, there had no warrant of attorney, and the question was, whether the Court would reverse the judgment, the Court said, if attorneys were able and responsible, they would not set it aside; but they also said, "The reason is, because the judgment is irregular, and the plaintiff ought not to sue, for there is no fault in him; but if the attorney be not responsible, or suspicious, we will set aside the judgment, for otherwise the defendant has no remedy, and the same may be undone by that means." This principle was acted upon in *Mudry v. Newman* (4), where, upon a rule for judgment as in case of a nonsuit, for not pleading to trial, it appeared, that the affidavit of the plaintiff was used by Pinero, attorney, without his knowledge, and the cause had long been joined; and Parke, J., said, "I fear the plaintiff's only remedy is against Pinero, for commencing the action without his consent." To the same effect is *Robson v. Eaton* (5), the marginal note of which is, "If A. be indebted to B., and pay such debt to the attorney of a person suing in B's name, but without his authority, A. is, notwithstanding, obliged to B. again, and A's remedy is against the attorney." So, in *The King v. Addington*, it is said, if an attorney exceed his authority, he must answer for it to his client; and if the client be prejudiced, the attorney is liable to make him satisfaction. This principle may be further illustrated by cases, in which orders of reference have been made. In *Filmer v. Delber* (7), the Court refused to set aside an order of reference on the affidavit of the party denying that the attorney had authority to refer. Chief Justice said, "There is an express agreement between the defendant's counsel and the attorney properly entered into; if

there was no authority given, the remedy is against the attorney." It would, indeed, appear from *Williams v. Smith* (8), that if an attorney appears for one without authority, and the latter apply promptly to the Court, the Court will protect him. But there cannot be the slightest pretence here for saying, that the party has made his application promptly, or in reasonable time. He also referred to the rule in the Court of Chancery, as laid down in *Wright v. Castle* (9), that a solicitor may, in the exercise of the general authority given him by his client, defend a suit, but cannot institute one without his special authority. The objection to the course pursued by the defendant is founded upon the general rule established by decided cases, that the Court will leave the party to his remedy against the attorney. From an adherence to this rule no practical evil or inconvenience can follow; it is, therefore, better to abide by it: whereas, if the rule be departed from, much mischief may result, as the defeated party will always deny that he gave any authority.

Wilde, Serj., in support of the rule, relied on the uncontradicted statements in the affidavit, that the defendant Evory had never interfered with the goods, which were merely deposited in his house; and he submitted, that the real question was, who should pay the costs incurred, where one party had done nothing in the cause, and was in utter ignorance of the proceedings.

TINDAL, C.J.—In my opinion, we cannot come to a just conclusion upon the matter now submitted to our consideration, without knowing the circumstances of the attorney, Wright. We agree with the law, as we find it laid down in the case cited from 1 *Salk* p. 88, where the Court refused to interfere except where the attorney was an insolvent, against whom it would be of no use to bring an action. The party here appears to have been a mere bailee of the goods. In my opinion, the rule should be enlarged, to have it referred to the Prothonotary, to ascertain the circumstances of Wright, the attorney, and a copy of the enlarged rule should be served on him, to inform him that an inquiry is pending with regard to

(8) 1 Dowl. P.C. 632.

(9) 3 Mer. 12.

Salk. 86.
ibid.
ibid. 88.
Cr. M. & R. 402; s.c. 3 *Law J. Rep.*
Arch. 356.
Term Rep. 62.
Ray. 259.
Taunt. 486.

him, and give him an opportunity of appearing.

The other Judges concurring—

Rule enlarged, accordingly.

1836. }
Nov. 8. } TAYLOR v. BLACKLOW.

Attorney—Duty—Action.

A client who has intrusted the abstracts of his title to an attorney, for the purpose of raising money on mortgage, may maintain an action against the attorney, for a breach of duty in voluntarily communicating defects in his title to a party interested, who has thereupon brought unsuccessful actions to recover a part of the property ; and it is no justification, that the party, to whom the communications were made, was also a client at the time of the delivery of the abstracts.

The declaration stated, that before and at the several times thereafter mentioned, the defendant was an attorney of the Court of Common Pleas at Westminster, and the plaintiff then claimed to be lawfully entitled to and interested in a certain estate, &c., in the county of Kent, and, before and at the time of the committing of the grievances by the defendant, therein-after mentioned, was desirous to borrow and obtain an advance of money, to wit, the sum of 4,000*l.*, by way of mortgage and security upon the said estate, whereof the defendant, before, &c. had notice, and thereupon, so being such attorney as aforesaid, represented to the plaintiff that he had a client who would advance the said sum of 4,000*l.* on sufficient security, and at a moderate rate of interest, to wit, at the rate of 4*l.* per cent. per annum, for interest on the same. And the plaintiff, at the request of the defendant, retained and employed the defendant as such attorney, to use his endeavours to obtain and procure the said sum of 4,000*l.* on such mortgage for the plaintiff, for reasonable reward to the defendant in that behalf ; and the plaintiff, at the request of the defendant, then delivered to the defendant, as such attorney, and in pursuance of the said retainer, divers, to wit, six abstracts of and relating to the title of the

plaintiff of, in, and to the said estate and premises, and certain other documents also relating to the same, to wit, a statement of the number of acres of which the said estate consisted, and the names of the tenants and occupiers of the same ; and thereupon, and by means of the premises, the defendant afterwards, and before, &c., as such attorney of and for the now plaintiff as aforesaid, discovered and ascertained that there was a certain defect in and objection to the legal right and title of the plaintiff to the said estate and premises, to wit, that in two of the title deeds of and relating to the said estate and premises, a part of the said estate and premises, to wit, sixty acres thereof, and certain messuages, buildings, and improvements thereon, had not been sufficiently conveyed to and for the use and benefit of the plaintiff ; and that by reason and on account thereof, a certain other person, to wit, John H. Taylor, the brother of the plaintiff, then had, in point of law, a legal right to such part of the said estate and premises, and to recover the possession of the same, although, in justice and in equity, the beneficial interest in the whole of the said estate and premises then belonged to the now plaintiff ; and by reason of the premises, and under and by virtue of the said retainer and employment, it then became and was the duty of the defendant not voluntarily or unnecessarily to divulge or communicate the said defect in and objection to the legal right and title of the plaintiff to the said estate and premises, to the said John H. Taylor, or to any other person, and not to instigate, or cause or procure to be commenced or prosecuted any action or proceeding for the recovery of the said estate and premises, or any part thereof, from the now plaintiff, for or by reason or on account of such discovery of the defendant by the means aforesaid : nevertheless, the defendant, so being such attorney as aforesaid, but not regarding his duty as such attorney, nor his duty in the premises, under and by virtue of his said retainer and employment, but contriving, and craftily and subtilly intending to injure and annoy the plaintiff, and to cause and procure a great part of the said estate and premises, to wit, the said sixty acres thereof, and the said messuages, buildings, im-

ments thereon, to be recovered from unjust, vexatious, and improper proceedings, heretofore, to wit, &c., dishonestly, fully, and unjustly, and for the sake of an unjust reward in that behalf, violation of his duty as such attorney, contrary to his said duty in the premises, and in violation of good faith, volubly and unnecessarily divulged and communicated the said defect in and objection to the legal right and title of the plaintiff to the said estate and premises to the said John H. Taylor, and wrongfully, fraudulently, dishonourably, and oppressively, contriving and intending as aforesaid, to wit, on the day and year aforesaid, instigated and caused and provided, to wit, four actions of ejectment, respectively, on the demise of the said John H. Taylor, to be commenced against the said divers, to wit, twelve tenants of the said plaintiff of certain parts of the said estate and premises of the plaintiff; the said now plaintiff having, as landowner, appeared and defended the said actions of ejectment, the now defendant admitted the same, and also wrongfully, fraudulently, dishonourably, and oppressively, and procured a certain other action, to wit, in the name of the said John H. Taylor, against the now plaintiff, to be commenced and prosecuted for a certain cause of action, to wit, the cutting down and converting certain timber, then growing on the said estate and premises of the plaintiff; and the now defendant further intending and contriving as aforesaid, also then wrongfully and maliciously, unjustly and oppressively instigated, caused and procured to be commenced in the name of the said John H. Taylor, against the now plaintiff, divers, to wit, four actions, for the recovery of certain sums of money, claimed to be due from the plaintiff, which, but for such instigation, causing and procuring of the now defendant, would not have been so commenced and prosecuted; and the defendant further intending as aforesaid, then falsely and fraudulently instigated and persuaded, and caused and procured the said John H. Taylor to commence and prosecute against the now plaintiff a certain untenable suit in the Court of Exchequer, for setting aside the conveyance to the now plaintiff

of his estate of and in the said premises, and which was afterwards, to wit, on the 9th of July 1834, according to equity and justice, dismissed with costs, to be paid by the said John H. Taylor; and the now plaintiff further saith, that in order to obtain relief in the premises, he was, heretofore, to wit, in Hilary term, in the 4th year of the reign of our lord the king, forced and obliged to file, and did file, and prosecute his certain bill of complaint against the said John H. Taylor, in the Court of Exchequer, for relief in the premises, and in order to obtain an injunction against the prosecution of the said actions of ejectment, and was then also forced and obliged to apply to the Court of Exchequer for relief against the said now defendant; by means of which said breach of duty, and of the said deceptive, false, fraudulent, and malicious conduct of the defendant in the premises, the plaintiff hath been forced and obliged to incur, and hath incurred, great trouble of mind and body, and great expense of his monies, to wit, to the amount of £2,000L., in defending and resisting the said unjust and vexatious proceedings, and in obtaining and enforcing, and endeavouring to enforce, by due and lawful ways and means, relief against the same and other unlawful, unjust, and oppressive, proceedings of the same defendant in the premises; and by means and in consequence of the said John H. Taylor having become insolvent, and unable to pay the costs of the said vexatious proceedings so instigated, and caused and procured by the now defendant to be instituted and prosecuted in his name as aforesaid, the now plaintiff hath been and is unable to recover or obtain payment or satisfaction of or from the said John H. Taylor of the said costs, and he is wholly unable to pay or satisfy the same; and the now plaintiff hath been, and is, by means of the said several malicious, unjust, vexatious and improper conduct of the defendant, greatly harassed, oppressed, and impoverished, and otherwise greatly injured; and also by means of the premises, the plaintiff was hindered and prevented from raising and procuring the said money or other money on mortgage of the said estate and premises, for a long time, to wit, from thence until the 20th of January 1836, and was by reason of the premises forced

and obliged to raise and procure, on mortgage and security of the said estate and premises, a much larger sum of money than the said sum of 4,000*l.*, to wit, the sum of 6,000*l.*, and at a greater rate of interest than at and after such rate of 4*l.* per cent. per annum, to wit, at and after the rate of 4½*l.* per cent. per annum, for each and every 100*l.* thereof, to the damages of the plaintiff, &c.

The third plea stated, that before and at the time when the defendant represented to the plaintiff that he, the defendant, had a client who would advance the said sum of 4,000*l.*, on sufficient security, at interest, and before and at the time when the plaintiff delivered to the defendant the said abstracts and other documents relating to the said estate and premises, and before and at the time when the said defendant discovered and ascertained that there was a certain defect in, and objection to the legal right and title of the plaintiff to the estate and premises, and before and at the time when the defendant divulged and communicated the said defect in, and objection to the legal right and title of the plaintiff to the said estate and premises, to the said John H. Taylor, the defendant was the attorney and solicitor for the said Henry J. Taylor, and had been and was retained and employed by him as such attorney and solicitor generally, in relation to his affairs, and whereof the plaintiff had notice; and thereupon it became and was the duty of the defendant, as such attorney and solicitor of and for the said John H. Taylor, to divulge and communicate the said defect in, and objection to the legal right and title of the plaintiff to the said estate and premises to the said John H. Taylor, and he did, on that account, and without malice or any violation of good faith at the said time when &c. divulge and communicate the said defect in and objection to the legal right and title of the plaintiff to the said estate and premises, to the said John H. Taylor, with a view and in order that he might claim and recover the said estate and premises from the plaintiff, if lawfully entitled thereunto, as he then appeared, and was believed by the defendant to be; and that thereupon the said John H. Taylor did retain and employ the said defendant as such attorney,

to take due and proper proceedings to try and investigate the said right and claim of the said John H. Taylor, and to recover the said estate and premises for him, and to bring and prosecute the said actions and suits in the declaration mentioned in that behalf, and this the defendant is ready to verify, &c.

To this plea the plaintiff demurred specially (1).

Joinder.

Kelly, in support of the demurrer.—Although there is no precedent of an action against an attorney under circumstances precisely similar to those in the present case, there can be no doubt that this action is maintainable, on the ground that it is brought for a breach of the defendant's

(1) The causes assigned were, that although the said defendant, in and by his plea, confesses and admits that he has been and was retained and employed by the plaintiff, to act for him as his attorney in the premises, and that under and by virtue of that retainer and employment, the said defendant discovered and ascertained the said defect in and objection to the legal right and title of the plaintiff to the said estate and premises, but that, in justice and equity, the beneficial interest in the whole of the said estate and premises then belonged to the plaintiff, and the said defendant hath, in and by his said third plea, confessed and admitted that it was his duty, under and by virtue of the said retainer and employment, not voluntarily or unnecessarily to divulge or communicate the said defect and objection to the said John H. Taylor, or to any other person, nor to instigate, or cause or procure any action or proceeding for the recovery of the said estate, or any part thereof; yet the said defendant hath attempted to defend and justify his said illegal conduct, upon and under colour of a wholly untenable ground and pretence; and also for that, although the said third plea hath been and is pleaded in bar to the whole declaration, yet the said third plea doth not state or shew any defence, or legal or sufficient justification or excuse of or for the said statement and cause of action against the defendant, for and in respect of his having so wrongfully, maliciously and dishonourably instigated, and caused and procured the said actions of ejectment to be commenced and prosecuted, and the said other action to be commenced and prosecuted for the said pretended cause of action, to wit, the cutting down and converting the said timber, or of or for the said defendant having so wrongfully, maliciously, unjustly, and oppressively instigated, and caused and procured to be commenced and prosecuted in the name of the said John H. Taylor, against the said plaintiff, the said other four actions, and falsely and maliciously instigating and persuading, and causing and procuring the said John H. Taylor to commence and prosecute against the plaintiff the said untenable suit in the Exchequer; and also for that the said third plea is in other respects uncertain, informal, &c.

as an attorney. When an attorney takes a retainer to perform services for and reward, he is bound to execute duty with diligence, integrity, and skill; a failure in any of these particulars renders him liable to an action.

INDAL, C.J.—The difficulty which presents itself at present to my mind, is you are trying (put the case as you to obtain damages from an attorney enabling him whom he conceived to be the rightful owner to recover certain property.)

admitting that to be so, the attorney has no right to expose the private actions of the party who employed him and it cannot be denied that it is a breach of duty, to shew to another abstracts which his client has intrusted to his keeping. An instance nearly similar to the present, is given by Chief Baron Collyer in his *Digest*, 'Action on the case for it,' (A) 5, where it is said to be a kind of such action, "If a man being intrusted in his profession, deceive him who trusted him; as, if a man retained of counsel become afterwards of counsel with the party in the same cause, or discover evidence or secrets of his cause." Other principles are also given by the learned bar, all of them tending to the same result and involving the same principle. The case may be compared to that of *Wodeley v. Clinton* (2), where it appeared dangerous to the Lord Chancellor and the Judges, whom he consulted, to personally employ A, in a cause against him and B, to leave the former as he was still willing to retain him, and enter into the service of B. The principle on which this action is maintainable, is that on which an action may be brought for words not in themselves actionable, but from which special damage results. Here the defendant has committed a breach of duty; he has disclosed the secrets of his client. The violation has been aggravated by the additional circumstance of the disclosure being made to a person who was enabled to take advantage of it. Damage and detriment have consequently accrued to the plaintiff, and he is entitled to the remedy which he seeks.

INDAL, contra.—The real question is,

(2) 19 Ves. 261; s. c. Coop. 80.
NEW SERIES, VI.—C.P.

whether the act to be done by the defendant was of such a nature as raised a duty not to make the disclosures complained of; or, in other words, whether he would have been privileged from making those disclosures had he been called upon to do so in a court of justice. That such was not the case, may be ascertained by a reference to the authorities on the subject. In *Wilson v. Rastal* (3), the privilege was said to be confined to counsel, solicitors, and attorneys, when acting in their respective characters. In *Cobden v. Kendrick* (4), it was held, that the attorney was not restrained by any rule of law from giving evidence of a conversation between him and his client, touching the justice of his suit, after a writ of inquiry, executed on an interlocutory judgment, and a compromise thereupon, for the purpose of the suit, had been obtained, as the communication could not be said to have been made by way of instruction for conducting the cause; and in *Bull. N.P.* 284, the ground of the privilege is said to be this, that it is contrary to the policy of the law to permit a person to betray a secret with which the law has intrusted him. In *Moore v. Terrell* (5), an action by an attorney for a libel, which stated that he had been guilty of disgraceful conduct, in having at an election disclosed confidential communications which he had acquired professionally, it was held, that the question for the jury was, whether the matters disclosed by the plaintiff were confidential communications acquired by him professionally, and not whether they were such as he would not be compellable to disclose, if called on as a witness in a court of justice. In *Walker v. Wildman* (6), *Bramwell v. Lucas* (7), and *Rex v. Wühers* (8), also limit the privilege to those communications which are made for the purpose of professional advice. In *Robinson v. Mullett* (9), it was held, that a solicitor who had acted to a certain extent only for parties defendants in an amicable suit in Chancery, should not be restrained from acting in a cause by bill filed by some of those defendants, on behalf of themselves,

(3) 4 Term Rep. 753.

(4) *Ibid.* 431.

(5) 4 B. & Ad. 870.

(6) 6 Mad. 47.

(7) 2 B. & C. 745; s. c. 2 Law J. Rep. K.B. 161.

(8) 2 Campb. 578.

(9) 4 Price, 353.

against others of them, the solicitor making affidavit that he was not confidentially possessed of any secrets which might be used to the prejudice of such other defendants, or had not knowledge of any facts unknown to his clients. To the same effect are *Grissel v. Peto* (10), and *Johnson v. Marriott* (11). In *Cromack v. Heathcote* (12), the privilege was allowed, whilst in *Wadsworth v. Hamshaw*, in note thereto, the communication was held not to be protected. In *Beer v. Ward* (13), the Lord Chancellor refused to restrain an attorney from acting for the opposite party, he having been dismissed by the other, without any misconduct; thus qualifying the rule in *Cholmondeley v. Clinton*, where the attorney, who was restrained, had of his own accord left his client. In *Bicheno v. Thorp* (14), the Court refused to restrain a party from acting as a solicitor for parties, against whom his former master was employed, upon general allegations of his having in his former service acquired information likely to be prejudicial to the clients of his former master (15). The doctrine as to privilege was extended, in *Cook v. Wilson* (16), to the clerks of attorneys, the Vice Chancellor there saying, "a solicitor's clerk is within the policy which excludes solicitors." The Court will bear in mind, that in many of the cases to which their attention has been called, the remedy sought was, the restraining of the attorney from acting by injunction. There is scarcely an instance of the party affecting to be injured proceeding, as here, by action. The authorities shew that the communication here raised no duty, and created no privilege. Where a party desires an at-

torney to raise money upon mortgage, he does not make a statement under the idea of professional confidence, and consequently the disclosure by the attorney should not be attended with the consequences sought to be established here. Besides, this being the privilege of the plaintiff, it may, like any other, be waived by him for whose benefit it was intended; and such waiver may be fairly inferred from the conduct of the plaintiff, in making a communication to the defendant, knowing at the time of making it, that another person interested in the discovery of such communication, was also the client of the defendant in whose cause, and in support of whose interests, he was bound to exercise due diligence and skill. The relation in which the party stood, to whom the disclosure was made, he being also a client of the defendant, completely negatives the imputation of malice.

Kelly, in reply, denied the propriety of trying the present question by the test proposed. Whether the statement made to the defendant was privileged and confidential, or whether it would be protected from disclosure in a court of justice, was, as far as regarded this discussion, perfectly indifferent. Even admitting the test to be correct and accurate, there was no analogy—no ground of comparison between the two cases proposed to be tried by the same rule, and submitted to the same standard. No resemblance, no similarity could be said to exist between a case where a party was compelled to make a disclosure in a court of justice, and one like the present, where the party in whom confidence was reposed made a free and voluntary disclosure.

TINDAL, C.J.—This case has been argued principally upon the right of the plaintiff to maintain the action, on the ground alleged in the declaration. This question has, and properly, been considered as more important than that which has been specially demurred to in the plea; and as, in my opinion, the plaintiff is entitled to maintain his action for the cause alleged, our judgment should be in his favour. The cases have been fully discussed on the part of the defendant, for the purpose of shewing that the disclosure which he made was of such a nature as, if he (the defendant) were examined as a witness in a court of justice, would not entitle him to the ex-

(10) 9 Bing. 1; s. c. 1 Law J. Rep. (N.S.) C.P. 139.

(11) 2 Cr. & Mee. 183; s. c. 3 Law J. Rep. (N.S.) Exch. 40.

(12) 2 Brod. & Bing. 4.

(13) 1 Jac. 77.

(14) 1 Jac. 300.

(15) In this case, Lord Eldon observed, "I know, that formerly, at the bar, if counsel was employed, and a retainer was offered him on the other side, he first gave those by whom he had been employed, the option of retaining him; but if they would not, there was no difficulty in going over to the other side, notwithstanding all he might know. If that be the rule at the bar, we must not lay it down differently for solicitors. I have no conception that we are to give ourselves liberties which we refuse to others."

(16) 4 Mad. 380.

use of privilege as an attorney, inasmuch as, under the circumstances in which the statement was made, and from its description, he would not be protected. Whether this is so or not, we are not now called upon to decide, although *Cromack v. Heath* and *Moore v. Terrell* may be said to be a great way in determining the point. But, in my opinion, it is not necessary to decide the question one way or the other: it is enough for us to say, that the action is maintainable. The complaint in the terms of the declaration is, "that the defendant, in violation of and contrary to his duty as an attorney, and in violation of good faith, voluntarily and unnecessarily divulged and communicated the said defect, &c. to the said John H. Taylor, and then, wrongfully, maliciously, and oppressively, contriving and intending, &c. instigated, caused, and procured divers, to wit, four actions of ejectment to be brought," &c. The complaint in substance is, that the defendant made a voluntary disclosure to another of the legal defect in the title of a person who confided in him. This cause of action, therefore, stands perfectly clear of the objection which has been put, and which would be supposed to arise, in consequence of the defendant being called upon as a witness in the investigation of the rights of conflicting parties. It is, it cannot be denied, the undoubted, unquestioned duty of an attorney to keep secret that which is intrusted to him, and not to divulge it to others. In this case, the deeds were placed in the hands of the party, for the purpose of raising money on them, which was to be furnished by another client; and certainly the person who confided his abstracts to him, could not be prepared to expect that he, the attorney, would have communicated the contents of such abstracts to another, and, at least, all, to one who might derive benefit from the defects which, as it was alleged, may be ascribed to the documents in question. Undoubtedly may happen, that in case of conflict between two clients, the minds of the persons acting as attorneys, may not be sufficiently strong to enable them to persevere in an equal course; but yet a person engaged in such circumstances has an easy way to pursue. He should keep his lips sealed with the solemn seal of silence to the last moment of his life; he should never communicate; he should never di-

vulge; he should keep buried in his breast that of which he has obtained the knowledge in the exercise and discharge of his profession. Instead, however, of acting thus,—instead of retaining that which was intrusted to him, with the greatest possible secrecy, and of confining it strictly to himself, the defendant has thought proper to make disclosures, the consequences of which have been actions at law and bills in equity, and which, inasmuch as they have been the cause of temporal injury, may be the groundwork of an action: at least, I can see no reason why they should not. I come to this conclusion the more readily when I lay the authorities on the subject, and the doctrine laid down in *Com. Dig.*, 'Action on the case for deceit,' together; and in my opinion, the passages cited from the latter work apply nearly to that which is the subject of discussion. It has been said for the defendant, that as the disclosure complained of was made to another client, it was at all events made without malice; and it has been alleged as a ground of justification, that as the plaintiff knew and was aware of the fact, that the person to whom the disclosure was made, was a client of the defendant, he, the plaintiff, must have waived his privilege and assented to the communication. The proper answer to this allegation is, that it does not appear that the plaintiff knew the party in question to be a client of the defendant; and if he did waive the privilege to a certain extent, still the communication should never have been made to the party to whom it has been made. Upon the whole, I am of opinion, that the plea is bad.

GASELEE, J.—I am of the same opinion. It is unnecessary to decide the question, whether that which was communicated to the defendant by the plaintiff, was or was not of such a nature as was entitled to privilege. If it were necessary to come to a decision, I should require time to look into the numerous cases on the subject. The objection which has been raised does not appear to me in point. The defendant has not gone into a court against his will; he has made a voluntary disclosure; he was not compelled. The first principle which should govern a professional man, it must be admitted, is, that he should not disclose that which was intrusted to him, more especially to the opponent of him by

whom the confidence is reposed. There may, as it is said, be no express authority upon the subject; but the case is, I think, within the principle upon which actions on the case for deceit are founded, as cited from *Com. Dig.* by Mr. Kelly. I will refrain from making further observations, though, in truth, I might make many. I will merely say, that upon principle an attorney should not voluntarily make disclosures adverse to the interest of those who employ him. He should withdraw himself from any retainer that may thus compromise him, and remain perfectly silent, and never take advantage of that person whom he was engaged to serve. The party here has no doubt suffered damage, but to what extent it is not for us to say (16).

VAUGHAN, J.—There cannot be two opinions on this subject. The defendant has, I think, been guilty of a great breach of moral duty, and the law can never be better administered, than in enforcing the performance of moral duties. It is not necessary, on this discussion, to say whether the communication in question may or may not be entitled to privilege; I will merely say, that Mr. Jervis has laid down the rule much too narrowly. The privilege is not confined to cases where suits are commenced or contemplated. The authorities are the other way.

BOSANQUET, J.—I am of the same opinion. It is unnecessary to refer to the case of privilege. As to the defendant's being liable to answer a question respecting the communication in a suit by a third party, such question need not be now decided, though, as at present advised, I do not hesitate to say, that I think the communication was privileged. There can be no doubt, when an attorney undertakes for money and reward the execution of a certain duty, the law imposes on him the performance: it is equally clear, that if, by his conduct, he violates such duty, the law will furnish a remedy by action against him.

Judgment for the plaintiff.

Note.—Vide *The King v. Delaval and others*, 3 Burr. 1434, where Lord Mansfield comments upon the duty of the profession of an attorney, and the chastity of character which he ought to possess.

(16) The cause came on for trial at the sittings after this term, at Guildhall, when a verdict for the plaintiff for 1,000*l.* damages was taken by consent.

1836. } STEVENS AND ANOTHER v.
Nov. 2. } W. UNDERWOOD.

Judge's Order—Bill of Particulars—Service.

A Judge's order, calling on the plaintiff's attorney or agent to furnish the defendant's attorney or agent with a better bill of particulars, is not satisfied by the service of such order upon the plaintiff; it should be served upon his attorney or agent.

Mansel had obtained a rule, calling upon the plaintiffs to shew cause why they or their attorneys should not within a fortnight comply with an order of Park, J., or, in default thereof, why the defendant should not be at liberty to sign judgment in the cause.

The order, which was made a rule of court, directed "that the plaintiffs' attorney or agent should deliver to the defendant's attorney or agent," a better bill of particulars; and the objection taken by—

Andrews, Serj., on shewing cause, was, that the plaintiffs, and not their attorney or agent, had been served with the rule and order.

Mansel, *contra*, urged, that service on the attorney or agent, was not necessary, inasmuch as the attorney must have been aware of the order, as he was present when it was made.

TINDAL, C.J.—The defendant has not, upon this occasion, adopted the course proper to be pursued. He should have served the attorney or agent of the plaintiffs. It is no answer, that the attorney was cognizant of the matter, and must have been so, as he was present at the time the order was made; as it often happens, that orders of this description are waived.

The other Judges concurring—

Rule discharged.

1836. } PHYPERS v. EBUEN.
Nov. 8. }

Copyhold—Fine—Seizure quousque.

The admittance of tenant for life being the admittance of him in remainder, the latter is not, on the death of the tenant for life, bound to come in and be admitted, and, consequently, pay a fine to the lord, except there is a special custom of the manor to such effect, or the lord at the time of the admittance

apportioned the fine between the tenant for life and the remainder-man, although the said by the tenant for life upon his admission be merely nominal, viz. one shilling.

This was an action for trespass upon the closes, named and described by the plaintiff and bounds in the declaration, to which the defendant pleaded—first, that the plaintiff was not in possession, in which, &c. was not in the plaintiff; and, secondly, a special plea of justification, that defendant, as bailiff, under a warrant from the steward of the manor of Crowlands, in the county of Cambridge, seized the closes in which, &c. were, viz. in the mean time, and until some person or persons should appear and show good his or their claim to be admitted thereto at a court of the lord of the manor of Crowlands.

In this plea the plaintiff replied, that John Purchas was admitted to the closes as tenant for life, with remainder to Frances Anne Purchas; and that one Frances Anne Purchas was admitted in remainder under that admission; and the parties, having joined issue, did to submit the following CASE for the consideration of the Court.

The plaintiff, before the committing of trespasses by the defendant in the closes in which, &c., was, and still is, the tenant and occupier of the lands in question as tenant to John Purchas, Esq., deceased, hereinafter mentioned, and since his death to Frances Anne Purchas hereinafter mentioned, daughter of the said J. Purchas. The lands in question are copyhold of the lord of Crowlands, in the parish of Dryden, in the county of Cambridge. The rent payable according to the custom of this manor, is two years' improved annual value, in consideration of a tenant of copyhold lands or his devisee or surrenderee.

A court held for the said manor on the 5th of January 1789, the homage presented to the death of J. Purchas, the father of the said J. Purchas, a customary tenant of the said manor, who held to him and his heirs divers lands and tenements of the lord of the said manor by copy of court roll, and that he died seised thereof; and before his death, he duly made and executed his last will and testament in writing, bearing date the 23rd of February 1788, having duly surrendered the said

premises to the uses thereof, whereby the said testator gave and devised unto his son, the said J. Purchas, all and singular his copyhold estates, whatsoever and where-soever, to hold unto the said J. Purchas, the son, his heirs and assigns for ever, upon trust, as soon as conveniently might be after his, the said testator's, decease, to sell and dispose of all his said real estate, and to pay the money arising thereupon in such manner as in such will is particularly mentioned; which said J. Purchas, the son, being present in court, desired of the lord of the said manor to be admitted tenant, agreeably to the tenor of the said will, to the said premises, being the said closes in which, &c., with other hereditaments, to whom the lord granted seisin of the said premises by the rod, to hold the same to the said J. Purchas, his heirs, and assigns, agreeably to the tenor of the said will of the lord of the said manor—(the trust for sale in the above will was never exercised, the object being to raise 5,000*l.* for the testator's younger son, and to pay debts, such legacy and debts being paid and satisfied by the said J. Purchas, the devisee, out of his own monies, the lord and steward of the manor having no other notice thereof than from the court-books, which are in the terms above specified); on which said admittance the said J. Purchas paid a full fine of two years' improved annual value to the lord of the said manor.

On the 23rd of Jan. 1790, the said J. Purchas did, out of court, surrender into the hands of the lord of the said manor, (amongst other hereditaments) the said closes in which, &c., with their appurtenances by the rod, according to the custom of the said manor, by the hands and acceptance of W. Silk and Thomas Silk, two customary tenants of the said manor in which, &c., to the use and behoof of himself, the said J. Purchas, and his heirs, until a marriage then intended between him and one Sarah F. Barwick should be had and solemnized; and from and after the solemnization thereof to the use of himself, the said J. Purchas, and assigns, for and during the term of his natural life; and from and immediately after his decease to the use and behoof of the said Sarah F. Barwick and her assigns for and during the term of her natural life in augmentation of her jointure; and from and

immediately after the decease of the survivor of them, the said J. Purchas and S. F. Barwick, subject and liable to the several powers, provisos, conditions, limitations, and agreements mentioned, expressed, and declared in a certain indenture of release of four parts, bearing even date therewith, made or mentioned to be made between the said J. Purchas of the first part, the said S. Barwick of the second part, Sarah Tauswell, of the town of Cambridge, grandmother of the said Sarah, of the third part, and John Archdeacon, printer to the University of Cambridge, of the fourth part, to the use of the eldest or only son of the body of the said J. Purchas on the body of the said S. F. Barwick, and to the heirs of such eldest or only son for ever; and in case there should be no such eldest or only son, then to the use of the eldest or only daughter of the said J. Purchas and of said Sarah, and to the heirs of such eldest or only daughter for ever; and in default of issue of such marriage, to the use and behoof of the right heirs of the said J. Purchas for ever, according to the custom of the said manor.

Afterwards, on the 30th of May 1796, at a general court baron of S. Smith, L.L.D., the lord of the said manor, holden before the deputy steward of the manor, the homage of that court presented the said surrender; and at that court the said J. Purchas prayed to be admitted tenant to the said surrendered premises, according to the form and effect of the said surrender, to whom the said S. Smith, the then lord of the manor, by the said deputy steward, granted seisin thereof by the rod, to hold the same unto the said J. Purchas and his assigns for and during the term of his natural life of the lord of the said manor, and at his will, according to the custom of the said manor; and he the said J. Purchas was thereupon admitted tenant of the said surrendered premises, with the appurtenances, for the term of his natural life; and he paid a fine of 1*s.* on such admission.

The marriage between the said J. Purchas and Sarah F. Barwick took place on or about the 24th of January 1790. The only issue of the said marriage was Frances Anne Purchas, who is now living, and was of full age at the death of the said J. Purchas. The said S. Purchas (formerly

Barwick) died in the lifetime of the said J. Purchas in 1811. The said J. Purchas died on or about the 16th of November 1833.

On the 10th of January 1834, at a general court baron of the Rev. S. Smith, L.L.D., lord of the said manor, holden for the said manor before the steward thereof, the first proclamation was duly made for the heir or heirs at law, or other person or persons entitled to the premises, whereof the said J. Purchas had then lately died seised within the said manor, to come into court, and take admission to the same, or that otherwise the same would be seised into the hands of the lord of the said manor for want of a tenant.

[There was then a statement of the second and third proclamations on the 5th of March and 9th of May of the same year.]

On the 17th of May 1734, the then steward of the said manor duly issued a warrant according to the custom of the said manor under his hand and seal, directed to the said defendant Francis Eburn, the bailiff of the court of the manor, reciting, that proclamations had been duly made at several courts baron on the 10th of January 1834, 5th of March, and 9th of May of the same year, for any person or persons claiming title to the customary or copyhold lands and hereditaments lying within, and holden of the same manor, of which J. Purchas, Esq. lately died seised, to come into court, and be admitted thereto; and forasmuch as no one came to take up and be admitted to the said lands and hereditaments, it was thereby commanded and ordered, that the said F. Eburn do seize, and he was thereby authorized to seize into the hands of the lord of the said manor all the said customary and copyhold lands and hereditaments, of which the said J. Purchas died seised, in the meantime, and until some person or persons should appear and make good his or their claim to be admitted thereto. The defendant, under that warrant, entered upon the closes in question, then in the occupation of the said plaintiff, as tenant to the said Anne Purchas. The said F. A. Purchas is, or claims to be, now seised of the said premises in question, at the will of the said lord of the manor, according to the custom under the surrender of the 23rd of January 1790, and the admittance of the 30th of May 1796.

question for the consideration of the was, whether the said F. Anne Pur- who claimed as tenant in remainder, that surrender and admittance, was to come in to be admitted at the court.

H. Watson, for the plaintiff.—The this case was not entitled to seize *ue*, as the tenant in remainder was und to come in and be admitted. The l rule of law laid down in *Barnes v. (1)* is, that “the admittance for a copy- for life, is so of him in the remain- and no fine due by the remainder *ans* special custom;” and a similar tion of the law is given in *Gyppen ney (2)*, by Popham and Fenner, *Js. Doe v. Jenney (4)* is no authority for endant, as the decision there, that mainder-man must come in and be ed, and pay a fine, was founded on cial custom of the manor, and no as there paid by the holder in his surrender to the use of himself e, and his admittance accordingly. rgument that the remainder-man is to be admitted and pay a fine, be- the fine paid by the tenant for life erely nominal, is not supported by uthority. It is true, that the lord have apportioned the fine, and have ed so much to be paid by each, but pportionment ought to have been at the time of the admittance. The t as to the degree of evidence neces- establish a custom for the payment ll fine by remainder-man upon his ion, was discussed in *The Dean and r of Ely v. Caldecot (5)*; and in *ow v. Graves (6)* it was said by C. J., “It shall not prejudice the or if a fine be assessed for the whole there is an end of the business; but e be assessed only for a particular the lord ought to have another.” pposing the lord had a claim against mainder-man, for a part of the

fine apportioned, his remedy should be, according to the dictum of the Lord Chan- cellor in *Lord Kensington v. Munsell (7)*, by action, not by seizure *quousque*, for the pur- pose of compelling him to come in and pay.

Kelly, contra, contended, that the doc- trine advanced for the defendant would enable a tenant in fee to deprive the lord of all fines, by surrendering to himself for life, with remainder to another. It is not denied that the admission of the tenant for life is an admission of the remainder-man, but that “shall not bar the lord of his fine, which he shall have by the custom”— *Brown's case (8)*. The distinction taken between this and *Doe v. Jenney*, that no fine was there paid, does not exist, as the small payment of 1s. cannot have been intended by the lord to operate as a fine. In *Watkins on Copyholds*, 292, it is said, “that where a new estate is limited, it should seem that a fine is due,” and here a new estate, *vis.* an estate for life, was limited to the tenant in fee. He also cited *The Earl of Bath v. Abney (9)*.

TINDAL, C.J.—This case comes before the Court upon the question, whether the warrant for the seizure *quousque*, of the premises in question, into the hands of the lord of the manor, for the purpose of com- pelling the tenant in remainder to come in and be admitted, and consequently pay a fine, is or is not valid; for unless we see that the lord has a right to compel such tenant to come in and be admitted, this, which is objected as a bar to the proceed- ing of the lord on this occasion, is binding and conclusive. For the purpose of decid- ing this question, we must bear in mind that a remainder-man is admitted, by the admittance of the tenant for life, and we are to see whether, by the custom of the manor, a fine is to be paid by him in remainder, after the admittance of the former; and if such be the case, the lord will not be barred in the proceeding which he has adopted, nor precluded from the remedy which he has pursued. Now the first observation which may be made to this part of the case is, that there is no custom of the manor which requires such fine to be paid by the tenant in remainder.

Lev. 308.

Cro. Eliz. 504.

Same case, Moo. 465, *nomine* Tipping v.

g. As reported in Cro. Eliz. the case is said to be adjourned; but in Moor it is said to be ad-

East, 522.

Bing. 439; s. c. 9 Law J. Rep. C.P. 171.

Mod. 102; 120; s. c. 1 Vent. 260, *nomine* v. Graves.

(7) 13 Ves. 253.

(8) 4 Co. Rep. 21.

(9) 1 Burr. 206.

Thus, the present case is reduced to a state of circumstances similar to those by which the older cases were surrounded, in which it is distinctly and broadly laid down, (and the doctrine is further confirmed by subsequent cases,) that when a fine is due to the lord by him in remainder, it must be by custom of the manor. This was determined in the case of *Doe v. Jenney*, which, in fact, disposes of the present. The general principle was there admitted, that he in remainder will, upon admittance, be liable to pay a fine upon the finding of a particular custom of the manor to that effect; and that case agrees in all points with that which is now the subject of discussion. There the party, who was tenant in fee upon the court roll, surrendered, and in pursuance of his marriage settlement became tenant for life, with several remainders over; and under such circumstances, he was admitted to his new and inferior estate. In that case, no fine at all was paid, on the surrender of the holder in fee, whereas, in the present, there was, though a small one; and there it was held, that he in remainder could not enter without payment of a fine. It is said, however, that it is impossible to look upon this record, without seeing that the fine levied upon the tenant for life was nominal, it being only 1s.; but the case of *Doe v. Jenney* decides that the remainder-man is not to pay a fine, unless where a custom is found. Here the custom is found otherwise, and this case admits the payment of the fine by the tenant for life, however small it may be. It is then said, that if this doctrine be acted upon, it will be in the power of any tenant in fee to cause the payment to be evaded, and that two successive tenants for life might enjoy the premises, without the payment of the fine: the answer to this objection is, that the incident, if it should occur, has been occasioned by the conduct of the lord himself, upon the admittance of the first tenant for life. The lord might have refused to admit him at all, as he was already a tenant upon the court roll; and if he did admit him, he might have imposed a fine upon him, and upon the tenant in remainder, in such manner, and in such apportionment, as should be just and reasonable. Then the remainder-man could not have refused to pay the fine assessed upon him; and if he

did, the lord would have had his remedy either by action or by seizure *quousque*. According to the decision in *Doe v. Jenney*, the warrant, issued for the purpose of making the tenant in remainder come in, and be admitted and pay the fine, is invalid, inasmuch as it is not authorized or sanctioned by the law by which copyhold tenure is regulated; and our judgment should be for the plaintiff.

GASELEE, J. of the same opinion. The rule is fully and authoritatively laid down in *Doe v. Jenney*. I cannot add anything upon the subject to that which has been said by my Lord Chief Justice.

VAUGHAN, J.—It would be impossible for us to pronounce judgment in favour of the defendant, without acting in direct contradiction to the first rule of copyhold property. The remainder-man cannot be compelled to pay a fine without the existence of a special custom, which has not been found here. I will not say that the lord of the manor has overreached himself by his conduct upon this occasion; but I will say, that he has suffered by the negligence of his steward, inasmuch as the party here is not bound to come in and be admitted.

BOSANQUET, J.—The question here is, if, upon the death of tenant for life, the remainder-man is not bound to be admitted for the purpose of paying a fine to the lord, for it is with that object his admittance is required. It is agreed, that the admittance of tenant for life is the admittance of him in remainder; and the case in *5 East* leads to the conclusion that such would be the result, if no fine were paid at all, inasmuch as that case decided, that no fine was to be paid by him in remainder, except a special custom to such effect was found; and here there is none such. Here a fine was paid by the tenant for life,—a small one no doubt, but still it was a fine, and entered as such upon the roll. We do not know what ground the lord might have had for remitting his fine, or reducing it so low, but still it was a fine, and was paid; consequently the lord is not entitled to call upon the tenant in remainder to come in and be admitted. Our judgment should be for the plaintiff.

Judgment accordingly.

36. }
14. } YATES v. CHAPMAN.

Summons—Irregularity—Bail Bond.

party, who states one irregularity in a summons to set aside proceedings, cannot, on hearing, rely upon and obtain an order otherwise.

us, where the defendant took out a summons to set aside "the bail-bond for irregularity," and at the hearing obtained a summons order to deliver up the bail-bond to be cancelled, on the ground of a defect in indorsement on the copy of the writ, delivered to him at the time of the arrest, must set aside the Judge's order.

In this case a summons had been taken out on the 10th of September, for setting aside the bail-bond for irregularity, but on appearance before a Judge at chambers on the 2nd, no objection was taken to the summons, which was perfectly regular. Objection then relied upon was, that the copy of the writ delivered to the defendant at the time of his arrest, was not fully indorsed, a blank being left for the amount of the sum for which the arrest was made; and for this defect the learned Judge made an order that the bail-bond should be delivered up to be cancelled.

Hobbold had obtained a rule for setting aside the order, upon citing *Hasker v. Hine* (1) and *Smith v. Clark* (2), as authorities that a party could not apply to set aside proceedings for one irregularity, when he sustains the application upon another.

Hobbold shewed cause, and contended, that the indorsement on the writ must be as good as to have the same defect as that on the copy; and if so, the writ was void, and the bail-bond taken under it was irregular.

The case resembled that of an affidavit of debt, which rendered subsequent proceedings irregular.

Hobbold, contra, relied on the cases cited, which shewed that a party is given his opponent notice of an error in the anterior proceedings was liberty to recede from such objec-

Cr. & Mee. 408; s. c. 2 Law J. Rep. (N.S.) 66.

Dowl. P.C. 218; s. c. 3 Law J. Rep. (N.S.) 13.

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tion, and meet him upon a ground not intimated. He also denied that a defective indorsement made the writ void, for which he referred to rule 10, Michaelmas term, 3 Will. 4 (3).

TINDAL, C.J.—When this order for delivering up the bail-bond was obtained, there did not appear to be any irregularity in the bail-bond, but the defect in the proceedings complained of was, that there was not a proper indorsement on the writ, or on the copy of the writ served on the defendant. This defect, however, did not, according to the 10th rule of Michaelmas term, 3 Will. 4, make the writ void, but it might have been set aside for irregularity, upon application to the Court out of which it had issued, or to any Judge. Undoubtedly, the correct mode of proceeding for the defendant would have been to obtain an order for setting aside the copy and the subsequent proceedings; and if that had been the foundation of his applying for the order, there would, I think, be no ground for the present objection; but as he has not adopted such course, I do not see why we should assist him; we should not, I think, interfere in a matter of this sort, where the party himself has not thought proper to make the statement with that accuracy and correctness which he ought, and which the plaintiff had a right to expect at his hands. In my opinion, the rule for setting aside the Judge's order should be made absolute, the defendant being allowed a week to put in bail.

GASELEE, J.—I agree. The party should either put the irregularity of which he complains, on the face of the summons, or in an affidavit, after taking out the summons. Conduct of this description would, if encouraged, be productive of much delay. It would give the other party an opportunity of making an application to adjourn the summons, and the consequence would be additional expense and loss of time.

(3) Which declares, "that if the plaintiff, or his attorney, shall omit to insert in or indorse upon any writ or copy thereof, any of the matters required by the said act, 3 Will. 4. c. 39, s. 12, and sch. App., to be by him inserted therein or indorsed thereon, such writ or copy thereof shall not be on that account held void, but it may be set aside as irregular upon application," &c.

E

VAUGHAN, J.—The proper course would have been, to apply for an order to set aside the writ, and all the subsequent proceedings, which would include the bail-bond and the assignment of it, the writ itself being, by the rule referred to, though irregular, not void.

BOSANQUET, J.—I will merely observe, that my only doubt arose, from a consideration of the service of the copy of the writ and the subsequent proceedings, whether the bail-bond, in such case, may not be set aside for irregularity. An analogy has been attempted to be established, founded upon the affidavit of debt, for holding to bail; but no analogy exists. There is a marked and essential difference; if the affidavit to hold to bail be irregular, if it be not within the statute, it is utterly void; it is as if none were made at all, and the arrest under it would not be warranted or authorized. But by the 10th rule of Michaelmas term, 3 Will. 4, the writ is not actually void, but it may be set aside for irregularity.

Rule absolute; the defendants allowed a week's time to put in bail.

1836. }
Nov. 14. } LANE v. PARSONS.

Time to plead, Computation of.

The additional time indorsed by consent on a summons after a rule to plead, is to be computed from the date of the Judge's order, and not from the expiration of the time allowed by the rule to plead.

The declaration in this case was delivered on the 28th of October, with a rule to plead in four days. On the 29th, the defendant took out a summons for time to plead, on which an indorsement for four days was that day made by consent. The order thereupon, dated the 29th, was drawn up and served on the plaintiff's attorney on the 31st; and, on the 3rd of November, the defendant's attorney offered to deliver a plea, which the plaintiff's attorney refused to accept, as he had that day signed judgment.

H. Roberts had obtained a rule for setting aside this judgment, on the ground

that it had been signed prematurely; as he contended, that the additional days were to be computed from the expiration of the first four days, and not from the date of the Judge's order. He cited *Aspinal v. Smith* (1), the marginal note of which was—"Where notice to plead is given, and, before the expiration of the time named in the notice, a Judge's order for further time to plead is obtained, such time is to be reckoned from the expiration of the time named in the notice to plead, and not from the date of the Judge's order."

J. Jervis, in shewing cause, denied the accuracy of the marginal note in *Aspinal v. Smith*, and referred to the report of the same case in 2 B. Moo. 655. He also cited *Simpson v. Cooper* (2), where it was held, that the additional time was to be computed from the date of the order (3).

TINDAL, C. J.—The order gave the defendant two days additional time. The absence of the word *further*, which is generally found in motions of this description, leads to the conclusion as to what meaning should be put upon the additional time and how it should be computed. Let the rule for setting aside the judgment for irregularity be discharged; but let the rule be made absolute for setting it aside on the payment of costs, and on the usual terms.

Rule accordingly.

1836. }
Nov. 15. } BROOKS v. FARLAR.

Bill of Particulars—Bill of Exchange.

Where a declaration amended upon demurrer is reduced to a single count upon a bill of exchange, the defendant is not entitled to a bill of particulars, though the bill delivered with the declaration before amendment, and which still remains unaltered, alleges, that the sum sought to be recovered (and which is specified,) is only part of the consideration given for the bill of exchange.

(1) 8 Taunt. 592.

(2) 2 Scott, 340.

(3) There was also an affidavit, stating, that the understanding between the parties was, that the time was to be computed in the manner contended for on the part of the plaintiff.

declaration in this case originally
ed a count by the plaintiff, as indor-
bill of exchange, for 200*l.* against
endant, as drawer, and a count on an
stated. The defendant demurred
y to the count on the bill, and the
amended and paid the costs (1),
g in the declaration the count on
of exchange only.

bill of particulars, delivered with
laration, as it originally stood, and
remained unaltered when the decla-
was amended, was as follows :

is action is brought to recover the
94*l.* 9*s.* 4*d.*, part of the considera-
the bill of exchange mentioned in
laration, together with the sum of
the expense of noting the said
interest on the above-mentioned
94*l.* 9*s.* 4*d.* from the time the said
ame due until the payment thereof;
the recovery, the plaintiff will re-
either count," &c.

time for pleading to the amended
ion expired upon the 7th of No-
; previous to which, the plaintiff's
attended a summons, before Park,
n out by the other party, for the
of getting a detailed account of
iculars of the plaintiff's demand of
4*d.*, which summons was dismissed,
order thereon was refused to be

The defendant then obtained
ime to plead upon terms; and be-
h time expired,

as, *Serj.* obtained a rule for the
tailed account, which had been re-
y Park, J. He referred to the
of Trin. term, 1 Will. 4.

en, *Serj.* shewed cause, and con-
that there was nothing in the case
endered it incumbent upon the
to furnish the defendant with any
urate information than that already
There was nothing in the declara-
ch could mislead or embarrass the
at. It consisted merely of a count
ut forth a claim upon a bill of ex-

ground of demurrer was the allegation
ntiff, (in reference to the non-payment of
en due,) "which period has now elapsed,"
it was contended, for the defendant, re-
the date of the declaration, not to the time
out the writ, and, consequently, that the
ot due when the action was commenced.]

change ; and upon such occasions it was
not usual to grant an application similar
to the present (2). He cited and relied
on *Snelling v. Chennels* (3), and *Amos v.*
Cooper (4), where Abbott, C. J. said :—
" You must give a bill of particulars of
goods sold ; but you need never give a
particular of bills of exchange, when they
appear in the declaration." The whole pro-
ceeding was evidently to gain time.

Bompas, Serj., in support of the rule,
urged, that the present was not a case in
which the defendant should be precluded
from obtaining that which he sought : the
application was founded upon necessity
and justice. It was not suggested, by any
sinister motive, or wish to delay. The count
in the declaration could not be said to be
founded exclusively upon a bill of ex-
change. There were various transactions
between the parties ; and in the bill of par-
ticulars originally given, and not altered,
the sum sought to be recovered was said
to be part of the consideration for the bill
mentioned in the count. There was not,
therefore, that certainty and absence of
doubt which distinguished other cases, in
which the amount of a bill of exchange was
the subject of litigation.

TINDAL, C. J.—Upon this question there
is, as it appears to me, nothing in the state
of the record, which should induce us to
disturb the ordinary rule as to the granting
of bills of particulars. The fear and danger
of the party here were, that, if he gave a
general bill of particulars, stating in fact
that he was going for the sum of 94*l.* 9*s.*
4*d.*, the defendant would turn round upon
him. It appeared to my Brother Park, before
whom the matter came, that, under all the
circumstances, the order required should
be refused, as here there was no count at
all, upon which the order could be founded,
or to which it could be referred. There
was here merely a count upon a bill of
exchange ; and in such case a bill of par-

(2) He also objected to the affidavit, made by the
defendant, that it did not contain his addition ; and
he supported his objection by reference to the 5th rule
of Hil. term, 2 Will. 4, Rule 1, K.B. 15 Car. 2 ;
Lawson v. Case, 1 Cr. & M. 481 ; s. c. 2 Law J. Rep.
(N.S.) Exch. 216 ; *Anonymous*, 6 Taunt. 73 ; but
upon this point the Court gave no opinion.

(3) 5 Dowl. P.C. 80.

(4) 2 Car. & Pay. 267.

particulars is not ordered to be given, unless a strong case indeed is made out, and it is shewn satisfactorily and clearly, that the party cannot go on without it. But this is not the fact here. Then it appears from the affidavits, that both parties have come into court with the perfect knowledge of each other's case. The defendant, in his computation of the various items, goes, with the exception of a sum less than 2*l.*, to the limit and extent of the plaintiff's demand; and I would not, upon account of such slight difference, disturb the order of the learned Judge, who, in my opinion, was quite right in the course which he adopted. The rule should, I think, be discharged, with costs.

GASELEE, J.—I agree. There is no bill of particulars granted when a bill of exchange is the subject of litigation. The party might, with as much propriety, ask for a bill of particulars, if an action were brought against him upon a common money bond.

VAUGHAN, J. was of the same opinion.

Rule discharged, with costs.

1836. } *In the matter of the acknow-*
Nov. 15. } *ledgment of ANNSCHOLFIELD.*

Deed — Acknowledgment by Married Woman.

The rules of Hilary term, 4 Will. 4. do not prevent an interested commissioner from making the affidavit or affirmation of verification of acknowledgment, directed by section 85 of 3 & 4 Will. 4. c. 74, and of the other circumstances required by those rules to be stated in such affidavit or affirmation.

An acknowledgment of a deed by Ann Scholfield, a married woman, having been taken before John H. Shaw and Richard E. Payne, two commissioners appointed for the West Riding of York, pursuant to the act, 3 & 4 Will. 4. c. 74, one of the commissioners, Mr. Payne, who was a Quaker, made an affirmation, verifying the same as required by the 85th section of the statute. The clerk of enrolments having refused to file the certificate and affirmation of record, on the objection, that Mr. Payne was concerned and interested as an attorney in the proceedings, which the officer considered was prohibited by

the rule of Hilary term, 4 Will. 4.—3 *Law J. Rep.* (N.S.) C.P. 1.

Wilde, Serj. now applied for a rule, calling upon that officer to file the certificate and affirmation of verification of record, submitting that the rules did not contain the supposed prohibition; but, on the contrary, clearly contemplated such a case as the present, by declaring, that the affidavit might be made, when found convenient, by one of the commissioners. He also suggested, that the facts required to be deposed to in the affidavit or affirmation, were such as would be peculiarly within the knowledge of an attorney concerned in the proceedings, and consequently that he was the fittest person to make an affirmation or affidavit.

TINDAL, C. J.—I see no reason for the objection started by the officer upon this occasion; and I am of opinion, that the rule for his enrolling the certificate of the commissioners of the acknowledgment of the married woman, and the affirmation of verification, and of the additional matters required by the rules of court, should be made absolute. I have little doubt but that the primary intention of the Court upon this subject was, that when a married woman should make an acknowledgment of any deed under or by virtue of the statute, she should do so under the treble sanction of the two commissioners and a practising attorney. This, I repeat it, was the primary object. When the rule was framed, the Court had some discussion upon the subject with some of the most eminent solicitors in London, who raised an objection to the rule, and complained that although they were placed by the statute in a situation bearing some analogy to a judicial one, they were obliged to make affidavits, and they required that full effect should be given to their certificates without the sanction of an oath. The Court yielded to the objection, and were satisfied with the affidavits of others. This was found in the result to be attended with inconvenience; and, consequently, the commissioner who was called the *disinterested* one, was first allowed to make the affidavit of verification (1). Under all circumstances, this va-

(1) The rule by which the making of the affidavit was confined to the *disinterested* commissioner,

riance from the rule was allowed as most convenient; and it was upon such principle, that of convenience, the commissioner was allowed to make an affidavit.

GASELEE, J.—I, too, think that this rule should be made absolute. This discussion has brought back to my mind that which occurred at the time when the rule was made. In fact, it was I myself who framed the rule, and then submitted it to my Brothers for their approbation. The rule owed its existence to this: married women were sent from the country by attornies to their agents in town, and the latter were called on to swear to the identity of those whom they had never seen before, and of whom they knew nothing, except that they were recommended to them by their clients; and it often happened that the party who brought them before a Judge, was unwilling to swear to that of which he had not certain and personal knowledge.

BOSANQUET, J.—I also agree, that this rule should be made absolute. The rule was made, first, as stated, by my Lord and my Brother Gaselee. The commissioners were not called upon to make their affidavits, and the inconvenience above referred to appeared to follow from it, upon the arrival of married women from the country. This was the reason for the rule, and no other interpretation can be put upon it.

Rule absolute, for the officer to enrol the certificate of the commissioners of the acknowledgedment of the married woman, and the affirmation of Mr. Payne, verifying the same.

1836. }
Nov. 19. } MUNK V. SHENSTONE.

Rule to plead—Judgment for want of Plea.

Where the defendant puts one plea upon the record, which always remains there, and upon leave to amend, on payment of costs,

was that of Michaelmas term, 4 Will. 4, Jervis's New Rules, p. 19, 22, and was revoked by the rule of Hilary term, 4 Will. 4, *ibid.* p. 24, a, 24, c, where the power of taking the affidavit is not restricted to the disinterested commissioner; the words are, "Such affidavit may be made, where it is found convenient, by one of the commissioners."—See 3 Law J. Rep. (N.S.) C.P. Reg. Gen. 1.

adds another, a rule to plead several pleas is not necessary, under the 34th rule of Hil. term, 2 Will. 4; and judgment signed for want of such rule will be set aside.

This was an action of assumpsit for money had and received, to which the defendant first pleaded the general issue, but afterwards obtained an order to amend by adding a plea of the Statute of Limitations. Both pleas were delivered to the defendant's attorney, and received by him without objection; but he afterwards treated the pleas as a nullity, and signed judgment, on the ground that the defendant had obtained no rule to plead two pleas.

Wilde, Serj. having obtained a rule to set aside the judgment for irregularity,

Adams, Serj. shewed cause, contending, that the judgment was regular, as the case was within the rule 34. of Hilary term, 2 Will. 4. (1).

Wilde, Serj., in support of the rule, maintained, that the rule referred to did not apply to or comprehend a case like the present, where several pleas did not appear originally upon the record, where one was merely added upon leave given to amend, and where the plaintiff received the costs of the amendment, and the pleas in the amended state, without objection. Besides, the plea of the general issue, originally given, always remained on the record; and how, in such case, could the plaintiff think of signing judgment as for want of a plea?

TINDAL, C.J.—This case is not, I think, within the 34th rule of Hil. term, 2 Will. 4, which refers to matter put originally upon the record, and not to cases like this, where a plea is, by leave, added to one which always remains upon the record. This latter incident of a plea being always on the record, does, in my opinion, constitute an essential difference between this and the cases to which the rule of court was intended to apply; and the rule for setting aside the judgment should be made absolute, without costs.

The other Judges concurring—

Rule absolute accordingly.

(1) The words of which are—"If a party plead several pleas, avowries, or cognisances without a rule for that purpose, the opposite party shall be at liberty to sign judgment."

1836. } *Ex parte GROVES AND AN-*
Nov. 22. } *OTHER.*

Lien—Fees of Commissioner under 3 & 4 Will. 4. c. 74.

The commissioners under the 3 & 4 Will. 4. c. 74. have a lien for their fees upon the deeds which come into their possession in the performance of their duty. But one commissioner, having been paid his own fees, cannot retain deeds for the fees of another, unless authorized by that other to do so.

This was a rule calling upon Mr. Roberts, a commissioner under the Act for the Abolition of Fines and Recoveries (3 & 4 Will. 4. c. 74.), to shew cause why he should not deliver up certain deeds in his possession, and on which he claimed a lien. Mr. Roberts and Mr. Collis, another commissioner, had signed two certificates of acknowledgment under the 85th section of the act, and the deeds having been placed in Mr. Roberts's hands for inspection, he at first refused to return them until his own fees were paid, and, after that payment had been made, still retained them on the ground of a lien for the fees of his colleague Mr. Collis.

Whateley shewed cause, and contended, that such an application, if made at all, should be made against Collis, in whose possession the deeds should be supposed to be, as it was for his benefit and advantage they were retained. He cited and relied upon *Blackbourn v. Brown* (1), where it was held, that the clerk of the warrants may refuse to file a warrant or pass a fine till the attorney employed by the parties has paid his termage fees. Besides, it was to be inferred from the affidavit of the party, that he had authority from Collis to retain the deeds for his fees.

Humfrey, in support of the rule, denied that such fact was stated in the affidavit, and of course it could not be inferred. The affidavit merely alleged, that Roberts had authority from Collis to receive his fees, which was very different from an authority to retain for them. The deponent also stated, that it was on the suggestion of his own mind that he retained the deeds; it did not even appear that he communicated

his ideas on the subject to Collis. The right of lien was personal, it was not transferable. The party had a right to retain that on which he had done work and expended labour; and, if the Court rejected the present application, they would carry the doctrine of lien to a dangerous and unprecedented extent.

TINDAL, C. J.—It is perfectly clear, that these two gentlemen, appointed to act as commissioners under the statute, have a lien on the deeds which come into their joint possession in the execution of that duty which has been cast upon them by law. It is also clear, that each of them had a lien on the deeds in his possession for his own fees until he was paid their amount; and I am also of opinion, that, if an authority was given by one of the commissioners to the other to retain the documents until the fees of both were paid, the party to whom the authority was given would be justified in doing so, more especially as, generally speaking, deeds, or at least, a single deed, is not divisible. If this were not so, the commissioners would have no remedy,—at all events, no practical remedy, for the recovery of small sums. But here, I think, there is an incident unaccounted for; there is a point of time unexplained. It does not appear that an express authority was given by one of those gentlemen to the other to detain the deeds in question, and therefore it appears to me that the rule should be made absolute. But, considering all the circumstances in which this matter originated, and under which this application has been made, it should, I think, be made absolute without costs.

The other Judges concurring—

Rule absolute accordingly.

1836. } *In re THE SHERIFF OF CAM-*
Nov. 23. } *BRIDGE.*

Interpleader Act—Costs.

Where none of the parties appear to a rule obtained by the sheriff under the Interpleader Act, the Court upon motion will order the parties to be enjoined from bringing an action against the sheriff, who is exonerated from liability, and will order it to be referred to

(1) 1 Bing. 277; s. c. 1 Law J. Rep. C.P. 102.

Prothonotary to ascertain what portion of the goods in question should be sold to pay the plaintiff his expenses, poundage, &c.

In this case, the sheriff of Cambridge was taken in execution certain goods to satisfy adverse claims were made, gave the notices, and obtained a rule under the Compulsory Act, requiring the contending parties to appear, &c. None of the parties appeared, and—

The plaintiff, on behalf of the sheriff, prayed for a declaration of the Court to enable the sheriff to obtain his expenses. He stated that the case was *primæ impressionis*. The plaintiff was at a loss to know how he should recover the purpose of reimbursing himself his expenses and charges, which he had necessarily incurred.

The learned Serj., *amicus Curie*, reminded the Court that the case was not without precedent: a similar instance had occurred before, and then the rule was thus made:—the sheriff was declared to be entitled to sell, and pay the money into Court, and the two contending parties were enjoined from ever interfering against him.

The Court inquired, whether, in the case before them, the goods had been sold, or remained in the hands of the sheriff; and being informed that they were still in possession of the officer unsold, they held that such part of the goods should be sold as should cover the expenses, poundage, &c. of the sheriff; that the plaintiff should be enjoined from bringing an action against the sheriff, who was exonerated from liability; and, to prevent the plaintiff from carving out too much upon a writ against himself, it was to be referred to the Prothonotary to sell such portion as he might think fit.

Rule absolute accordingly.

4. } WILSON AND WIFE v.
LAINSON.

—Battery—Admission.

Action of trespass for an assault, and false imprisonment of the plaintiff E. the defendant pleaded, first, that E. was not the

wife of the plaintiff; and thirdly, as to the assault and imprisonment, a justification under a writ of *ca. sa.* On a verdict for the plaintiff on the first two pleas, and for the defendant on the third:—*Held, that the battery was not admitted on the record; and, therefore, that the Judge had power to certify under 43 Eliz. c. 6, to deprive the plaintiff of full costs.*

To this action of trespass for assault, battery, and imprisonment of the plaintiff's wife, the defendant pleaded—first, not guilty; secondly, that the plaintiff Esther was not, nor is she, the wife of the other plaintiff, in manner and form as alleged; thirdly, a justification of the assault and imprisonment, (without referring to the battery,) under a writ of *ca. sa.*, directed to the sheriff of Middlesex. Upon verdict for the plaintiffs on the first two pleas, damages one farthing, and for the defendant on the third plea, Bosanquet, J. certified, under the 43rd of Eliz. c. 6. s. 2. (1), that the damages did not amount to 40s.

Martin had obtained a rule for setting aside the certificate, and having it referred to the Prothonotary, to tax the plaintiffs their full costs, on the ground, that the plaintiff was entitled to his full costs, under 22 & 23 Car. 2. c. 9. s. 166, as a battery was admitted on the record. He cited *Bone v. Daw* (2), *Wiffin v. Kincard* (3), *Briggs v. Bomgin* (4), the note to *Green v. Jones* (5), and *Hughes v. Hughes* (6).

Talfourd, Serj. and Ball shewed cause. —No battery is admitted upon the record.

(1) Which enacts, "That if upon any action personal to be brought in any of the courts at Westminster, not being for any title or interest of lands, nor concerning the freehold or inheritance of any lands, nor for any battery, it shall appear to the Judges of the same court, and so signified or set down by the Justices before whom the same shall be tried, that the debt or damages to be recovered therein in the same court shall not amount to the sum of 40s. or above, that in every such case, the Judges and Justices before whom any such action shall be pursued, shall not award for costs to the party plaintiff any greater or more costs than the sum of the debt or damages so recovered," &c.

(2) 3 Ad. & El. 711; s. c. 4 Law J. Rep. (N.S.) K.B. 241.

(3) 2 New Rep. 471.

(4) 2 Bing. 333; s. c. 3 Law J. Rep. C.P. 25.

(5) 1 Wms. Saund. 300.

(6) 2 Cr. M. & R. 663; s. c. 5 Law J. Rep. (N.S.) Exch. 31.

F

SERIES, VI.—C.P.

It is expressly denied by the first plea of not guilty, and the certificate given at the trial, before the *postea* was entered up, shews that it was not proved. The second plea contains no admission of the battery, but merely traverses one of the allegations as to a distinct collateral fact—viz. the character of the female plaintiff; and the admission of the imprisonment in the third plea, is not an admission of the battery, inasmuch as the former opinion, that every imprisonment includes a battery, is now exploded—*Emmett v. Lyne* (7). *Bone v. Daw*, *Smith v. Edge* (8), and *Hughes v. Hughes*, were cases in which either the battery, or the freehold, was clearly admitted in the plea.

Martin, in support of the rule, contended, that the second plea was an admission of the battery; and he cited *Smith v. Edwards* (9), and *Jones v. Brown* (10).

Cup. adv. vult.

TINDAL, C.J.—The question in this case is, whether, notwithstanding the Judge's certificate under the statute 43 Eliz., the plaintiff is entitled to his full costs; and this depends on another question, whether a battery appears to be confessed upon the record; for actions for battery being expressly excepted out of the statute, if it appears judicially to us that this was an action for battery, the statute does not apply.

The plaintiff contends, that such admission appears on the record upon two grounds; first, because on the issue joined on the plea of not guilty, the *postea* has been entered up generally for him, and he insists that, as he has declared for a battery, and there is no exception of it in the finding of the jury, it must be taken, as against the defendants, that a battery was proved at the trial. But to this the answer appears obvious, that the question as to the evidence must be considered now as it was at the time the certificate was given, and at that time there had been no *postea* formally drawn up; and if the facts were such as that the Judge had the power to certify

at the moment the cause was decided, the defendants cannot be deprived of the benefit of such certificate by the subsequent voluntary act of the plaintiff himself.

The other ground on which the plaintiff relies is, that the second plea, taking issue only on a single fact alleged in the declaration, must be taken to be an admission of the battery. But we think, taking the whole of the record together, there is no necessary confession of the battery on this record. The plea of not guilty expressly denies it; the last plea, which is a plea in confession and avoidance, excludes the battery. The question, therefore, arises on the second plea alone.

Now this is not, in its form, a plea of confession and avoidance: it is a plea of traverse, or denial of a particular collateral fact alleged in the declaration; and if this plea had been pleaded alone, although the plaintiff might have contended that a cause of action was admitted by the defendant, yet he never could have contended that the whole of his ground of action was admitted; for his cause of action in this case is several and divisible. His action is maintainable, either for the assault or the battery, or the imprisonment; either of those grounds of action would support it. The admission, therefore, of a ground of action that is divisible, we consider no necessary admission of the whole, but that the plaintiff must still prove at the trial what part of his gravamen he relies on.

Holding, therefore, that there is no necessary admission of a battery on this record, we think the certificate of the Judge, certifying under the statute of Elizabeth deprived the plaintiff of full costs.

Rule discharged.

1836. }
Nov. 25. } MALACHY v. SOPER.

Slander of Title—Special Damage.

An action for slander of title is an action on the case for special damage sustained by reason of the speaking or publication of the slander; and therefore, whether it be oral, written, or printed, there must be an express allegation of some particular damage resulting to the plaintiff from such slander.

(7) 1 New Rep. 255.

(8) 6 Term Rep. 56.

(9) 4 Dowl. P.C. 621.

(10) 1 Bing. N.C. 484; a. c. 4 Law J. Rep. (N.S.) C.P. 124.

declaration stated, that the plaintiff possessed of certain shares in a silver mine which was worked and used for and on behalf of the plaintiff and other shareholders, to the great benefit, profit, and advantage of the plaintiff, and to the great increase of the value of his shares; that bills in Chancery had been filed by certain persons claiming a right to the said shares, praying an injunction from selling the said shares, and the appointment of a manager or receiver of the mine, to which bills the plaintiff and the other shareholders had demurred; and that the defendant published in a paper the following libel—"Wheal Brothers' silver mine: Tollervey v. Malachy; and v. Malachy.—In these cases, which are full of disputes relating to the celebrated mine Wheal Brothers, and which have been brought into the court of the Vice-Chancellor, the learned Judge, after hearing long arguments and a multitude of affidavits, has refused the demurrers, and granted the prayer of the petition, and persons duly authorized to work the mine in the workings;" by means of which the plaintiff had been greatly injured in his rights, and his shares were much devalued in value, and divers persons believed to have no right to the shares, and that the mine could not be lawfully worked or used for profit; and the plaintiff had been hindered and prevented from selling the shares, and from working the mine in so ample and beneficial a manner as he otherwise would have done, and from acquiring profits, emoluments, and advantages which otherwise would have come to him from the same:—

in arrest of judgment, that the action for a libel on the plaintiff in the course of his business and in the way of his livelihood, but strictly an action for a libel on his title to his shares, and that the damage alleged was not sufficient to maintain such an action.

declaration stated, that the plaintiff owned and at the time of the committing of the wrongs by the defendants as thereinafter mentioned, was possessed of and owned in divers, to wit, 1,600 shares or the whole into divers, to wit, 5,000 parts, to be divided, of and in a silver mine, commonly known and called by the name of "Wheal Brothers," situate, and being in the parish of Calstock,

in the county of Cornwall, such shares being of great value, to wit, of the value of 100,000*l*. That before and at the time of committing the wrongs by the defendants as hereinafter mentioned, the said mine had been worked and used, and was then being worked and used, for and on the behalf of the plaintiff and others, the holders of shares and interests in the said mine, to the great benefit, profit, and advantage of the plaintiff, and to the great increase of the value of his said shares. That, also before and at the time of the committing of the wrongs by the defendants as hereinafter mentioned, one Horatio Nelson Tollervey had instituted his certain bill of complaint in writing against Malachy, the plaintiff, and others, in the High Court of Chancery of our lord the king, and in and by the said bill of complaint the said H. N. Tollervey claimed to be a holder of, and interested in, divers shares in the said mine, and disputed the plaintiff's right to the whole of the said shares, and claimed in himself, the said H. N. Tollervey, a right in and to a part of the same. And the said H. N. Tollervey did, in and by his said bill of complaint, pray that the said Malachy, the plaintiff, and others, might answer the premises therein mentioned, and make a full and true disclosure and discovery of all and singular the matters therein mentioned, and that H. N. Tollervey might be declared to be entitled to $\frac{1}{388}$ th parts or shares of and in the said mines, or to such other parts or shares thereof as the said Court should be of opinion that he was entitled to, and that a proper legal assignment and transfer thereof might be made to him by all necessary parties; that the said Malachy, the plaintiff, and others, might be compelled to come to an account with the said H. N. Tollervey for so much of the profits which had been made in the said mine, as, under the circumstances in the said bill mentioned, the said H. N. Tollervey had been entitled to receive in respect of his shares, and so far as such profits had been divided among the shareholders, and to pay to the said H. N. Tollervey what should be due to him on such account; and also to pay to the said H. N. Tollervey from time to time his share of the profits of the said mine, which should be divided

and paid in respect of such shares as therein mentioned ; and that the said H. N. Tollervey might also be declared to be entitled to the like share and interest in the future term therein mentioned to have been granted in the said mine and premises, as he was entitled to in the therein mentioned lease of the 29th of September 1833 ; and that he might have the benefit thereof secured to him accordingly ; and that the said Malachy, the plaintiff, and others, might be restrained by the order and injunction of the said Court from selling or disposing of, or transferring the said H. N. Tollervey's share and interest in the said mine, or any other shares or interests in the said mine, to the prejudice of the said H. N. Tollervey's rights and interest therein ; and that some proper person might be appointed, by the said Court, receiver of the said mine and premises, with all usual and proper directions for carrying on the same under the direction of the said Court, to the end that the said H. N. Tollervey's shares of the profits thereof might be properly secured for his benefit ; or else that some proper person might be appointed by the said Court as receiver of $\frac{1}{388}$ th parts of the profits of the said mine, with all usual and necessary directions ; and that the said Malachy, the plaintiff, and others, might be restrained by the injunction of the said Court from retaining to their own use, or appropriating in any other manner, the said H. N. Tollervey's share of the said profit. And such proceedings were had in the said court, that before and at the time of the committing of the grievances by the defendants as hereinafter mentioned, the said Malachy, the plaintiff, and the others, had demurred to the said bill of complaint, and had demanded the judgment of the said Court of Chancery whether they should be compelled to make any further or other answer to the said bill, or any of the matters therein contained, and they prayed that the same might be thenceforth dismissed. That, also, before and at the time of the committing of the grievances by the defendants as hereinafter mentioned, one Richard Deadman Hayward had exhibited his certain bill of complaint in writing against Malachy, the plaintiff, and Samuel Lyle, in the High Court of Chancery of our Lord

the King, and the said R. D. Hayward in and by his said bill of complaint claimed to be entitled to be a holder of, and interested in divers shares in the said mine, and disputed the plaintiff's right to the whole of the said shares, and claimed in himself, the said R. D. Hayward, a right in and to a part of the same ; and the said R. D. Hayward did, in and by the said last-mentioned bill of complaint, pray that the said Malachy, the plaintiff, and S. Lyle might make a full and true disclosure and discovery of all and singular the matters in that bill mentioned, and that it might be declared that as against the said Malachy, the plaintiff, and S. Lyle, the said R. D. Hayward was entitled, not only to the two shares in the said bill mentioned, in the said mine, and the said property and effects belonging thereto, for which shares he had such certificates as in the said bill were mentioned, but also to five other 500 $\frac{1}{2}$ shares therein, and to all the profits thereof, from the 22nd of February 1834 ; and that the said Malachy, the plaintiff, and S. Lyle might be compelled to sign and deliver to the said R. D. Hayward certificates of his title to such five shares, or that the said Malachy, the plaintiff, and S. Lyle might be compelled to procure and deliver to the said R. D. Hayward such certificates ; and that he, the plaintiff, might be decreed to pay the costs of that suit, or the costs thereof so far as the same had been made necessary by his conduct ; and that the said Malachy, the plaintiff, and S. Lyle might be compelled to account with the said R. D. Hayward for the profits which had been already declared and divided in respect of the said mine, and to pay to the said R. D. Hayward $\frac{5}{388}$ th parts of such profits, and also to pay to the said R. D. Hayward for the time to come, what the said R. D. Hayward would be entitled to receive in respect of such shares as aforesaid of the profits and proceeds thereafter to be divided amongst the owners of the said mine ; and that the said Malachy, the plaintiff, and S. Lyle might be restrained by the injunction of the said Court from selling or disposing of their or either of their interests in the said mine, without first giving to the said R. D. Hayward a proper transfer of such shares as aforesaid ; and that the said Malachy, the plaintiff, and S. Lyle

be in like manner restrained from any assignment of the said leases mentioned, or either of them; and the said R. D. Hayward might be set in the enjoyment of his said unmentioned shares of the said mine and the profits and the produce thereof; it should be necessary, then that some person or persons might be appointed by the said Court, as a manager or managers of the said mine, to manage and direct the same, and to sell and dispose of the produce thereof, with all usual and necessary directions, and that all usual and necessary directions might be given for settling the said accounts and effectuating several purposes aforesaid. And such proceedings were had in the said last-mentioned suit, that before and at the time of committing of the grievances by the defendants as hereinafter mentioned, the said Lyle had demurred to the said last-mentioned bill of complaint, and had obtained the judgment of the said Court of Chancery, whether he should be compelled to make any further or other answer to the said last-mentioned bill, or any of the matters therein contained, and prayed the said bill to be thence dismissed with his reasonable costs in that behalf sustained. Yet the defendants, well knowing the premises, greatly envying the happy state and condition of the plaintiff, and contriving wickedly and maliciously intending to deprive the plaintiff in his said rights, and to cause it to be suspected and believed that the said shares of the plaintiff were of no value, and that the plaintiff had no right to use or work the said mine as aforesaid, and to hinder and prevent the plaintiff from selling or disposing of his said shares, and from deriving or acquiring by the said mine any more profits, emoluments, or advantages whatever, and also to harass, oppress, impoverish, and ruin the plaintiff, to wit, on the 1st of January 1836, wrongfully and unlawfully did publish, and cause and procure to be published, a certain false, malicious, unfounded libel in a certain public newspaper, of and concerning the plaintiff's said shares, and the said using and working of the said mine, and of and concerning the aforesaid suits, bills, and decrees—that is to say—"Wheal Brothers

silver mine (meaning the said mine)—*Tollervey v. Malachy* (meaning the first-mentioned suit), and *Hayward v. Malachy* (meaning the second-mentioned suit); in these cases (meaning the said two suits), which arose out of disputes relating to the celebrated silver mine, Wheal Brothers, in the parish of Calstock (meaning the said mine), and which have been brought into the Court of the Vice Chancellor, the learned Judge, after hearing long arguments, and a multitude of affidavits, has set aside the demurrers (meaning the said demurrers) and granted the prayer of the petition (meaning the prayer of the petition in each of the said bills as aforesaid, for an account and an injunction), and persons duly authorized have arrived on the workings" (meaning the workings of the said mine); thereby then meaning that the said several demurrers had been set aside by the said Court, and that the prayer of the said petition on each of the said bills for an account and injunction had been granted by the said Court, and that persons duly authorized by the said Court, had arrived on the workings of the said mine, and were hindering and preventing the said mine from being used and worked as it was before the committing of the grievance, and as the same would have continued to have been in so ample and beneficial a manner for the plaintiff and others, the holders of shares in the said mine; whereas, in truth and in fact, at the time of the committing of the grievance, the said demurrers had not, nor had either of them, been set aside by the said Court, nor had the prayer of the said petition, on each of the said bills, for an account and injunction, been granted by the said Court: and whereas, in truth and in fact, at the time of the committing of the grievance, no person or persons, duly authorized by the said Court, had carried on the workings of the said mine, nor was nor were any person or persons hindering or preventing the said mine from being used and worked, as it had been before the committing of the said grievance, and as the same would have continued to have been, in so ample and beneficial a manner for the plaintiff, and others, the holders of shares in the said mine. By means of which said several premises, the plaintiff had been and was greatly injured in his said rights; and

the said shares so possessed by him, and in which he was interested as aforesaid, became and were much depreciated and lessened in value, to wit, in the value of 50*l.*, on and in respect of each of such shares, and divers persons had believed, and still did believe, that the plaintiff had little or no right to the said shares, and that the said mine could not lawfully be worked or used for the benefit of the plaintiff; and the plaintiff had been hindered and prevented from selling or disposing of his said shares in the said mine, and from working and using the same in so ample and beneficial a manner as he otherwise would have done; and the plaintiff had been otherwise hindered and prevented from gaining, acquiring, or deriving divers profits, emoluments, benefits, and advantages which otherwise would have arisen and accrued to him from the same; and also by reason of the premises aforesaid the plaintiff had been and was otherwise much damnified and injured.

On this declaration a verdict had been found for the plaintiff, damages 5*l.*

Talfourd, Serj. moved to arrest the judgment, upon the ground that the plaintiff had not alleged that he had suffered any special damage as to the estate in question, in consequence of the publication complained of, which was essentially necessary for the maintaining of the present action. He cited *Law v. Harwood* (1), where, in an action for slander of title, the plaintiff declared, that he was seised in fee as copyholder of lands in D, within the jurisdiction of the defendant's court: that the defendant said he had not any title to those lands. Upon verdict for plaintiff, it was assigned as error, that the declaration was not good, because he did not shew that, by the words used, he had any prejudice, as that he was bargaining with any one for the inheritance, &c.; and the Court agreed, that the declaration was not good, and so the judgment was erroneous, because the action is not maintainable without shewing special prejudice. He also referred to *Rome v. Roach* (2).

Bompas, Serj., Erle, Crowder, and Butt, shewed cause.—This is not merely an action for slander of the plaintiff's title to his

shares in the mine, but more properly, for defaming him in his business, employment, and mode of obtaining his livelihood; and, therefore, no allegation of special damage is necessary. But, conceding that the action is for defamation of title, the same distinction may be taken as in other cases of slander, that the injury complained of is a printed libel, and the action may be sustained, although it could not have been supported, if the slander had been merely oral. Besides, the allegation of special damage is unnecessary, if the words themselves import damage to the plaintiff's estate. Thus, in *Bois v. Bois* (3), where for calling a widow, who held an estate while sole and chaste, *whore*, falsely and maliciously, with intent to oust her of her estate, after verdict for the plaintiff, on issue of not guilty, it was moved in arrest of judgment, that, no special damage being laid, the words were not actionable; but, by the Court—they import damage in themselves in this case in respect of her estate; as for calling a man *thief*, an action lies without special damage, because the words import it in themselves. In *Pennymann v. Rabanks* (4), it was held, that an action was maintainable for slandering the plaintiff's title to one who was in speech to buy the plaintiff's land, by the words, "I know one that hath two leases of the land, who will not part with them at any reasonable rate," and it does not appear that there was any allegation of special damage. So also, in *Bold v. Bacon* (5), the only damage alleged was, that "none would buy the land of the plaintiff," without averring the loss of any specific purchaser; and *Hargrave v. Le Breton* (6) also shews, that the names of the persons, who might otherwise have been purchasers, need not be stated. In *Millman v. Pratt* (7) no special damage was alleged; and in *Hartley v. Herring* (8), an action for consequential damages from slander for imputing incontinence to the plaintiff, it was held enough to state, that he was employed to preach to a dissenting congregation at a certain licensed chapel,

(3) 1 Lev. 134.

(4) Cro. Elia. 437.

(5) Ibid. 345.

(6) 4 Burr. 2422.

(7) 2 B. & C. 486.

(8) 8 Term Rep. 130.

(1) Cro. Car. 140; s. c. Sir W. Jones, 196.

(2) 1 Mau. & Selw. 304.

that he derived considerable profit from preaching; and that by reason of this, persons frequenting the chapel refused to permit him to preach, and continued to give him the profit, which he had and would otherwise have given, but saying who these persons were, or at what authority he was excluded. *Pitt v. Newland* (9) will not assist the defendant in the question there was, whether the action lay *bonâ fide*.

fourd, Barston, and Rowe, in support of the rule.—The action for slander of title is founded on the special damage sustained by the plaintiff, and therefore an allegation of special damage is essential. *Millman v. Millman* is no authority against that proposition, that case was decided on the ground of variance; and *Lowe v. Harwood* clearly shews, that the action is not maintainable without shewing special prejudice, and a slander of title does not in itself cause a loss without shewing particularly the use of loss by reason of the speaking of the words. So, in *Manning v. Avery* (10), an action of slander of title, judgment was reversed, as no special damage, or particular colloquium of treaty to sell to any person in certain was shewn, but only an offer to sell to any who would buy; and this was held to be too general; and *Harwood v. Dickenson* (11), per Wray, J. In all cases where one doth entitle himself to a thing, it is not actionable, except it be shewn that some damage cometh to the plaintiff by it, viz. that he cannot let it for a certain time. *Tasborough v. Day* (12) is to the same effect. The distinction between oral and written slander does not extend to slander of title; but the rule, that the mischief is not the natural and necessary result, but arises indirectly, it is alleged by way of special damage, is applicable. The argument that this action may be sustained as for a libel in respect to the plaintiff's trade and business, is not good, for there is no colloquium of such trade and business, which is indispensable in *Robbery v. Robbery* (13).

TINDAL, C. J.—In this case a verdict having been found for the plaintiff at the trial of the cause, with 5*l.* damages, a motion has been made to arrest the judgment, on the ground that the declaration does not state any legal cause of action. And we are of opinion that this objection is well founded; and that the judgment must be arrested.

This is not an ordinary action for defamation of the person, by the publication of slander either oral or written; in which form of action, no special damage need either be alleged or proved: the law presuming that the uttering of the slanderous words, or the publishing of the libel, have of themselves a natural and necessary tendency to injure the plaintiff. But this is an action to recover damages by reason of the publication of a paragraph in a newspaper, which contains no other charge than that the "petition in a bill filed in the Court of Chancery against the plaintiff, and certain other persons, as shareowners in a certain mine, for an account and an injunction, had been granted by the Vice Chancellor, and that persons duly authorized had arrived in the workings." The publication, therefore, is one which slanders, not the person or character of the plaintiff, but his title as one of the shareholders to the undisputed possession and enjoyment of his shares of the mine: and the objection taken is, that the plaintiff, in order to maintain this action, must shew a special damage to have happened from the publication, and that this declaration shews none.

The first question therefore is, does the law require in such an action an allegation of special damage? And, looking at the authorities, we think they all point the same way. The law is clearly laid down in *Sir W. Jones*, 196 (*Lowe v. Harwood*): "Of slander of title, the plaintiff shall not maintain action, unless it was *re verâ* a damage; *scil.*, that he was hindered in sale of his land; so there the particular damage ought to be alleged." And in addition to the cases cited at the bar, viz. *Sir John Tasborough v. Day*, and *Manning v. Avery*, the case of *Cane v. Goulding* furnishes a strong authority. That was an action on the case for slandering the plaintiff's title, by speaking these words, viz.,

(9) 1 Mau. & Selw. 693.

(10) 2 Keb. 153.

(11) Cro. Eliz. 196.

(12) Cro. Jac. 484.

(13) Salk. 694.

"his right and title thereunto is nought, and I have a better title than he." The words were alleged to be spoken *falso et malitiosè*, and that he was likely to sell, and was injured by the words; and that by reason of speaking the words, he could not recover his tithes. After verdict for the plaintiff, there was a motion in arrest of judgment; and Rolle, C. J. said, "there ought to be a scandal and a particular damage set forth, and there is not here:" and upon its being moved again and argued by the Judges, Rolle, C. J. held, that the action did not lie, although it was alleged that the words were spoken *falso et malitiosè*, for "the plaintiff ought to have a special cause; but that, the verdict might supply; but the plaintiff ought also to have shewed a special damage, which he hath not done, and this the verdict cannot supply: the declaration here is too general, and upon which no good issue can be joined; and he ought to have alleged, that there was a communication had before the words spoken touching the sale of the lands whereof the title was slandered, and that by speaking of them the sale was hindered;" and cited several cases to that effect.

We hold, therefore, on the authority of these cases, that an action for slander of title is not properly an action for words spoken, or for libel written and published, but an action on the case for special damage sustained by reason of the speaking or publication of the slander of the plaintiff's title. The action is ranged under that division of actions in the Digests, and other writers on the text law, and such we feel bound to hold it to remain at the present day.

The next question is, has there been such a special damage alleged in this case, as will satisfy the rule laid down by the authorities above referred to? The doctrine of the older cases is, that the plaintiff ought to aver that, by the speaking, he could not sell or lease (*Cro. Eliz.* 197, *Cro. Car.* 140); and that it will not be sufficient to say only, that he had an intent to sell, without alleging a communication for sale (*R. 1, Roll.* 244). Admitting, however, that these may be put as instances only, and that there may be many more cases in which a particular damage may be equally apparent without such allegation,

they establish at least this, that in the action for slander of title, there must be an express allegation of some particular damage resulting to the plaintiff from such slander. Now the allegation upon this record is only this, "that the plaintiff is injured in his rights; and the shares so possessed by him, and in which he is interested, have been and are much depreciated and lessened in value; and divers persons have believed and do believe, that he has little or no right to the shares, and that the mine cannot be lawfully worked or used for his benefit; and that he hath been hindered and prevented from selling or disposing of his said shares in the said mine, and from working and using the same in so ample and beneficial a manner as he otherwise would have done." And we are of opinion, that this is not such allegation of special damage as the authorities above referred to require, where the action is not founded on the words spoken or written, but upon the special damage sustained.

It has been argued in support of the present action, that it is not so much an action for slander of title as an action for a libel on the plaintiff in the course of his business, and in the way of gaining his livelihood, and that such an action is strictly and properly an action for defamation, and so classed and held by all the authorities. But we think it sufficient to advert to the declaration, to be convinced that the publication complained of was really and strictly a slander of the plaintiff's title to his shares, and nothing else. The bill in Chancery, out of which the publication arose, is filed by Tollervey, who disputed the plaintiff's right to the whole of the shares, and claimed in himself a right to part of the same, and prayed that he might be declared to be entitled to some of them; and the only mention made as to the working of the mines, was with reference to the appointment of a receiver to the profits thereof. And we think it would be doing violence to the natural meaning of the terms of the publication, if we were to hold it to be published of the plaintiff in the course of his business or occupation, or mode of acquiring his livelihood, and not as referring to the disputed title of the shares of the mine.

has been urged, secondly, that how-
 necessary it may be, according to the
 authorities, to allege some particu-
 lar in cases of unwritten slander of
 the case of written slander stands on
 different grounds; and that an action may
 be maintained without an allegation of dam-
 age actually sustained, if the plaintiff's
 action is impeached by a written publica-
 tion of itself, it is contended, affords
 sufficient ground of injury to the plaintiff. No
 authority whatever has been cited in sup-
 port of this distinction. And we are of
 opinion that the necessity for an allegation
 of damage in the case of slander of
 title cannot depend upon the medium
 by which that slander is conveyed,
 whether it be through words, or
 by print; but that it rests on the
 nature of the action itself, namely, that it
 is an action for special damage actually
 sustained, and not an action for slander.
 The circumstance of the slander of title
 being conveyed in a letter or other publi-
 cation appears to us to make no other
 difference than that it is more widely and
 more readily disseminated, and the damages
 consequent more likely to be serious
 where the slander of title is by words
 than where it is by writing. But it makes no difference whatever
 as to the legal ground of action.

On these reasons we are of opinion,
 that the action is not maintainable, and
 the writ must be arrested; and, con-
 trary to what is contended, it becomes unnecessary to in-
 quire whether the *innuendo* laid in the de-
 claration is larger than it ought to have
 been. We therefore make the rule for arresting
 the writ absolute.

Rule absolute.

4. } BENNETT v. SMITH.

Notice.—Declaration—Rule to plead.

*Notice is given to defendant, that
 the declaration is left at the office, and he is
 to plead in eight days, such declara-
 tion is held to be well delivered from the
 time of giving such notice, not from the day
 the declaration is actually lodged in*

On the 26th of October, the plaintiff left
 a declaration at the office, and on the same
 day entered a rule to plead. On the 27th,
 the defendant, who resided at Liverpool,
 received a notice, that a declaration had
 been left at the office, with a direction to
 plead in eight days. The defendant im-
 mediately wrote to his agent in London,
 who searched the office for a rule to plead,
 commencing his search on the 27th of Oc-
 tober, the day when notice of the declara-
 tion was given. As he found no rule en-
 tered on or subsequent to that day, the
 defendant did not plead, and the plaintiff
 signed judgment.

Sewell had obtained a rule to shew cause
 why that judgment should not be set aside,
 on the ground, that the rule to plead, hav-
 ing been entered before the declaration was
 delivered, was a nullity, and, consequently,
 judgment was signed without any rule to
 plead. He relied on the rule of Michael-
 mas term, 1 Geo. 2 (1).

Crowder, in shewing cause, relied on
Shadwell v. Angell (2).

Sewell, in support of the rule, cited
Hutchinson v. Brown (3), *Weddle v. Brazier*
 (4), *Tidd's Prac.* 9th edit. 456, *Gascoigne*
v. Brown (5), and *Arch. Pr. C.P.* ed. 1834,
 p. 192.

The COURT said, they would speak to the
 Judges upon the subject, and inquire as to
 the practice of the other Courts; and now

Per Curiam.—We find by the practice,
 as well of this as of the other courts, that
 a rule to plead should not be left at the
 office until notice of declaration has been
 given; consequently, the judgment here
 was irregular, and the rule for setting it
 aside should be made absolute, but without
 costs.

(1) Which directs, that "where a copy of the
 declaration is left in the office, such declaration shall
 be deemed well delivered to the defendant from the
 time of giving such notice, and not otherwise."

(2) 1 Burr. 55.

(3) 7 Term Rep. 298.

(4) 1 Dowl. P.C. 639; a. c. 2 Law J. Rep. (N.S.)
 Exch. 4.

(5) Barnes, 227.

1836. }
Nov. 23. } STOCKLEY v. PAGET.

Affidavit of Debt—Writ of Capias.

An affidavit of debt for money paid, work and labour, &c., at the request of the defendant, need not specify the distinct amounts due for money paid, work and labour, &c.

If a writ of capias, issued against a defendant, expire by efflux of time, i.e. if the four months have elapsed from the teste, the second writ issued against the party into the same county should be an original, not an alias.

The affidavit of debt, on which the defendant had been arrested in this action, stated, that the defendant was indebted to the plaintiff in the sum of 156*l.* for money paid, laid out, and expended by the deponent unto and for the use of the said William Paget, and at his request, and for work and labour, care, diligence, and attendance, and jounies done, performed, bestowed, and taken by him, this deponent, for the said William Paget, at his request. A writ of *capias* had been issued into Middlesex, tested the 11th of January 1836, but the arrest was made under a second original writ, tested the 11th of November 1836, and issued into the same county.

Butt now applied for a rule to shew cause why the defendant should not be discharged out of custody, contending, that the affidavit of debt should have specified the distinct amounts due for money paid, work and labour, &c., as these could not all be the subject of one count; and that the second writ, as it was issued into the same county as the first, ought not to have been an original, but an *alias*.

The Court were decidedly of opinion that the objection to the affidavit of debt could not be maintained, as the words, "at his request" were added; and, upon ascertaining the *teste* of the first writ, they were of the same opinion as to the other objection, inasmuch as the four months for which the first writ was to be in force had expired long before the *teste* of the second, and thus the second could not be considered as a continuance of the first, but should be treated as an original writ, and could not be referred to or connected with

the former, under which nothing had been done; consequently—

Butt took nothing by his motion.

1836. }
Nov. 25. } DOE d. CAULDFIELD v. ROE.

Landlord and Tenant—Ejectment—Bail.

An agreement on which an application is made by a landlord against a tenant under 1 Geo. 4. c. 87. s. 1, must be stamped at the time when the application is made. It is not enough to get it stamped in the interval between obtaining the rule and shewing cause.

The act requires the landlord to produce the original agreement, or a counterpart or duplicate, and the production of a copy is insufficient.

Wilde, Serj., upon an affidavit in the terms prescribed by 1 Geo. 4. c. 87. s. 1, to which was annexed a copy of an agreement for a lease which had expired, had obtained a rule, on the part of the landlord against the tenant, under that statute.

Stephen, Serj., on shewing cause, took the preliminary objection, that the original agreement was unstamped at the time the rule was obtained, although it had been stamped previously to the day for shewing cause. He also submitted, that the production of a copy did not satisfy the terms of the statute, which required the landlord to produce "the lease, or agreement, or some counterpart or duplicate thereof."

Wilde, Serj., in support of the rule, submitted, that, as the instrument was now in court, properly stamped, the Court would not inquire when the stamp was affixed, but act upon the principle adopted in *Clarke v. Jones* (1), where, upon motion to set aside a cognovit, upon the ground that it was not stamped, the application was refused, as the party might get it stamped before cause was shewn. He also urged, that the object of the statute, which was to enable the Court to see whether the term had expired, was satisfied by the production of a copy as well as a duplicate or counterpart.

(1) 3 Dowl. P.C. 277.

TINDAL, C.J.—This, as it appears to me, is a difficulty which cannot be surmounted. The lease or agreement, upon which the landlord seeks to bring a party within this statute, should, in my opinion, be a lease or agreement, valid, binding, and perfect in all its parts, at the time when the landlord makes his application to the Court. Now it cannot be affirmed of an unstamped instrument that it is binding, valid, and perfect. With regard to the objection, that the motion should be made on the production of the original instrument or counterpart, as the statute is explicit, and entitles the landlord to move on “producing the lease or agreement, or some counterpart or duplicate thereof,” I think that the copy is insufficient. The rule on both points should be discharged.

The other Judges concurring—

Rule discharged.

1836. } STAVERS V. CURLING AND AN-
Nov. 25. } OTHER.

Ship and Shipping—Covenant—Condition precedent.

Articles of agreement between the owners of a South Sea whaler, and the master, contained covenants by the latter, that he would proceed to the southern whale fishery, procure a cargo of sperm oil, &c., or as great a proportion thereof as circumstances would permit, and having done so, would return in and with the said ship to the port of London, and there, at his own cost, together with the crew, discharge and deliver the cargo to the owners; that he would obey whatever orders might be received from the owners, and would be frugal of the stores of the ship, and would on no account whatever smuggle or permit it directly or indirectly, whereby the owners might be injured, binding himself to indemnify the owners in case of loss or damage thereby; and the owners covenanted, that on the performance of the before-mentioned terms and conditions, they would pay to the master one-twelfth part of the net proceeds of the cargo, &c.

Held, that the performance of the master's covenants was not a condition precedent to his right of action against the owners, but that the covenants were independent: and,

consequently, that in an action for the non-payment of the master's proportion of the proceeds of the cargo, for work and labour, &c., pleas, that the plaintiff did not pay strict attention to the preservation of the stores, that he traded in such a manner as that the owners were prejudiced, that he did not use his best exertions to procure a cargo, and on divers days was drunk and intoxicated, and suffered disorder and irregularity in the vessel, were held bad on demurrer.

The declaration stated, that, on the 9th of February 1832, by certain articles of agreement, bearing date the day and year aforesaid, between the defendants therein described as owners of the ship *Offley*, then lying at Gravesend in the river Thames, of the one part, and the plaintiff of the other part; which said articles of agreement were sealed with the respective seals of the defendants, but being in the possession of the defendants, the plaintiff could not bring them into court;—after reciting that the defendants, as owners of the ship *Offley*, had fitted out the same with all necessary stores, provisions, casks, and other implements for the prosecuting of a voyage to the southern whale fishery; and had appointed the plaintiff to be master of the said vessel, on the terms and conditions thereafter mentioned: it was by the said articles of agreement witnessed, and the said parties did thereby mutually covenant and agree to and with each other, in manner following: that is to say, the plaintiff for himself, his heirs, executors, administrators, and assigns, did thereby covenant, promise, and agree to and with the defendants, their heirs, executors, administrators, and assigns, that he, the plaintiff, would take upon himself the command of the said ship, and proceed in her as soon as she was ready for sea, to the southern whale fishery, and procure a cargo of sperm oil, head matter, ambergris, whale oil, seal skins, or any other produce, or as great a proportion thereof as might be under all circumstances within his power to obtain; and having done so, would return in and with the said ship to the port of London, and there at his own costs, together with the crew, discharge and deliver to the defendants, their heirs, executors, administrators, and assigns, whatever cargo the said vessel

might have on board; and also that he, the plaintiff, would obey such instructions relative to the said vessel and her voyage, as might from time to time be received by him from the defendants, their heirs, executors, administrators, and assigns; and likewise would be as frugal as possible with the stores and provisions of the said ship, and regularly enter, in a book to be provided for the purpose, the expenditure and appropriation thereof, and not dispose of any part of them without faithfully accounting with the defendants, their heirs, executors, administrators, and assigns, for the produce thereof; and further, that he would not on any account or pretence whatsoever smuggle or trade, or permit it directly or indirectly, whereby the said ship, or the owners thereof, might be prejudicially affected; or consent or suffer to be committed with his knowledge, any illegal act or acts on board the said ship, whereby the owner or owners might be injured: and he thereby engaged and bound himself, his heirs, executors, administrators and assigns, to indemnify, in case of such an event, the said owners, from and against any claim, loss, or damage which they might sustain thereby: and the plaintiff thereby engaged on all occasions to act for the interests of the said ship and owners, according to the utmost of his judgment and abilities: and the defendants, for themselves, their heirs, executors, administrators, and assigns, did thereby covenant, promise, and agree that, *on the performance of the before-mentioned terms and conditions* on the part of the plaintiff, they, the defendants, their heirs, executors, administrators, and assigns would pay, or cause to be paid unto the plaintiff, his heirs, executors, administrators, and assigns, a sum of money, equal to one twelfth part of the net proceeds which might be received from the sale of the cargo, after deducting the cost of the casks sold with the cargo of the ship, and all custom-house expenses, lighterages, pierages outwards and inwards, convoy, dock, and all other duties which were or might thereafter be imposed on ship and cargo, or either of them, together with lighterage, landing, wharfage, quaying, coopering, commissions, and all other charges and expenses attending the landing and sale of the said cargo, together with the

amount of any disbursements for refreshments or fresh provisions which might have been made during the voyage by the said master: and further, the defendants agreed to allow to the plaintiff one per cent. upon the aforesaid net proceeds after the above recited deductions had been made therefrom, as by the said articles of agreement, reference being thereunto had, would more fully and at large appear. And the plaintiff said, that afterwards, to wit, on the 1st of March in the year aforesaid, the plaintiff took upon himself the command of the said ship, and, the same being ready for sea, then proceeded in her for the southern whale fishery; and afterwards, to wit, on &c., and on divers days between that day and the return of the said ship to the said port of London, as hereinafter mentioned, at and in the said southern whale fishery, procured for the said ship a cargo, to wit, 374 tons of sperm oil, head matter, ambergris, whale oil, seal skins, and other produce of great value, to wit, of the value of 10,000*l.*, being the best cargo that, under all the circumstances, it was in the power of the plaintiff to obtain. That the said cargo being so obtained, and on board the said ship, afterwards, to wit, on the 1st of January 1835, the plaintiff, in and with the said ship, the said cargo being and continuing on board thereof, returned to and arrived at the said port of London, and then and there at the said port, at his, the plaintiff's, own cost, together with the said ship, discharged and delivered to the defendants the said cargo, being of the value aforesaid. That the plaintiff, during the voyage aforesaid, obeyed all instructions relative to the said vessel and her said voyage, from time to time received by him, the plaintiff, from the defendants, or either of them, and was as frugal as possible with the stores and provisions of the said ship, and regularly entered in a certain book provided for that purpose the expenditure and appropriation thereof, and faithfully accounted to the defendants for the produce of every part of the stores and provisions aforesaid by the plaintiff disposed of during the voyage. That the plaintiff during the said voyage did not smuggle or trade, or permit it directly or indirectly, whereby the said ship or owners might be or were prejudicially affected, and did not consent or suffer to be committed

his knowledge, any illegal act or acts toward the said ship, whereby the owner or owners might be injured, but, on the contrary thereof, the plaintiff on all occasions acted for the interest of the said ship and owners to the utmost of his judgment and abilities; of all which several premises the defendants afterwards, and after the return of the said ship to the port of London to wit, on &c. had notice. That the cargo, after the return of the said ship aforesaid to the port of London, to wit, on &c., was, by the defendants, sold for a certain sum, to wit, the sum of 10,000*l.*; and the net proceeds received by the defendants from the said sale, after deducting the cost of the casks sold with the cargo, and all custom-house expenses, lighterages, pierages outwards and inwards, convoy, dock, and other duties levied on the said ship and cargo, or any of them, together with lighterage, wharfage, quaying, coopering, commissions, and all other charges and expenses attending the landing and sale of the cargo, together with the amount of the disbursements for refreshments and fresh provisions made during the said voyage by the plaintiff, amounted to a large sum, to wit, the sum of 6,000*l.*, whereof the defendants then had notice; whereby, and by means of the premises, an action hath been brought to the plaintiff, to demand and receive of or from the defendants a large sum, to wit, the sum of 500*l.*, being one-fifth part of the said net proceeds, to wit, of the said sum of 6,000*l.*; and thereby and by means of the premises, an action hath accrued to the plaintiff to demand and have, of and from the defendants, a certain other large sum, to wit, the sum of 1,000*l.*, being one per cent. upon the said net proceeds, to wit, on the said sum of 10,000*l.*. Yet the defendants have never at any time paid to the plaintiff the said sums of 500*l.* and 60*l.*, or either of them, or part thereof.

The declaration also contained a count for work and labour, money paid, and on account stated.

The second plea alleged, that, after the making of the agreement in the first count mentioned, and before the commencement of the said voyage, to wit, on the 9th of January 1832, the plaintiff received from

the defendants certain instructions relative to the said vessel and her said voyage, whereby the defendants instructed the plaintiff among other things, during the said voyage to pay the strictest attention to the preservation of the stores of all kinds belonging to the ship, and to be careful in bringing the ship and remaining stores home in the best possible order for undertaking a future voyage: that the plaintiff should cautiously abstain himself, and strictly prohibit all on board the said vessel from engaging in any sort of trade whatsoever: that the plaintiff should studiously avoid putting in anywhere except when urgent and unavoidable necessity impelled him to do so: that the plaintiff should use his best exertions to obtain in the least possible time a full cargo for the said ship or vessel; should endeavour to maintain order and regularity therein, and to promote the health and comfort of all on board the said vessel during the voyage. That the plaintiff disobeyed the said instructions in this, to wit, that he did not during the said voyage pay the strictest attention to the preservation of the stores of all kinds belonging to the ship, and was not careful in bringing the remaining stores home in the best possible order for undertaking a future voyage; but, on the contrary thereof, during the said voyage did carelessly, negligently, and wilfully damage and suffer to be damaged, certain stores which had been and were provided, and were during the said voyage the stores of the said ship, and which were not used during the voyage, whereby the same were rendered unfit for undertaking a future voyage; and that the plaintiff also disobeyed the said instructions in this, to wit, that he did not cautiously abstain from engaging in any sort of trade whatsoever, but, on the contrary thereof, during the time aforesaid, on divers days between the said 9th of February 1832, and the 7th of August 1835, and during the said voyage, was engaged in trade, and did trade for his own personal advantage. That the plaintiff also disobeyed the said instructions in this, to wit, that he did not avoid putting in anywhere except when urgent and unavoidable necessity compelled him so to do, but, on the contrary thereof, during the said voyage, put in to divers, to wit, ten ports and ten

harbours, and stayed and continued therein for divers long spaces of time, that is to say, for two months in each of the said ports and harbours, although not compelled by any urgent or unavoidable necessity so to do. That the plaintiff also disobeyed the said instructions in this, to wit, that the plaintiff did not use his best exertions to obtain in the least possible time a full cargo for the said ship or vessel, and did not, during the voyage, maintain order and regularity in the said vessel, or promote the comfort of all who, during the said time, were on board the said vessel; but, on the contrary, the plaintiff, on divers days and times during that time and during the said voyage, to wit, on the 9th of February 1832, and on divers other days and times between that day and the 7th of August 1835, was drunk and intoxicated, and caused and suffered disorder and irregularity in the said vessel, although he might and could then have maintained order and regularity therein. That the plaintiff, during the said voyage, also disobeyed his said instructions in this, to wit, that, during the whole of the said voyage, he rendered the said vessel and the said voyage uncomfortable to the crew who, during that time, were on board the said vessel: concluding with a verification.

Third plea—that the plaintiff, during the said voyage, to wit, on the said 9th of February 1832, and on divers days between that day and the 7th of August 1835, did trade in such a manner that the owners of the said ship were prejudicially affected thereby: concluding to the country.

Fifth plea—so far as related to the non-payment of the said sum of money, in which the defendants were alleged to be indebted to the plaintiff, for the price and value of work done by the plaintiff for the defendants at their request,—that the said work was done by the plaintiff for the defendants in and about the taking upon himself the command of the said ship in the first count mentioned, and proceeding in her to the southern whale fishery, as in the said first count mentioned, and in procuring for the same ship a cargo, and in returning in the said ship and in the command thereof to the port of London, and there discharging and delivering to the defendants the said cargo: that such work was done

and performed by the plaintiff for the defendants, under and by virtue of the said articles of agreement in the said first count mentioned: and that the plaintiff did, during the said voyage, to wit, on the 9th of February 1832, and on divers days between that day and the 7th of August 1835, trade in such a manner that the owners of the said ship were prejudicially affected thereby: concluding with a verification.

Demurrer and joinder.

Whately, in support of the demurrer.—The pleas are bad, as the covenants are not dependent, and conditions precedent, but independent, and the remedy against the plaintiff for the covenants he is alleged to have broken, is by cross-action. The difficulties that formerly arose upon this subject have been removed by the doctrine of Lord Mansfield in *Boone v. Eyre* (1), “That where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other; but where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent.” This distinction was acted on in *Davidson v. Gwynne* (2), where it was held, that a master of a ship was entitled to his full freight, though he had not sailed with the first convoy, according to agreement; his sailing with such first convoy not being a condition precedent to his recovering freight for the voyage actually performed, but a distinct covenant, for the breach of which he was liable in damages; and in *Ritchie v. Atkinson* (3), where a master agreed to deliver a complete cargo, and only delivered half one, and it was held, that the delivery of a complete cargo was not a condition precedent, and the master might recover freight for the short cargo, as the freighter had his remedy in damages. The principle was confirmed in *Storer v. Gordon* (4), in *Pullen v. Staniforth* (5), and in *Carpenter v. Cresswell* (6). In *Campbell v. Jones* (7),

(1) 1 H. Black. 273.

(2) 12 East, 381.

(3) 10 East, 295.

(4) 3 Mau. & Selw. 308.

(5) 11 East, 230.

(6) 4 Bing. 409; s. c. 6 Law J. Rep. C.P. 27.

(7) 6 Term Rep. 571.

Kenyon said, "Whether these kinds of covenants be or be not independent of each other, must certainly depend on the sense of the case;" and clearly, if in the test, the covenants here must be construed as independent, for otherwise the plaintiff would not be entitled to any remuneration for his services, although he performed the voyage, and obtained a profit on the sale of the cargo, if he had not obtained a full cargo.

W. Richards.—The cases referred to determine this question, for each must depend upon its own circumstances, and the intention of the parties to be collected from the whole of the agreement. Now on looking at this agreement, it is for a protracted and expensive voyage, attended with considerable risk, and with the best management, it is impossible to infer that the owners intended to have a rigid performance of the covenants by the captain, as a condition precedent to remuneration, in order to ensure the greatest care and skill in bringing on board the most valuable cargo that could be procured. The words of the covenants are strongly in support of this conclusion, for the captain is to be entitled to his reward "on performance of the mentioned terms and conditions," which distinguishes this case from *Carpenter v. Swell*, where the defendant's engagements were in consideration of the plaintiff's services; and in *Rose v. Poulton* (8), where, as Lord Tindal, J. said, "there is a well-known distinction between cases where the consideration is for doing a thing is the doing of the thing, and where it is merely promising to do such a thing." The facts resemble those of *Glasebrook v. Woodrow*, where the plaintiff covenanted to furnish the defendant a school-house, and to let the same to him on or before the 1st of August 1797, and deliver possession on the 24th of June 1796, and in consideration thereof, the defendant covenanted to pay to the plaintiff a certain sum on or before the 1st of August 1797:—it was held, that these were independent covenants, and that the plaintiff could not sue for the money, with-

out averring that he conveyed or tendered to convey the premises in question. *Hunlocke v. Blacklowe* (10), which contains the words, "in consideration of the performance thereof," in which judgment was given for the plaintiff, will not assist the party here, for the covenant there was in the nature of a negative one.

Whately, in reply, denied the applicability of *Glasebrook v. Woodrow* to the present case. He also urged, that the importance contended for could not be attached to the words of the covenant, for according to Ashurst, J., delivering the judgment in *Hotham v. the East India Company* (11), there are no precise technical words required in a deed, to make a stipulation a condition precedent or subsequent: neither does it depend on the circumstance, whether the clause is placed prior or subsequent in the deed, so that it operates as a proviso or covenant. He also referred to *Thorpe v. Thorpe* (12).

Cur. adv. vult.

TINDAL, C.J.—The demurrer to the pleas of the defendant raises the question, whether the performance of the covenants entered into by the plaintiff in the articles of agreement on which this action is founded, forms a condition precedent to the plaintiff's right to recover on the covenants entered into by the defendants.

The rule has been established by a long series of decisions in modern times, that the question whether covenants are to be held dependent or independent of each other, is to be determined by the intention and meaning of the parties as it appears on the instrument, and by the application of common sense to each particular case; to which intention, when once discovered, all technical forms of expression must give way. And one of the means of discovering such intention has been laid down with great accuracy by Lord Ellenborough, in the case of *Ritchie v. Atkinson*, to be this, "that where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other; but where the covenants

(10) 2 Saund. 155, B; s. c. 1 Mod. 164.

(11) 1 Term Rep. 645.

(12) 1 Lord Raym. 662; s. c. 2 Salk. 171.

go only to a *part*, there a remedy lies on the covenant to recover damages for the breach of it, but it is not a condition precedent."

Now, applying that distinction to the consideration of the covenant in question, we think the necessary inference is, that it was not the intention of the contracting parties that any of the covenants entered into by the plaintiff, the captain of the ship, should form a condition precedent to his right to recover on the covenant entered into by the defendants, the ship-owners, for his stipulated remuneration. Thus, for instance, if the covenant to procure a cargo of sperm oil, &c., or as great a proportion thereof as might be, under all circumstances, within the power of the plaintiff to obtain, be held to be a condition precedent, a very small and trifling deficiency from the best possible cargo, if attributable to any the slightest carelessness on the part of the plaintiff, would occasion the total loss of all his profits of the voyage; whereas, if the breach of covenant were made the subject of an action by the defendants, the compensation to them for such breach would correspond exactly with the extent of their injury. The same observation applies, in a still stronger degree, to the non-performance of the several other covenants set out and relied upon in the second and last pleas; which covenants might be broken, to the letter, with very little damage resulting therefrom to the ship-owner, whilst, on the other hand, by treating them as conditions precedent, a trifling injury to one party would occasion the loss of all the remuneration to the other for long and laborious service.

The parties to such a contract may undoubtedly, if they think proper, agree that the captain's right to recover any remuneration for his services shall be conditional only, and shall depend on his strict performance of the covenants he enters into: and if words are used in the contract so precise, express, and strong, that such intention, and such intention only, is compatible with the terms employed, however inconsistent it may be with general principles of reasoning, a Court can only give effect to such declared intention of the parties. The only question in every particular case is, whether such intention is so

declared. In this case it is insisted on the part of the defendants that such must be considered to be the intention; for that the defendants' covenant is entered into with the plaintiff, not simply in consideration of the plaintiffs' covenants and agreements, but "on the performance of the before-mentioned terms and conditions on the part of the plaintiff;" which words, it is argued, must of necessity shew the intention that the performance by the plaintiff must be a condition precedent, and not rest in covenant merely. And if this were *res integra*, the argument would undoubtedly be strong. But in the case of *Booth v. Eyre*, the leading case on this subject, and in which the distinction before adverted to is first clearly established, the defendant covenanted that "the plaintiff was to and truly performing all and everything therein contained on his part to be performed," he the defendant would pay to the plaintiff an annuity. In that case the performance of the plaintiff's covenant is made the consideration for the defendant's liability according to the strict technical frame of the agreement; but in that case it was held that the obvious intention of the parties was opposed to it, and such intention was allowed to prevail. The case also of *Hollock v. Blacklowe* is strong to shew that the courts of justice are more anxious to do justice and to be governed by the intention of the parties, than to follow the strict technical form of words used in the instrument.

We think, therefore, the authorities are able us to give effect in this case to the intention which appears to us the intention of the parties; namely, that the ship-owners should have their remedy in damages for the covenants entered into by the captain for any loss occasioned by the breach thereof; but that a failure in the full literal performance of those covenants on the part of the captain should not be set up by the ship-owners as an answer to an action on their own covenants. And we therefore give

Judgment for the plaintiff

1836. } TROWER AND OTHERS v.
Nov. 25. } CHADWICK.

Case—Negligence—Pleading.

In an action on the case, a count alleged that the plaintiffs were possessed of a vault or cellar adjoining other vaults and walls, and which in part rested upon and was of right supported in part by part of those adjoining vaults and walls; and that the plaintiffs were of right entitled that their vault or cellar should be so supported; and that there were foundations belonging to and supporting the plaintiffs' vault or cellar, which the plaintiffs of right ought to enjoy; and that the defendant wrongfully and injuriously took down and removed the adjoining vaults and walls without shoring or propping up, or taking other reasonable or proper precaution to support or secure the plaintiffs' vault or cellar, so as to prevent it from being weakened or damaged, and wrongfully and injuriously dug near to the foundations thereof, without taking due and proper precautions to prevent them from being weakened and injured and from giving way; whereby the vault and foundations were weakened and injured, and by the fall of certain bricks and timber, special damage ensued:—Held, that a clear and substantial ground of action was stated; and that if the defendant objected, that the plaintiffs' right and title was not set forth with sufficient certainty, he ought to have demurred specially, and not to have pleaded over.

Pleas, as to the not shoring up or taking due or proper precautions to secure the plaintiffs' vault, or to prevent the foundations thereof from being weakened, that no such duty or obligation was cast upon the defendant by law, held bad, as traversing the existence of a duty or obligation not alleged by the plaintiffs, and raising an issue of law. A plea alleging that the fall of the bricks, timber, &c. was not caused by any act or default of the defendant, or the breach or neglect of any obligation, duty, or liability imposed upon him by law or otherwise, also held to be bad for the same reasons.

Quære, whether the mere juxtaposition of buildings imposes an obligation in law upon either owner, who is about to pull down his building, to give notice of his intention to his neighbour, in order to enable him to protect himself; semble, that it does not. But it is

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his duty, in taking down the adjoining walls, to use due care and skill, and due and reasonable precautions; and an action lies if he conduct himself so carelessly, negligently, and unskilfully in pulling down his wall, as thereby to injure the adjoining wall or building of his neighbour.

Case. The first count of the declaration stated, that the plaintiffs were lawfully possessed of a certain vault or cellar in the city of London, and used and occupied the same in and for the purpose of carrying on their trade or business of wine merchants, and kept and had in their said vault or cellar divers large quantities of wine, and divers bottles of great value, &c.: that the plaintiffs' said vault or cellar adjoined certain other vaults, and certain walls there, and in part rested upon, and was of right in part supported by part of the said adjoining vaults and of the said walls; and the plaintiffs were of right entitled that their said vault or cellar should be so supported in part by the said parts of the said adjoining vaults and walls without the hindrance or disturbance of any person: that there were certain foundations belonging to, and supporting, the said vault or cellar of the plaintiffs, and that they of right had enjoyed, and still of right ought to enjoy, such foundations, and the benefit and advantage thereof, for the support of their said vault or cellar, without the hindrance or disturbance of any person. Yet the defendant, well knowing the premises, but contriving and intending to injure the plaintiffs, heretofore, to wit, on the 1st of October 1835, and on divers other days and times, &c. wrongfully and injuriously took down, pulled down, and removed, and caused and procured to be taken down and removed, the said vaults and walls so adjoining the said vault or cellar of the plaintiffs, by which the said last-mentioned vault or cellar was so in part supported as aforesaid, without shoring up, propping up, or otherwise securing or taking other reasonable and proper precautions to support or secure or shore up the said vault or cellar of the plaintiffs, so as to prevent the same from giving way, or being weakened or damaged or destroyed on that occasion; and also then and there wrongfully and injuriously dug, and made and caused and

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procured to be dug and made, divers excavations in the earth near to the said foundations of the said vault or cellar of the plaintiffs, and loosened, weakened, and disturbed such foundations, without taking due and proper precautions to prevent the said foundations from being weakened and injured, and giving way; and by reason thereof, the said foundations then became and were injured, loosened, and weakened; and the said vault or cellar of the plaintiffs became and was greatly injured and weakened; and by reason of the said several premises, and also by reason of certain timber, wood, bricks, and mortar, and other things, afterwards, to wit, on &c., falling upon the said vault or cellar of plaintiffs (and which vault or cellar by reason of the same having been so weakened and injured as aforesaid, and on no other account, was then unable to bear or resist the force, weight, and pressure of the said timber, wood, bricks, and mortar, and other things, as the same otherwise might and would have done,) the same vault or cellar of the plaintiffs, then, to wit, on &c., gave way and fell in, and became and was greatly injured and destroyed; and by reason of the several premises a great part, to wit, one half of the said wine became wasted, lost, spoiled and destroyed, and the residue thereof became, and was, and still is injured and deteriorated in value, and the said bottles were damaged and destroyed; and thereby also the plaintiffs from thence hitherto, lost and became deprived of the use of their said vault or cellar, and of the profits, benefits and advantages which they otherwise might and would have acquired from the possession and use thereof, and the same became of no use or value to the plaintiffs; and thereby the plaintiffs were greatly prejudiced and injured in their said trade and business, and necessarily incurred divers expenses, to wit, to the amount of 2,000*l.* in having their said vault or cellar examined and surveyed, and the nature and extent of the said damages, injuries, and losses ascertained and repaired; and in and about the removal of the ruins of the said vault or cellar, and of such of the said wines as were not wholly lost and destroyed, and in and about the removal of the said wine and said bottles and pieces thereof, and the procuring the said vault or cellar and the

ruins thereof, and the said wine and bottles to be watched and taken care of during the times aforesaid, and otherwise in relation to the several premises and matters last aforesaid, and were otherwise injured.

The second count, after stating that the plaintiffs were possessed of a certain other vault, (as in the first count,) alleged that the defendant was about to pull down, and prostrate, and remove, and did pull down and prostrate certain other vaults, and buildings, and walls next adjoining the last-mentioned vault of the plaintiffs; and thereupon it became and was the duty of the defendant, in the event of his not shoring up or protecting the plaintiffs' last-mentioned vault in that behalf, to give due and reasonable notice to the plaintiffs of his the defendant's intention to pull down, prostrate, and remove the said vaults, buildings, and walls so adjoining the plaintiffs' last-mentioned vault, before the defendant prostrated and removed the same, so as to enable the plaintiffs to protect themselves in that behalf; and also to use due care and skill, and take due, reasonable, and proper precautions in and about the pulling down, and prostrating and removing the said vaults, buildings, and walls so adjoining the plaintiffs' last-mentioned vault, so that for want of such care, skill, and precaution, the last-mentioned vault of the plaintiffs, and the contents thereof, might not be damaged or destroyed on that occasion, or the plaintiffs injured in respect thereof. Yet the defendant not regarding his duty in that behalf, but contriving and intending to injure the plaintiffs, heretofore, to wit, on &c., and on divers other days and times afterwards, and before the commencement of this suit, wrongfully and injuriously pulled down, prostrated and destroyed the said vaults, buildings, and walls so adjoining the last-mentioned vault of the plaintiffs, without giving the plaintiffs or either of them due or reasonable or other notice of his the defendant's intention so to do, according to his said duty in that behalf, although the defendant did not shore up or protect the plaintiffs' said last-mentioned vault: and the defendant did not, nor would use due care or skill, or take due, reasonable, or proper precautions, in or about the pulling down, or prostrating, or removing the

said vaults, buildings, and walls so adjoining the last-mentioned vault of the plaintiffs, upon the said last-mentioned occasion, according to his said duty; and the defendant, contriving and intending to injure the plaintiffs, heretofore, to wit, on &c., and on the said other days and times after that day and before the commencement of this suit, wrongfully and injuriously pulled down and prostrated divers parts of the said vaults, buildings, and walls so adjoining the last-mentioned vault of the plaintiffs upon the last-mentioned occasion, in a careless, unskilful, and improper manner, and behaved and conducted himself carelessly, unskilfully, and improperly in that behalf; and by reason of the several premises in this count mentioned, the last-mentioned vault of the plaintiffs became and was greatly shaken, and weakened, and injured; and by reason of the several premises in this count before mentioned, and also by reason of certain timber, wood, bricks, and mortar, and other things afterwards, to wit, on &c., falling upon the said last-mentioned vault, &c., (alleging the damage as in the first count.)

The defendant pleaded, first, not guilty.

Secondly, that the said vault or cellar of plaintiffs in the first count mentioned did not rest upon, nor was of right in part supported by parts of the said adjoining vaults, and of the said walls in that count mentioned, in manner and form as the plaintiffs had in that count alleged: concluding to the country.

Thirdly, that the plaintiffs were not, before and at and during the times in the said first count in that behalf mentioned, or at any of those times, of right entitled that their said vault or cellar should be supported by the said parts of the said adjoining vaults and walls in that count mentioned, in manner and form as the plaintiffs had in that count alleged: concluding to the country.

Fourthly, as to so much of the first count as related to the defendant not shoring up, propping up, or otherwise securing or taking other reasonable or proper precautions to support, or secure, or shore up the said vault or cellar of the plaintiffs in that count mentioned, so as to prevent the same from being weakened, or damaged, or destroyed, on the occa-

sion in the said first count mentioned; that the defendant was not on the occasion in that count mentioned, or otherwise, bound by law or otherwise, nor was there any duty, obligation, or liability imposed or cast by law or otherwise upon him to shore up, prop up, or otherwise secure, or to take other reasonable or proper or any means to support or secure, or shore up the said vault or cellar of the plaintiffs, for the purposes in that count mentioned, or otherwise: concluding with a verification.

Fifthly, as to so much of the said first count as related to the defendant not having taken due and proper precaution to prevent the said foundations of the said cellar of the plaintiffs being weakened, injured, and giving way, as in that count mentioned; that the defendant was not on the occasion in that count mentioned, or otherwise, bound by law or otherwise, nor was there then any duty, obligation, or liability cast or imposed by law or otherwise upon him the defendant, to take due and proper, or any precautions to prevent the said foundations of the said vault or cellar of the plaintiffs, in that count mentioned, from being weakened and injured: concluding with a verification.

Sixthly, as to so much of the said first count as related to the falling of the said timber, wood, bricks and mortar, and other things, upon the said vault or cellar; that the said falling of the said timber, wood, bricks and mortar, and other things, upon the said vault or cellar, was not, nor was the falling of any of them or any part of them, caused or occasioned by any act, default, neglect, or omission of the defendant, or the breach or neglect of any duty, obligation or liability imposed or cast upon him by law or otherwise. Verification.

Seventhly, that the defendant had good, lawful, and sufficient right, title, power and authority, to pull down, prostrate, and remove, the said vaults and walls in the said first count mentioned, and upon part of which the vault of the plaintiffs was in and by that count alleged to have rested and been supported; and that the digging and making the said excavations in the earth, in that count mentioned, were necessary and proper works for that purpose; and that if the said foundations of the said vault

or cellar, in that count mentioned, were loosened, weakened, or disturbed, they were so loosened, weakened and disturbed by and by reason of such necessary and proper works as aforesaid, for the purpose aforesaid : and further, that the plaintiffs, before any damage or injury was or could be done, or caused to be done to them, or their said vault, or the contents thereof, and in sufficient time to guard and protect themselves, and their said vault or cellar and its contents, against the consequences of the defendant's pulling down, prostrating, and removing the said vaults, and the necessary and proper works for that purpose, had notice of his intention to pull down, prostrate, and remove the said vaults and walls, and if they were minded and desirous to protect themselves or their property in the premises, against the consequences of the defendant's so pulling down the said vaults and walls, it was their duty to have properly shored up and supported their vault or cellar, or to take due and proper precautions to protect themselves and their said vault or cellar and the property therein, against the consequences of the exercise by the defendant of the said lawful right of the defendant to pull down, prostrate, and remove the said vaults and walls on which the vault of the plaintiffs, in that count mentioned, was alleged in part to have rested and to have been supported ; and had they done their duty in that behalf, their said vault or cellar and its contents would have been saved and protected from the alleged damage and injuries in the first count mentioned ; but they wholly neglected and omitted so to do. And the defendant further said, that in pulling down, prostrating, and removing the said vaults and walls, he was not guilty of any unlawful or wrongful act, neglect, default, or breach of any duty imposed upon him, by law or otherwise, but exercised his said lawful right, in the manner he had lawful right to exercise the same, and not otherwise : and if any injury or damage happened or was occasioned to the plaintiffs, or their said vault, or the contents thereof, the same happened and was occasioned by the default of the plaintiffs themselves, in not properly shoring up and supporting their vault, and taking due and proper precautions to protect themselves and their

vault or cellar and its contents, from the consequences of the exercise by the defendant of his said lawful right, to pull down, prostrate, and remove, and in pulling down, prostrating and removing the said vaults and walls ; and not by or through any unlawful or wrongful act of the defendant, or any default or omission of the defendant, or any duty or obligation, imposed on him by law or otherwise, in the pulling down, prostrating, and removing the vaults and walls : concluding with a verification.

Eightly, as to so much of the last count as related to the defendant not having given the plaintiffs due and reasonable notice of his intention to pull down, prostrate, and remove the said vaults, buildings, and walls in that count mentioned ; that the defendant was not bound by law, or otherwise, nor was there any duty, obligation, or liability imposed or cast on him, by law or otherwise, to shore up or protect the said last-mentioned vaults of the plaintiffs, on the occasion in that count mentioned, or otherwise ; nor was it his duty, in the event of not shoring up or protecting the said last-mentioned vault of the plaintiffs, to give due, or reasonable, or any notice of his the defendant's intention to pull down, prostrate, and remove the said vaults, buildings and walls adjoining the vault of the plaintiffs in that count mentioned, in manner and form as the plaintiffs had, in that count alleged : concluding to the country.

Eleventhly, as to so much of the said last count as charged it to have been the duty of the defendant to have taken due and reasonable precautions in and about the pulling down, and prostrating, and removing the said vaults, walls and buildings in that count mentioned, so that the said last-mentioned vault of the plaintiffs and the contents thereof, might not be damaged or destroyed, or the plaintiffs injured in respect thereof ; that it was not his duty to have used due and proper precautions in that behalf, as the plaintiffs had in that count alleged : concluding to the country.

Twelfthly, as to so much of the said last count as related to the falling of the said timber, wood, bricks and mortar, and other things, upon the said vault of the plaintiffs ; that the said falling of the said timber, wood, bricks and mortar, a

other things, upon the said vault of the plaintiffs, in that count mentioned, was not, nor was the falling of any of them, or any part of them, caused or occasioned by any act, default, omission, or neglect of the defendant; or the breach or neglect of any duty, obligation, or liability imposed or cast upon him by law or otherwise: verification.

Thirteenthly, as to the last count of the declaration, that the defendant had good and lawful and sufficient right, title, power and authority to pull down, prostrate and remove the said vaults, walls, and buildings in the said last count mentioned, and therein stated to have been pulled down, prostrated, and removed by him; and that the plaintiffs had notice of his intention so to do before any damage or injury was or could be done, or caused to be done, to their said vault or cellar, &c., alleging in terms nearly similar to those in the seventh plea, the neglect of the plaintiffs to shore up, that the defendant was not guilty of any unlawful or wrongful act, or any neglect or omission of any duty or obligation imposed upon him by law; and concluding with a verification.

The plaintiffs, by their replication, joined issue on the first, second, third, and tenth pleas; traversed the ninth; and demurred to the fourth, fifth, sixth, seventh, eighth, eleventh, twelfth, and last, for the following causes:—

That the fourth plea traversed matter of law, namely, whether it was the defendant's duty to shore up the plaintiffs' vault; offered an immaterial issue in so doing, and was an informal traverse.

The like causes of demurrer to the fifth plea as to the foundations of the plaintiffs' vaults.

To the sixth plea, that it traversed mere matter of law; offered an immaterial issue; and should have concluded to the country, &c.

To the seventh plea, that the plea did not traverse the plaintiffs' right, but set up that they were bound to support their vault; the same not being matter material to the cause of action, or proper to be referred to a jury; that the plea traversed mere matter of law; that the traverses were uncertain, &c.; and that the plea did not answer all it professed to answer.

To the eighth plea, the same as to the fourth.

To the eleventh plea, that it offered to refer to a jury mere matter of law, namely, whether the defendant was bound to use the precautions stated, and that no grounds of excuse for not using such precautions were alleged.

To the twelfth plea, the same as to the fourth and fifth, that a mere question of law was attempted to be traversed; and that an immaterial issue, whether the defendant caused the timber, &c. to fall on the vault, was tendered.

To the last plea, that matter of law was traversed, and an immaterial point attempted to be put in issue; that the traverse was argumentative and informal; and that the plea did not deny, or confess, or avoid.

R. V. Richards, for the demurrer.—The principal objection advanced to these pleas is, that they put in issue matter of law, and refer that to the jury, which is for the determination of the Judge. The real question is, whether the defendant has demeaned himself so negligently and carelessly as to prejudice and injure the plaintiffs in their property. Whatever doubt there might be formerly as to the mode in which the owners of adjacent property should conduct themselves, it seems now clearly established, that if there be two closes, the owner of one cannot, by building upon it, prevent the owner of the other from using that other, unless, from efflux of time, a grant can be presumed. The declaration does not allege title in the plaintiff, nor that the messuage was ancient; it merely alleges possession; and whether the plaintiff is entitled to the easement or not, or whether the injury to the house was the consequence of the defendant's negligence, is a question for the jury—*Dodd v. Holme* (1). The same principle may be extracted from *Brown v. Windsor* (2); and although, in *Wyatt v. Harmer* (3), the Court were of opinion that the house should be an ancient one, and, as it was not so stated, the defendant should have judgment as to so much of the declaration as referred to

(1) 1 Ad. & El. 493.

(2) 1 Cr. & Jer. 20.

(3) 3 B. & Ad. 871; s. c. 1 Law J. Rep. (N.S.) K.B. 237.

the digging so near the plaintiff's house as to weaken the foundation, and thereby injure the house, the defendant there took advantage of the defect by demurrer, and did not, as in the present case, plead over. In *Peyton v. the Lord Mayor of London* (4), it was held, that the plaintiff could not recover, as he had not alleged or proved any right to have his house supported by the defendants; here, however, the right is alleged. As to the necessity imposed on the defendant of giving notice of his intention of pulling down the walls, *Jones v. Bond* (5) is decisive. The first three pleas raise the entire question, which is one of fact for the jury, that is to say, whether the work has been properly or improperly done by the defendant. The fourth plea, as to shoring up, is bad, as it denies any right or obligation upon the defendant to shore up, and evidently refers a question of law to the jury. The sixth plea, as to the falling of bricks and timber, is also bad, for the same reason; it is not said, that it happened by the act or default of the defendant; but it is said, that he, by his improper and negligent conduct, was the *causa causans*. Again, there is no introductory matter as to this in the declaration, which the defendant could either traverse, or confess or avoid, as there is no allegation that the causing of the timber to fall was the act of the defendant. Here, therefore, the defendant sets up a new fact, and he has not concluded as he ought. The seventh plea is also bad, as it professes to answer the whole of the second count, but it does not; it is at best but a hypothetical answer, and insufficient; it should confess and avoid absolutely—*Gould v. Lashbury* (6). To the remaining pleas, it may be also objected, that they refer matter of law to the jury.

Wightman, contra.—The prolixity of the pleas cannot be objected to. The defendant could not plead otherwise, as since the new rules the general issue only refers to the act done. The declaration here is bad. The plaintiffs have alleged a right to have their vault supported on the walls of the defendant; but they have not stated

how this right has accrued. They could not have obtained such right by situation alone. The right might have been acquired by possession for a certain time, by licence, subject to the right of the defendant to pull down the walls gently; this would be sufficient to prevent the defendant from being a wrong-doer. Now with regard to the sixth plea, as to the falling of timber, bricks, &c., this, it is submitted, is not imputed to the defendant as his act; why, therefore, should it be attempted to make him liable for an act which is not his? He may, to a certain extent, have weakened, by his conduct, the foundations of the plaintiffs' vault; but in such case, *Flower v. Adam* (7) shews that the plaintiffs cannot recover if the mischief be occasioned by the misfeasance of a third party not sued. As the plaintiffs, in the declaration, took upon themselves to allege that the defendant was bound to shore up and give notice, it was equally competent to the defendant to deny such duty, and negative such obligation. Such issues raised no questions of law; they were strictly and properly issues of fact. It was to the consideration of the jury they should be submitted, and it is by them the questions raised by the pleadings should be decided.

Richards, in reply, contended, that the main question was, whether the second count of the declaration was good, and if so, pleading over, and this should be decided in the affirmative; and, even if the count were specially demurred to, it would be good in substance. The object of the defendant, by his mode of pleading, was to take from the jury that on which it was their duty to decide. Suppose, in a case like the present, where two houses adjoin each other, and it did not appear that one house had a right of support as against the other, and injury was done by the conduct of one party, should not certain facts be submitted to the jury? should they not be called on to decide that the party had used his property, in accordance with the maxim *sic utere tuo ut non alienum lædas*? Here the plaintiff has replied, he has done so, merely by taking issue upon the facts, and he could not at once take issue, and

(4) 9 B. & C. 725; s. c. 7 Law J. Rep. K. B. 322.

(5) 5 B. & Ald. 837.

(6) 1 Cr. M. & R. 254; s. c. 3 Law J. Rep. (N. S.) Exch. 299.

(7) 2 Taunt. 314.

assign either the same or different matters, as such replication, and new assignment would be double—*Cheasely v. Barnes* (8).

Cur. adv. vult.

TINDAL, C.J.—This is an action upon the case, the declaration in which contains two counts; in the first of which the plaintiffs allege their possession of a certain vault or cellar adjoining to certain other vaults and walls, and which in part rested upon, and was of right supported in part, by parts of the adjoining vaults and walls; that the plaintiffs were of right entitled that their vault or cellar should be supported in part; and that there were certain foundations belonging to, and supporting the said vault or cellar, which the plaintiffs ought to enjoy: yet that the defendant wrongfully took down and removed the said vaults and walls so adjoining to the vault or cellar of the plaintiffs, without shoring or propping up, or taking other reasonable or proper precaution to support or secure it, so as to prevent its being weakened or destroyed; and wrongfully dug the earth and disturbed the foundations, without taking due and proper precautions to prevent the said foundations from being weakened and giving way. And the declaration then states the injury which the plaintiffs sustained, and the special damage which followed thereon. The second count states that the defendant was about to pull down the adjoining vaults and walls, and alleges it to have been the duty of the defendant, in the event of his not shoring up the walls, to give notice to the plaintiffs of his intension to pull down, and also his duty to use due care and skill, and to take due, reasonable, and proper precaution about the pulling down his vaults and walls; and then alleges a breach of such duty.

To this declaration the defendant pleads thirteen pleas, of which the first seven are pleaded to the first count either in part or in the whole, and the eighth and subsequent pleas are pleaded in like manner to the second count of the declaration.

The plaintiffs demur to the fourth, fifth, sixth, seventh, eighth, eleventh, twelfth, and last pleas, assigning certain causes of

special demurrer to each; and the defendant having joined in demurrer, the first question arises on the validity of those pleas.

The fourth plea, which is pleaded only to "the not shoring or propping up the wall, or taking other reasonable or proper precautions to support or secure the vault or cellar of plaintiffs so as to prevent the same from being weakened," we hold to be bad on two grounds. In the first place, the traverse contained in that plea is not the traverse of any allegation to be found in the first count of the declaration. The ground of action on which the plaintiffs rely in that count, is their right to the foundations on which their vault rested; not any duty or obligation of the defendant to prop or shore up the plaintiffs' vault, or to take due and proper precautions in pulling down his own vault. When, therefore, the defendant traverses the existence of such duty or obligation, he traverses that which is not alleged by the plaintiffs; who only mention the want of propping and shoring up, and the want of proper precaution by the defendant, as the description of the mode or means by which the injury to them was occasioned. And the second objection to this plea appears to us to be this, that it raises an issue of law, and nothing else, for the consideration of the jury; viz. whether any duty or obligation was cast by law upon the defendant or otherwise. A jury might, indeed, try whether there was any duty of that nature arising from usage or contract—for the existence of any such duty is a mere question of fact—but they cannot try whether there is any such duty or obligation cast upon him by law; for that is a question to be determined only by the Court, and not by the jury.

On the same grounds, and for the same reason, we hold the fifth plea to be bad in law.

As to the sixth plea of the defendant, it appears to us to be bad also upon two grounds; first, that it is a plea which confesses, without avoiding that part of the charge in the first count, to which it professes to be an answer. This plea is pleaded, not as any answer to the right claimed in the declaration, but to that which is alleged in the first count, as a necessary and immediate consequence from the wrongful act of the

defendant; that is, it is pleaded to part of the special damage alleged to have followed from the weakening of the plaintiffs' vault or cellar. But if the vault or cellar of the plaintiffs has been weakened in its walls or foundations, by the wrongful act of the defendant, it is no avoidance of the plaintiffs' right of action, as it appears to us, that the timber, bricks, or materials that fell upon the vault or cellar in its weakened state, were not the property of the defendant, or were not thrown there by his carelessness or negligence; but that the defendant is equally liable to answer for the injury in whomsoever the property of those materials may be; and whether they were placed there by the act of the defendant, or of any other person. The plaintiffs have alleged in their declaration that, but for the wrongful act of the defendant, and the weakened state of the walls, "and on no other account" was the vault unable to bear or resist the weight and pressure of the timber, &c. The defendant, therefore, is the proximate cause of this damage, and appears to us to be answerable for it. And we think this plea is further bad, because it denies an obligation in law, and still further an obligation which has not even been alleged in the declaration.

The seventh plea is pleaded to the whole of the first count of the declaration. If, therefore, professing to give an answer to the whole, it omits any material part, it is bad. Now, the first count of the declaration is founded on the alleged wrongful act of the defendant, not only in pulling down the vaults and walls of the defendant, but also in digging the earth and disturbing the foundations of the vault or cellar of the plaintiffs; and to this cause of action, though confessed by the plea, there is no matter of avoidance pleaded in bar.

The remaining pleas to which the plaintiffs have demurred, apply themselves to the last count of the declaration: and of these, we think the eighth plea cannot be supported, inasmuch as it traverses a matter of law. It is pleaded as to so much of the last count as relates to the defendant not having given the plaintiffs due and reasonable notice of his intention to pull down his walls. The allegation in this plea, that he was not bound by law or otherwise, nor was there any duty, liability,

or obligation imposed on him by law or otherwise, to give any notice of his intention to the plaintiffs, appears to us to raise a direct question of law upon an issue joined on that plea.

The eleventh plea, which is pleaded to so much of the second count as alleges it to have been the duty of the defendant to have taken due and reasonable precautions about the pulling down his walls, we hold to be bad for the same reason as the last—viz. that it raises an issue of law, instead of an issue of fact for the jury.

The twelfth plea falls altogether within the same consideration as the sixth, and is bad for the same reason.

The last plea to the second count of the declaration is bad for the same reason as the seventh plea, which is pleaded to a similar part of the first count, and sets up precisely the same defence.

But the defendant contends that, admitting the pleas to be bad, the plaintiffs have shewn no sufficient ground of action either in the first or second count of their declaration.

The first count rests upon a precise and distinct allegation, that the vault or cellar of the plaintiffs was, of right, supported by parts of the adjoining walls, and that the plaintiffs were, of right, entitled to have them so supported, and that there were certain foundations for supporting those vaults which the plaintiffs ought to enjoy: and the count then proceeds to allege, as part of the gravamen, that the defendant wrongfully dug the earth, and disturbed the foundations, without taking due and proper precautions to prevent the foundations from being weakened. And we think, without entering into the examination of the several cases cited by the plaintiffs, this count contains a clear and substantial ground of action—viz. that of negligence and carelessness in the exercise of the defendant's rights, by reason whereof the plaintiffs' rights were injured; and that if the defendant meant to object that the plaintiffs' right and title was not alleged with sufficient certainty, he ought to have demurred specially to the declaration, instead of pleading over.

With respect to the second count of the declaration, the right of action, as stated in that count, appears, in one respect, more

doubtful. There is no allegation in this count of any right of easement *in alieno solo*, which forms the plaintiffs' ground of action in the first count. And as to the allegation that it was the duty of the defendant to give notice to the plaintiffs of his intention to pull down his wall, if he did not shore it up himself, it is objected, and we think with considerable weight, that no such obligation results, as an inference of law, from the mere circumstance of the juxtaposition of the walls of the defendant and the plaintiffs. But we think ourselves not called upon, on the present occasion, to decide this question; for the count goes on to allege, that it was also the duty of the defendant to use due care and skill, and take due, reasonable and proper precaution in pulling down his walls adjoining to the plaintiffs' vault, so that for want of such care, skill, and precaution, the plaintiffs' vault might not be injured. We think that duty is clearly imposed by law; and that a breach, which alleges that the defendant conducted himself so carelessly, negligently, and unskilfully, in pulling down his wall, as, by reason thereof, to injure the plaintiffs' wall, is well assigned; and that, inasmuch as this latter allegation of duty is severable from the former, it states a good ground of action.

Upon the whole, therefore, we think the plaintiffs are entitled to judgment on the demurrers filed to the several pleas of the defendant.

Judgment for the plaintiffs.

1836. }
Nov. 23. } PENNY v. THOMAS.

Appearance—Affidavit.

The affidavit on which it is sought to enter an appearance for the defendant, under the stat. 2 Will. 4. c. 39. s. 111, upon the expiration of eight days from the return of the writ of distringas, must shew when the search for the defendant's appearance was made.

Gurney moved for leave to enter an appearance for the defendant, under the stat. 2 Will. 4. c. 39. s. 111, more than eight days having elapsed since the return of the writ of *distringas*; but it did not appear
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from the affidavit when the search was made, for the purpose of ascertaining whether the defendant had appeared or not; and, in consequence—

GASELEE, J. (sitting alone) refused the application.

1836. }
Nov. 24. } VIVIAN v. BLOMBERG.

Ecclesiastical Lease—Reversion.

A lease by a vicar, of messuages in the city of London, not being the habitation of the vicar, and of ground belonging to the same, not above the quantity of ten acres, for twenty-one years from the date thereof, made at a time when there were less than three years of a former lease unexpired, is not void under the statutes 13 Eliz. c. 10, 14 Eliz. c. 11, and 18 Eliz. c. 11.

The following case was submitted by His Honour the Vice Chancellor, for the opinion of this Court.

The vicarage of the parish and parish church of St. Giles Without, Cripplegate, is a benefice with cure of souls in the city of London; and the several messuages or tenements hereinafter particularly mentioned (not being the capital messuage or dwelling-house used for the habitation of the vicar, nor having ground, to the same belonging, above the quantity of ten acres,) are parcel of the possessions of the said vicarage, and are situate and being within the said city, and have been accustomed to be demised by the vicars of the said parish, for the time being, for the term of forty years in possession, at the yearly rent of 3*l*.

By indenture of lease, bearing date the 30th of October 1793, and made between the Rev. George Watson Hand, since deceased, then vicar of the parish church of St. Giles Without, Cripplegate, aforesaid, of the one part, and Thomas Smith and others of the other part, for the consideration therein expressed, the said G. W. Hand did demise unto the said other persons, parties thereto, the messuages or tenements, and other hereditaments hereinafter particularly mentioned, parcel of or belonging to the vicarage of St. Giles Without, Cripplegate, as aforesaid, with the appurtenances; to

hold the same unto the aforesaid lessees, their executors, administrators, and assigns, from the 29th of September then last past, for the term of forty years; yielding and paying therefore, yearly during the said term unto the said G. W. Hand and his successors, vicars for the time being of the said parish church, the yearly rent of 3*l.* payable quarterly, on the four most usual feasts; the lessees being charged with the reparations, and subject to the covenants and agreements therein expressed and contained; and which said lease was duly confirmed by the patron and ordinary.

The said G. W. Hand departed this life many years since. After his decease the Rev. William Holmes was duly presented and instituted to and inducted into the vicarage of the parish and parish church of St. Giles Without, Cripplegate, aforesaid.

In the month of October 1830, there were less than three years unexpired of the said term of forty years so granted as aforesaid, and the said William Holmes being then such vicar as aforesaid, duly executed another indenture of lease, bearing date the 8th of October 1830, and made or expressed to be made between him (William Holmes) as such vicar, of the one part, and James William Vivian and Christopher Hodgson, of the other part, whereby, for the considerations therein expressed, the said William Holmes did demise unto the said J. W. Vivian and C. Hodgson, all that messuage, house, or building, situate and being in Fore Street, in the parish of St. Giles Without, Cripplegate, London, called the Quest House, and used by the inhabitants of the said parish as a vestry house, and the rooms and other appurtenances thereto adjoining and belonging, and therewith used and enjoyed; and also all and every the messuages, tenements, shops, and buildings therein and hereinafter particularly mentioned, that is to say, all those four messuages or tenements situate, standing, and being in Fore Street, in the said parish of St. Giles Without, Cripplegate, London, then or late in the several tenures or occupations of W. W. &c.; and also all that piece or parcel of ground on which stood a building theretofore called "Pratt's Buildings," and on which then or late stood the back part or parcel of three messuages or tenements and outbuildings, situate in

Fore Street aforesaid, formerly in the tenure or occupation of I. R., &c., and then or late of J. W. &c. together with the small piece or parcel of ground thereunto adjoining, and then laid into the yard or back-sides of the said three messuages; and also all that small house or shop in Fore Street aforesaid, formerly in the tenure or occupation of A. S. &c., and then or late of M. D.; and also the ground on the north side of the said church, on which stood a wall and palisadoes; together with all the appurtenances to the said quest house and premises belonging, as the same premises were more particularly described in the plan drawn in the margin of the same indenture: to hold the same unto the said J. W. Vivian and C. Hodgson, their executors, administrators, and assigns, from the making of the said indenture, for the term of twenty-one years thence next ensuing (subject, nevertheless, to the aforesaid existing lease of the same premises, bearing date the 30th of October 1793, as hereinbefore particularly mentioned); yielding and paying therefore, yearly, during the said term of twenty-one years, unto the said W. Holmes and his successors, vicars, as aforesaid, the rent or sum of 3*l.*, payable quarterly, on the four most usual feasts, by equal portions; the first payment to be made on the Feast-day of the birth of our Lord Christ then next ensuing; the lessees being charged with the reparations, and subject to the covenants and agreements on the lessee's part therein contained—which last-mentioned lease was duly confirmed by the patron and ordinary.

The said W. Holmes departed this life in the month of June 1833.

The question for the opinion of the Court was, whether the said last-mentioned indenture of lease was a valid and effectual lease, and binding upon the successor of the said W. Holmes in the said vicarage, for the remainder of the said term of twenty-one years, expressed to be thereby granted.

Maule, for the plaintiff.—The lease is valid, as it was made by the vicar, at the usual rent, for a term of twenty-one years, within three years of the expiration of the then existing lease, and was sanctioned and confirmed by the patron and ordinary. It is good as an ecclesiastical lease at common

and it is admitted on the other side, the restraining statute, 15 Eliz. c. 10, such leases as they were at common law. The objection is founded on the 19th sections of 14 Eliz. c. 11, 15 Eliz. c. 11. s. 2; but the 17th section of the former statute takes all leases in towns out of the prohibition enacted in 13 Eliz., and the 19th section does not avoid leases when granted in reversion, although it prohibits the granting of leases (2). Neither is the enactment of 15 Eliz. c. 11. s. 2. here applicable, as it is only to cases where three years of the lease remain unexpired. This question, although it has frequently been considered, has never been decided. In *The Lord Chancellor's case* (3),

the third section of which, after reciting, "That long and unreasonable leases made by colleges and chapters, parsons, vicars, and others, spiritual promotions, be the chiefest causes of dilapidations, and the decay of all spiritual &c., enacted, "That from henceforth all gifts, grants, feoffments, conveyances, or estates made, &c. by any master and fellows of a college, dean and chapter, &c., parson, vicar, or other having any spiritual or ecclesiastical living (other than for the term of twenty-one years, or lives from the time any such lease or grant made or granted, whereupon the accustomed rent or more shall be reserved and payable during the said term,) shall be utterly void of any effect," &c.

The 17th section enacts, (after reciting the 13th,) "That the said branch nor any herein contained, shall not extend to any insurance or lease of any houses belonging to the persons aforesaid, nor to any grounds or houses appertaining, which houses be situate in city, borough, town corporate, or market town, &c., but that all such houses and grounds granted, demised, &c., as by the laws of this kingdom and the several statutes of the colleges, &c., lawfully might have been before the making of this statute, or lawfully might be if the said houses were not, so always that such house be not a dwelling-house used for the habitation of persons aforesaid, nor have ground to the house or dwelling-house above the quantity of ten acres." The 19th section enacts, "That no lease shall be made by the force of this act in reversion, nor without reserving the accustomed rent at the least, nor without charging the tenant with the reparations, nor for a longer term than three years at the most."

15 Eliz. c. 11. s. 2. enacts, "That all leases made by any of the ecclesiastical, or any former lease for years is in being, shall be enforced, surrendered, or ended within three years next after the making of any such new lease, and shall be void, frustrate, and of none effect." 15 Eliz. c. 11. s. 2.

where a lease of town houses, to begin presently, was given, while seventeen years of a former lease were yet to run, Tirrel, J. was of opinion, that the lease was within 14 Eliz. and its proviso; but Bridgman, C.J., who also agreed that the lease as one in reversion was void under the 14 Eliz., said, "I shall tell you where I differ from my Brother that held the same opinion with me. I do hold, that if a lease be not made according to the proviso of the 14th, it falls back into the 13th, and if it be within the 13th, it falls under the 18th. The words in the statute, 'decimo quarto,' are not that no lease shall be permitted to be made; but no lease shall be permitted to be made by virtue of this act; so that this act leaves us where we were before; but if it be not within *decimo quarto*, we are not left at common law, but are within *decimo tertio*." In *Bayly v. Murin* (4), in ejectment upon a special verdict, the case was, that a vicar, seised of a house in a market town, let it for three years, and when one year of the lease was expired, he let it for twenty-one years, to begin from the Michaelmas following; and the question was, whether this was a lease in reversion, and so not warranted by the 14 Eliz.; and all the Court held that it was, as this statute repeals the 13 Eliz. as to houses in market towns, but excepts leases in reversion, which this is, being to commence at a day to come: and two of the Judges seemed to be of opinion, and Twissden strongly, that if the lease in the case at bar had been made to commence presently, it yet would have been void, there being another lease in being; so that for so many years as were to come of the former lease, it would be a lease in reversion; and that the 18 Eliz. that permits a concurrent lease, so that there be not above three years in being, shall not, in their opinion, make any alteration of 14 Eliz., but it only extends

(4) 1 Vent. 244; s. c. 2 Lev. 62, as *Bayley v. Munday*, s. c. 3 Keb. 46, 107, 193.—The Court seemed to think lightly of the authority of Keble; Park, J. saying, "that following the advice and example of Lord Kenyon, he had ejected him from his library." Perhaps a more unequivocal instance of his inaccuracy could not be given than in regard to the present case, which he has reported three times under different names: at p. 46, as *Bayley v. Munne*; at p. 107, as *Bayley v. Mun & Sybley*; and at p. 193, as *Bayley v. Man*.

to 13 Eliz., because it recites that, but not the former; and such was the opinion of Hobart, in *Crane v. Taylor* (5), and it hath been often held, that it did not extend to the stat. 1 Eliz., concerning bishops. But Hale, C.J., was of opinion, that the lease had been good if made to commence presently, there being less than three years of the former lease to come, and that the 18 Eliz. did give a qualification to leases made upon the 14th as well as upon the 13th: and he gave the following reasons for this opinion—"first, because the 14 Eliz. is a kind of appendix to the 13th, and does not repeal it; but *sub modo*, a little enlarging it as to houses in market towns, wherefore the 18 Eliz. reciting the 13 Eliz., does by consequence recite the 14th; also secondly, that there is such a connexion between all the statutes concerning ecclesiastical leases, that they have been taken into the construction of one another;—thirdly, it would make a great romage in leases if one should be void, when there was never so little of a former lease unexpired;—fourthly, there is no authority to the contrary. In *Hunt v. Singleton* (6), there were ten years of the former lease in being, and upon that lay the weight of the opinion; and *Crane v. Taylor* is concerning covenants only, and the reason that it does not extend to 1 Eliz. is, because the 18 Eliz. begins with inferior ecclesiastical persons; and therefore cannot include bishops."

[TINDAL, C.J.—Is not the 13 Eliz. entitled, 'An act for explanation of the statutes entitled, Against defeating of dilapidations' ?]

It certainly is, and they are so linked together as to constitute but one. The lease, consequently, is good, for the time it has to run. It is not invalidated by the 13 Eliz.; even if it were, it would be within the relaxation of such prohibition which is found in the 14th, and it does not come within that other restriction as to reversions in the 14th, inasmuch as that is to be taken in conjunction with, and explained by the preceding 13th and succeeding 18th. It may be also fairly contended that it is a concurrent not a reversionary lease, and, consequently, not within the

statutes of Eliz. at all. It resembles the lease in *Fox v. Collier* (7), which was held good and valid.

Stephen, Serj., contra.—This lease within the statute 14 Eliz. c. 11; and, as a lease in reversion, is void. It is not denied, that a lease made by the incumbent confirmed by the patron and ordinary, was good at common law. But the 13 Eliz. effected a restriction upon the subject not known to the common law. This restriction was qualified by the 14 Eliz., as to houses in towns, and they were taken expressly out of the operation of the former statute; and that statute, in the 19th section, introduced, of itself, a new law as to those houses, not known either to the 13th or at common law; viz. that no lease should be made of them in reversion; and of this opinion were the Court in *Crane v. Taylor*. It is a mere subtlety to engraft any other construction upon the statute, and that this is the sound and long-established opinion, appears from *Bac. Abr.* 'Leases' (E) 3, and *Watson's Cler. Law*, 437. This point may be considered as decided in *Bayly v. Murin*, more especially where that case is taken in conjunction with *Hunt v. Singleton*; and no distinction was made between a concurrent lease and one in reversion, for it was said, that though the lease was to commence immediately, it was in law a lease in reversion, and so within the words of the statute. Thus, the doctrine attributed to Hale, C.J., is not entitled to weight, and he was either wrong himself, or he has been wronged by the report. As to the observation that this is not a reversionary lease at all, there are various descriptions of leases in reversion: one where the habendum is to take effect at a time different from the date; also one which is called a concurrent lease, where the one by its terms is to commence immediately, but there is another lease then in existence. There is also the kind which does not, in fact, take effect from the expiration of the other lease, but from some other period. *Fox v. Collier*, where a lease for twenty-one years from the date of indenture, was held to be good, though the time of the making of the lease there was another in being for four years

(5) Hob. Rep. 269.

(6) Cro. Eliz. 564.

(7) Moo. 107.

of a term of forty years, is admitted; but was a bishop's lease, confirmed by the dean and chapter, and not within s. c. 19. s. 5. Even admitting that the present lease is what is called a concurrent one, such admission cannot benefit the plaintiff, for according to Yates, J., in *W. v. Sewell* (8), "the lease in being is that in possession; a concurrent lease is a lease *in esse*; it operates only by deed; it passes no interest during the term of the lease." Neither can it operate here by the doctrine of estoppel, for by the 8th rule, by the doctrine is governed, as laid down by Lord Coke, in 1 *Inst.* 352, (B), "where the veritie is apparent in the record, there the adverse party cannot be estopped to take advantage of the truth, for he cannot be estopped to the truth, when the truth appeareth of record." The verity does appear of record, for it is said in the case, that the lease, which is the subject of discussion is subject to the aforesaid existing lease of the same premises, bearing date of October 1793. But the lease, in question, being concurrent, is clearly one in possession, and the opinion of Lord Hale in *W. v. Murin* is, at best, extra-judicial, and cannot influence the Court in their decision. In reply, denied that the doctrine of estoppel was applicable. He also urged, that it could not be maintained, that this lease in reversion, from the terms in which it was expressed, for, whatever those terms might be, the lease must, in effect and substance, be one *in presenti*, although it did not come into operation by the end of the lease until the expiration of that term was in existence.

Cur. adv. vult.

DAL, C.J. now said—As the question has been sent for our consideration to His Honour, the Vice Chancellor, has long considered as *vexata questio* in law, it may be more satisfactory that we should explain the grounds upon which we certify, in answer to that question, that it is decided.

The case states a lease by a vicar, for one year from its date, made at

the time when a former lease, for forty years, of the same premises was still in being, but was within three years of its expiration. The subject-matter of the lease consists of certain messuages in the city of London, of which the capital messuage, or dwelling-house, used for the habitation of the vicar, forms no part, and the ground demised is of less extent than ten acres: so that the subject-matter of the demise clearly falls within the statute 14 Eliz. c. 11. s. 17; and the question is, whether such lease is void under any of the restraining acts of Elizabeth.

There are three statutes, and three only, which it will be necessary to consider as bearing on the present question, viz. the 13 Eliz. c. 10, the 14 Eliz. c. 11. ss. 17 & 19, and the 18 Eliz. c. 11. s. 2.

Now the lease in question cannot be held to be made void either by the *first* or *last* of the above-mentioned statutes. Not by the first, because it is a lease for twenty-one years only from the date, and complies with all the other requisites of that restraining act. It is, indeed, a lease in reversion; but there is nothing in that act to make leases in reversion void. And although the act, lastly above named, the 18 Eliz. c. 11. s. 2, after pointing out the mischief of granting leases, authorized by the former statutes, in reversion, declares the same to be void; yet, in its terms, it only comprehends those leases in reversion which are made when the former lease for years is in being, "not to be expired or ended within three years next after the making of any such new lease." But as the lease in question was made when the former lease, for forty years, was within two years of its expiration by efflux of time, it is not a lease in reversion made void by the operative words of that statute.

So far, therefore, as relates to the first or last of the statutes above referred to, this lease does not become void by either; that is, neither of those statutes seems to us to apply to the case.

It only remains, therefore, to consider whether, in the statute, 14 Eliz. c. 11, there is any enactment which avoids this lease: and, indeed, the argument, on the part of the defendant, has been put entirely on that statute; it being contended, that the cases of leases of houses in cities, of

the description therein contained, are taken entirely out of the first restraining statute, and are made subject to a new law created by the statute of the 14 Eliz.; and that as the 19th section enacts, "That no lease shall be permitted to be made by force of this act in reversion," so the present lease, being a lease in reversion of houses described in the act, is void by the necessary construction of the statute.

The first observation that arises on the statute 14 Eliz. is, that it does not contain within it, from beginning to end, any terms importing the avoidance of any lease whatever; on the contrary, it is a statute which excepts from the operation of the former avoiding statute, leases of property therein described. It enacts in section 17, "that the branch of the former statute, nor any thing therein contained, shall extend to any houses, &c. (therein described,) but that the same may be demised, as by the laws of this realm and the statutes of the colleges, &c. they lawfully might have been, before the making of the said statute, or lawfully might if the said statute were not." No words can be more large and explicit to exempt such leases from the whole of the effect of the restraining statute 13 Eliz.; and although the 19th section goes on to enact, "that no lease shall be permitted to be made by force of this act in reversion," there are no words added to declare leases, made contrary to such permission, void. And taking this statute alone, and by itself, it would be a much stronger construction than we feel ourselves warranted to put upon it, to hold that such words can defeat and avoid an estate, when they may be fully satisfied by allowing them to give a right of action to the successor. But, in truth, this statute is not to be construed alone, but with reference to the statute 13 Eliz., and the succeeding statute 18 Eliz. c. 11; for not only are all the acts made *in pari materia*, but the 14 Eliz. c. 11. is expressly entitled 'An act for the continuation, explanation, perfecting, and enlarging of (amongst others) the former statute;' and the 18 Eliz. c. 11. is entitled, 'An act for the explanation of the statutes against defeating of dilapidations,' &c. The three statutes, therefore, are to be read together, as forming one law on the same subject-matter;

and it may, therefore, be well held, that where leases of houses, &c. which are exempted out of the 13 Eliz. by the next statute, the 14th, do not observe the provisions of the latter statute, they fall within the general enactments of the first statute, and are made void thereby; in other words, a lease, not warranted by the 14 Eliz., remains restrained by the 13 Eliz., which makes leases against that act void. But the lease in question, considered as a lease in reversion, is not, as is above stated, void by the 13 Eliz., and is expressly sanctioned by the 18th.

No decided case has been brought before us, by the authority of which the present lease is to be declared void. In the case of *Bayly v. Murin*, the lease was clearly void under the statute 13 Eliz., being a lease to begin at a future day, and not from the time of granting the lease; and in that case Hale, C. J. appears to have thought the lease would have been good, "if it had been to commence presently, there being less than three years to come of the former lease." In *Hunt v. Singleton*, the lease of a house for forty years by the dean and chapter of St. Paul's was held not warranted by the 14 Eliz., there being at the time of granting the lease ten years unexpired of the former lease. The case of *The Dean and Chapter of Westminster* decides, that the lease in reversion of a house in the city of Westminster for forty years, by the dean and chapter of Westminster, was void, there being, at the time of granting the lease, seventeen years unexpired of the former lease; and in this latter case, the judgment of Bridgman, C. J. is strong to shew, that a lease made under the circumstances of the present, would be held good. See the judgment more at large in *Bridgman's Rep.* 122. And the case of *Crane v. Taylor* does not afford an authority, that a lease for twenty-one years in reversion, there being only two years to come of the existing lease, would be void; it is an authority for no more than this, that a covenant to make a lease is not void under the statute 18 Eliz., being made concerning a house in London.

Upon the whole, therefore, we think this lease is not void, and send our certificate accordingly to the Vice Chancellor.

The following certificate was afterwards sent:—

have heard this case argued by
and are of opinion, that the lease
mentioned of the 8th of October
is a valid and effectual lease, and
upon the successor of the said
Holmes in the said vicarage, for
remainder of the said term of twenty-
years expressed to be thereby granted.

N. C. TINDAL.

S. GASELRE.

J. A. PARK.

J. VAUGHAN."

5. } WEYMOUTH v. KNIFE.

ney—Costs—Taxation.

Court have no authority, on the ap-
peal of an attorney, to refer the bills of
attorney for agency charges, to the
taxation, as the words of the 6th
of the 12 Geo. 2. c. 13. take such
of the operation of the 2 Geo. 2.
c. 23, and leave attornies, when their
costs are the subject of dispute, to
their remedy in the ordinary manner.

was an action by an attorney to
the balance of bills of costs for
business done for the defendant,
attorney. The defendant had taken
summons for the purpose of having
of costs taxed; but Park, J. re-
make an order for that purpose,
ground that the act of parliament,
c. 23, did not extend to bills of
due from one attorney to another

dorff obtained a rule, calling upon
attiff to shew cause why the bills
not be referred to the officer for
the defendant undertaking to
sum of 83*l.* 1*s.* 4*d.* into court
prejudice, pleading issuably, and
short notice of trial; all proceed-
the meantime to be stayed.

er shewed cause.—The Court have
ity to refer these bills for taxation,
power given by the statute 2 Geo. 2.
confined to cases between an at-
tend an unprofessional client; and, if
it could exist upon this subject, it
rest by the express words of 12

Geo. 2. c. 13. s. 6. (1) In *Tidd's Pr.*,
p. 332, 8th edit., after the admission that
2 Geo. 2. c. 23. s. 23. does not extend to
any bill of fees due from any attorney or
solicitor to any other attorney or solicitor,
reference is made to 1 *Wils.* 266, where it
was held, that an *agent's* bill could not be
taxed; and it is then added:—"It is now
the uniform practice of all the Courts to
refer an *agent's* bill to be taxed." And
Ex parte Bearcroft (2) is cited as authority
for the position; but in the note to page
199 of the same book, there is the case of
Dixon v. Plant, where Willes, Ashurst, and
Buller, Justices, were inclined to think
that the bill was not taxable by the Master.
The intention of the legislature was to
prevent imposition upon a client ignorant
of and unacquainted with the rules and
forms of law; but there was no such mis-
chief to be avoided in cases of litigation
between attorney and attorney. The dicta
and decisions in favour of the exercise of
a paramount jurisdiction by the Court in
taxing attorney's bills independently of
the statute, are unsatisfactory, and cannot
be relied upon; for, although in *Wilson v.*
Gutteridge (3), the Court of King's Bench
said, they had such jurisdiction; yet, in
Dagley v. Kentish (4), great doubt was
expressed upon that subject by all the
Judges; and it was again denied in *Clutter-*
buck v. Combes (5).

Wilde, Serj. and *Petersdorff*, in support
of the rule, endeavoured to distinguish the
present from some of the cases referred to,
as here there was a suit actually pending.
By refusing this application, the Court will,
in effect and substance, remove the taxa-
tion from the officer, whose habits and
knowledge render him peculiarly compe-
tent to decide, and will transfer it to a

(1) Which enacts—"That the said act, for the
better regulation of attornies and solicitors, or any
clause, &c. shall not extend to any bill of fees,
charges, and disbursements that are now, or shall
hereafter become due from any attorney or solicitor
to any other attorney or solicitor, or any clerk in
court; but that every such attorney, solicitor, or
clerk in court may use such remedies for the re-
covery of his fees, charges, disbursements against
such other attorney or solicitor, as he might have
done before the making of such act."

(2) 1 Doug. 200, n.

(3) 3 B. & C. 157; a. c. 2 Law J. Rep. K.B. 221.

(4) 2 B. & Ad. 411; s. c. 9 Law J. Rep. K.B. 133.

(5) 5 B. & Ad. 400.

tribunal (the jury), which cannot by possibility possess these advantages. The general proposition, as laid down in the passage from *Tidd*, is that upon which the Court should act; and the principle there laid down is supported by *Wildbore v. Bryan* (6), where a distinction seems to be taken between ordering the taxation of an agent's bill at the instance of the client and of the attorney; and also by *Innes v. Hake* (7). If, however, the Court have no power under the statute, this is a case in which they will exercise a paramount jurisdiction, which it cannot be doubted they possess, as the cases cited do not negative the authority, but only afford instances in which they refused to exercise it.

The Court, however, were of opinion, that the rule should be discharged, as they thought that the authority conferred upon them to refer an attorney's bill for taxation was statutable; and the words of the 6th section of 12 Geo. 2. c. 13, exempting bills like the present from the operation of 2 Geo. 2. c. 23. s. 23. were imperative and binding.

Rule discharged accordingly.

1836. }
June 9. } NAPIER v. DANIEL AND WELSH.*

Verdict—Jury—Libel.

The Court above will not alter a verdict that has been recorded, in consequence of a statement made by the foreman of the jury, during the summing up, as to the opinion of the jury. The proper time to object that the finding is adverse to such opinion, and to ascertain and correct the error, is when the verdict is delivered at Nisi Prius.

Thus, where a plea justified the publication of a libel, imputing that the plaintiff committed an assault and then ran away, and the foreman of the jury, during the summing up, said that the jury were satisfied that the assault was committed, but did not believe that the plaintiff ran away; but, after retiring to deliberate, the jury found a

(6) 8 Price, 677.

(7) 2 Cox, 173.

* This and the two following cases were decided in Trinity term last.

verdict, upon that plea generally, for defendant:—Held, that such finding cannot be altered or the verdict entered for plaintiff, in consequence of the opinion previously expressed by the foreman.

This was an action for a libel, published in the form of a letter from a correspondent, in the Bath Herald newspaper.

The defendant, Daniel, pleaded the general issue only; and the defendant Welsh also pleaded the general issue, and pleas justifying the publication of different portions of the alleged libel.

The material part of the libel, professed to be justified by the second plea, was as follows:—The writer, after observing that five pounds were given to the poor of the parish for the purchase of coals, by a person named Newth, which five pounds were given to that individual as a compensation for a violent assault committed upon him by Col. Napier (the plaintiff), describing the conduct of the Colonel, upon the occasion, in the following words: "The Colonel, on hearing of this circumstance, started off, taking Captain P. with him, to Newth's house; on inquiry, they were told that he was not at home; but Newth, who was at no great distance, hearing that two gentlemen had been inquiring for him, immediately went in search of them, and, coming up with the Colonel and his friend, the Colonel, without saying a word to Newth, commenced a most brutal attack upon his person, by beating him with a large stick which he held in his hand, then ran away as fast as his legs could carry him, without sounding a retreat as to afford," &c.

At the trial, before Bolland, B., at the last assizes at Taunton, the foreman of the jury intimated to the learned Judge, when he was summing up, that the jury were satisfied as to the assault having been committed. The learned Judge then called their attention to that part of the justification respecting the running away, when the foreman stated, that the jury were satisfied that the plaintiff made an attack, but that he did not run away; they had mistaken the issue when the learned Judge before observed that they were satisfied with the evidence which had been given, that they only meant as to the attack on

plaintiff. The learned Judge continued his summing up after these observations, and the jury, after a deliberation of two hours, returned a verdict for the plaintiff on the plea of the general issue; for the defendant Welch on the second plea; and for the plaintiff on the third plea, with 5*l.* damages.

Wilde, Serj. obtained a rule calling upon the defendants to shew cause why the verdict should not be entered for the plaintiff on the second plea, contending, that the declaration of the foreman of the jury during the summing up, that the jury were satisfied that there was no running away on the part of the plaintiff, was a finding of that portion of the issue in his favour; and consequently the plaintiff was entitled, notwithstanding the subsequent general finding of the jury, to have a verdict entered for him on the whole plea.

Bompas, Serj. shewed cause, and contended, that it was sufficient if the issue was substantially proved, and of this there could be no doubt. The jury agreed that the assault was committed; and the demeanour of the party committing it, as to whether he ran away or not, was immaterial. The declaration of the foreman, that of a mere individual, whilst the Judge was summing up, was also unimportant; it neither was, nor could be, attended with the consequences contended for; at the utmost, it could only be said that an opinion was delivered, which the jury had altered upon retiring to discuss the subject, and consequently there was no reason to disturb the finding.

Fraser, Bingham, and Butt, in support of the rule, denied any intention to interfere with the province of the jury. But upon this occasion, the jury had through their foreman intimated an opinion upon the subject, and the verdict should be entered in conformity with such opinion. The case bore a strong resemblance to that of a special verdict, which should be entered according to its legal effect, and such effect here was manifestly a finding for the plaintiff. That part of the publication which the jury had said was disproved, threw a serious imputation upon the character of the plaintiff; and the verdict should be entered for him, for the purpose of removing the aspersion.

NEW SERIES, VI.—C.P.

TINDAL, C.J.—This is an application, on the part of the plaintiff, calling upon us to alter a verdict found upon an issue, and solemnly recorded by the officer of the Court. The application is made in consequence of some observations which were said to have been addressed during the summing up to the learned Judge, and which, as it is said, are contrary to the verdict which has been pronounced. If we were to listen to the application thus made, we should, in my opinion, establish a most dangerous precedent. That which is said before the finding of the verdict was never considered to be the verdict. I have always understood the rule to be, that the jury are at liberty to alter the verdict before it is recorded, but not after. This is laid down in *Co. Litt.* fol. 227, *b*, where it is said, "after the verdict recorded, the jury cannot vary from it, but before it be recorded they may vary from the first offer of their verdict, and that verdict which is recorded shall stand." This, therefore, may be considered as the dividing line. A consideration of the facts of this case will, I also think, lead us more forcibly to the propriety of such resolution. The question was, whether the second plea of justification, on which issue was joined, namely, that the plaintiff did run away, was made out; and, with regard to this, it was said, that the foreman of the jury had declared that the running away, imputed to the plaintiff, was not made out by the witness. Then some conversation arose between the counsel and the Judge. The latter then proceeded to sum up the whole of the evidence; and he told the jury that the plea divided itself into three distinct parts, and if they were not satisfied that these parts were proved by the defendant, they should find for the plaintiff; upon this the jury went out and discussed the matters which were submitted to their decision. We cannot, of course, take upon ourselves to say that the entire discussion was confined to this subject alone; it probably was not; it comprehended, it is to be presumed, the amount of damages, &c. When the jury came back, and were asked which way they found, they said, "We find for the defendant upon the second plea." It would, I think, be attended with dangerous consequences if we were to alter a general

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verdict, or allow it to be altered one way or the other, in consequence of certain expressions used as these were. The proper course for those who now take upon themselves to say that we have authority to alter the verdict, would have been to require at the time that the whole issue should have been entered for them. It was at that time they should have stood their ground, and the jury would then have known what they were to do. Upon the whole, we have no authority to grant the application which has been made; and the rule should be discharged.

PARK, J.—I am of the same opinion. We should be doing an act of a most dangerous tendency if we were to consent to this application, which has, as I think, no foundation whatever; if we sanction the application now made, all verdicts may be set aside, upon a ground similar to the present; for we all know that it is usual for juries to make observations in the course of a trial previous to their retiring, and when they return, they often pronounce a verdict quite different from the purport of observations which they have made. When they do express an opinion in this manner, it should not, in my opinion, bind the verdict. Their minds may receive a different impression from the summing up of the Judge, and under his advice they may deliver a verdict the other way. Upon this occasion they discussed all matters; they must be supposed to be men of sense, and to be perfectly satisfied with the evidence; and by returning a general verdict they put an end to every observation of the kind referred to here. I am the more confirmed in this reasoning, when I look back to the notes of the learned Judge. It is also said, that this was like a special verdict, and that, being entered by mistake, it may now be corrected. But this is by no means like a special verdict; it may be as well said, that it is like a demurrer. Upon the whole, we should not grant the rule; there is not the least colour or pretence for so doing, and the precedent would be most dangerous. It has been also said, that we should grant the application, to do justice to the character of the plaintiff; but nothing, at least as far as I am aware, has occurred, by which his character has been impeached.

GASELER, J.—I am of the same opinion. Something more than we have heard, in all probability, occurred when the verdict was returned. This was not a mere finding between the parties; there were several distinct issues, and they must have been taken by the officer. The only ground of application to the Court has been, as I think, the high character of the plaintiff; but a legal question cannot be varied from considerations as to character. The only way in which the jury could in this case be said to have done wrong was in respect of the evidence; and this consideration was entirely beside the question.

VAUGHAN, J.—If we were to yield to this application, we should, I think, make all appeal to the province of a jury vain. It is said, that in a case of this nature, that is to say, in case of a special verdict, the party has a right to require the assistance of the Court, and have the verdict entered according to its legal effect; but the fallacy of the argument is in this—this is not a special finding at all. True it is, that, in the progress of the cause, before the Judge had completely discharged his duty, and finished his summing up, certain observations were made; but, assuming that at that time the foreman of the jury made the observation imputed to him, namely, that there was no pretence for asserting that Colonel Napier ran away, and that he uttered this sentiment, not as his own, but as the deliberate opinion of the twelve jurors; then the discussion went on, and the Judge put it in terms to the jury, that the plea consisted of three distinct allegations: first, that the Colonel had committed an assault; secondly, that he ran away; thirdly, that money was paid for settling the charge, and effecting an arrangement; and that he then expressed himself in these words: "I tell you, that before you find your verdict for the defendant, you must be satisfied that these distinct allegations are substantially proved; proof of one or of two will not be sufficient; proof of the three is required;" supposing that these expressions were used by the Judge to the jury, a special one, and that they, hearing the language from his Lordship, went on taking the issue with them, and after an interval of two hours and a half returned and stated their intention of finding for

defendant on the second plea, what be said against such finding? Now, at the case in another point of view: these certain facts had appeared clearly in the mind of my Brother Bolland, and he had stated these impressions to the jury before they went out, and had said to the jury that the three allegations have not been proved, and you will find so; and that they, coming back, had returned a verdict in favour of the plaintiff, and that he then had said to the jury, "As it appears to me, you have not considered the evidence with sufficient attention; would it not be better for you to return a verdict?" Suppose they had done so again, and returned with an altered verdict, we should not therefore have interference. There is no misdirection imputed to the judge, neither is the verdict said to be contrary to evidence; we are relieved from consideration of such objections; they constitute the ground of this motion. The question, upon the whole, is, if we invade the province of the jury, I must say that of the Judge. Every-thing essential, as it appears to me, was actually made out upon the trial; and, in all the circumstances, the rule should be discharged.

Rule for entering the verdict upon the second plea, for the plaintiff, discharged.

3. } JONES V. PRICE.

Counting—Trespass—Statute 3 & 4 Will. 4. c. 71.

Trespass, quare clausum fregit, a plea entered by the defendant of a right of way over the locus in quo for thirty years before the commencement of the suit, (using the word next,) is good on special demurrer, as the statute 3 & 4 Will. 4. c. 71. is incumbent on the defendant to prove the non-existence of the right for thirty years before the action.

Trespass for breaking and entering certain premises of the plaintiff.

—First, the general issue;—Secondly, that the closes in which, &c. at all times when, &c., were part and parcel of a certain messuage and lands, common to wit, Dolevan Common;

that before and at the times when, &c., the defendant was and still is the occupier of a certain messuage and lands, with the appurtenances, situate and being at Dolevan aforesaid, and that he and all other the occupiers of the said messuage and lands, with the appurtenances, for a full period of thirty years before the commencement of this suit, had actually taken and enjoyed, claiming right thereto, and without interruption, for himself and themselves, occupiers of the said messuage and lands, with the appurtenances, common of pasture, in respect of the said messuage and lands, with the appurtenances in, upon, and throughout the said closes in which, &c., for all his and their commonable cattle levant and couchant, in and upon the said messuage and lands, with the appurtenances every year, and at all times of the year, wherefore, &c.

Special demurrer to the second plea, assigning for cause, that it was not averred or shewn in or by the said plea, that such right of common as in that plea mentioned was actually exercised or enjoyed by the defendant, and the occupiers of the messuage and lands in that plea mentioned, uninterruptedly, for the full period of thirty years next before the commencement of this suit, so that if issue were taken on the existence and exercise and enjoyment of such right of common, the defendant would in manner and form as that plea was framed and drawn, be at liberty to give in evidence an uninterrupted exercise and enjoyment of such right of common, by the occupiers of the said messuage and lands, in respect of which it was claimed, for any one continuous period of thirty years before the commencement of this suit, however remote, although such right might have been subsequently, and for more than thirty years next before the commencement of this suit, extinguished and lost. Joinder.

R. V. Richards, in support of the demurrer, contended that the word "next" was essential in a plea justifying under the statute 3 & 4 Will. 4. c. 71, and was invariably inserted. It was used in *The Monmouth Canal Company v. Harford* (1), where the plea was, that for twenty years and upwards next before the commence-

(1) 1 Cr. M. & R. 611; s. c. 4 Law J. Rep. (N.S.) Exch. 43.

ment, &c.; and in *Wright v. Williams* (2), the words of the plea were "for the full period of forty years next before the commencement of this suit." The effect of allowing so loose a form of plea would be to render it difficult for the plaintiff to know upon what point he should take issue; and the enjoyment for thirty years out of any greater number, would be sufficient to support the defendant's allegation.

TINDAL, C.J.—The 4th section of the statute, which provides that the period mentioned in the act shall be deemed and taken to be the period next before some suit or action, wherein the claim to which such period may relate shall have been brought into question, reduces the subject of discussion to a mere question of evidence. The plaintiff may take issue on the terms of the plea as they stand at present, and the defendant cannot get out of the 4th section; he must give such evidence as the section points out, that is to say, evidence of the enjoyment of the right for thirty years next before the action.

The other Judges concurred; but the defendant had leave to amend on the usual terms, withdrawing the demurrer and taking issue on the right.

1836. } STUART AND OTHERS V. NICHOLSON AND HOOLE.
June 13. }

Arbitration — Submission — Contract — Consideration — Trade.

The signature of a memorandum, according to the direction of an award, held sufficient evidence of the submission of the party signing to the arbitration.

An objection in an action of assumpsit, that the promise is not proved to be founded on the consideration alleged in the declaration, must be taken at the time of the trial; and such an objection will not prevail, if all the facts alleged as constituting the consideration are proved, and the Court cannot, upon the evidence, see any other circumstances that could form the consideration for the promise.

Whether an agreement, by a fender-maker, not to use the patterns of another fender-

(2) 1 Moo. & Wels. 77; s. c. 5 Law J. Rep. (N.S.) Exch. 107.

maker, on any account whatever, until the patterns have been out a clear twelvemonth from the time the latter should have had any one pattern in the market, is an agreement in restraint of trade—quære.

The declaration stated in substance, that before and at the time of making the promise, and committing the breaches thereafter mentioned, and thence hitherto, the plaintiffs carried on the trade and business of manufacturers of stoves, grates, and fenders, and in the prosecution of the said trade and business, during all that time, laid out large sums of money in and about the inventing, designing, making, and producing, and causing to be invented, designed, and made, and in and about the inventing, &c. and about the purchasing and procuring divers new and original patterns and models for the said stove and fender manufactory, in their said business as aforesaid, at Sheffield, in the county of York. It was then alleged, that the defendants, being also in the same trade, had frequently pirated and abstracted the models, &c. from the premises of the plaintiffs for clandestine and surreptitious imitation, use, &c., whereby the plaintiffs were greatly injured, harassed, and oppressed: that on the 18th of October 1831, one of the said patterns of the plaintiffs was found on the premises of the defendants, and divers disputes and differences arose thereon; that for the purpose of settling these disputes, putting an end to legal proceedings, and ascertaining, defining, and regulating the conditions, terms, &c. on which the plaintiffs and defendants should carry on their business respectively, it was agreed to leave and refer the whole matter to mutual friends of the plaintiffs and defendants, for their direction and award; whereupon, in consideration of the premises, and that the plaintiffs would consent to refer the said disputes to certain mutual friends, to wit, Messrs. J. L. G. R. & R. S. for their award, &c. and would agree and faithfully promise the defendants to abide by, perform, and keep their award, &c., the defendants then agreed to refer the whole matters, &c. to the said J. L. G. R. and R. S. and faithfully promised the plaintiffs to abide by, perform, and keep their award: that the parties then referred the

same to the said arbitrators, who afterwards, on the 19th of October, awarded that the defendants should pay a certain large sum of money, to wit, 200*l.* to the plaintiffs, and that they, the defendants, should make and sign, and perform, and keep the matters on the defendants' part and behalf to be performed and kept by and in a certain memorandum, in writing, to the effect and form following, (that is to say,) that they the defendants thereby acknowledged having received the patterns of the plaintiffs surreptitiously and clandestinely, and that one was found on the defendants' premises on the 12th of October 1831, for which the defendants were sorry, and then bound themselves from that day, to wit, from the 19th of October 1831, not to use, directly or indirectly, any patterns of the plaintiffs, on any account whatever, until the patterns should have been out a clear twelvemonth from the time the said plaintiffs should have had any one pattern in the market, and that thereby it should be mutually agreed that the said document, then so signed by the defendants as aforesaid, should not be printed in any newspaper or otherwise, and that only two written copies should ever be in circulation. The declaration then alleged, that the plaintiffs kept all the conditions required in the memorandum, and had received from the defendants the sum of 200*l.*, as directed by the arbitrator; and that after the making and signing of the memorandum above mentioned, to wit, on the 1st of August 1835, at Sheffield, they invented and designed a certain fender at considerable cost, and from the use and sale of fenders from the said pattern large profits and gains would have arisen to them, within and during the twelve months from the invention and design thereof, and from the time the said plaintiffs had the same in the market, but for the breach of promise and misconduct of the defendants, &c. It was then stated, that the defendants, on the 1st of August 1835, and on divers days between that time and twelve months next following the time when the plaintiffs first had the same in the market, did use directly and indirectly the said pattern of the said fender, and then made divers, to wit, 2,000 fenders from the use, direct and indirect, of the

said pattern, and in imitation and copy thereof; by reason whereof, the plaintiffs sustained great injury and damage in the market. The declaration then averred, that the defendants did not incur the like or any expenses in and about the making of the fenders, by which means they were enabled to sell them at a lower rate than the plaintiffs could afford to do, and that divers persons, (naming them,) who were before and usually customers of the plaintiffs, would have bought, but for the piracy of the defendants; of all which premises, the defendants had notice; and by reason of the said premises, the plaintiffs lost divers great gains and profits, which they otherwise would have made from the sale, &c. And the plaintiffs say, that by reason of the premises, and of the defendants selling, and offering the fenders of the said pattern in the market, at a much less price than the plaintiffs could afford to do, they, the plaintiffs, have incurred cost and labour in producing, inventing, and designing the same, which the defendants did not incur; and divers persons, to wit, Messrs. M. L. and others, refused to do further business with the plaintiffs, unless the plaintiffs would sell and let them have the fenders of the said pattern, at the said reduced price at which the same were offered in the market by the defendants.

The second count was similar to the first, and also stated the signature and delivery by the defendants of the memorandum to the effect and form before mentioned.

Pleas—First, that defendants did not promise *modo et forma*. Second, that plaintiffs were not the inventors of the fenders. Third, defendants did not sell or use fenders in imitation, &c. On these pleas, issues were joined.

It was contended at the trial, before Lord Denman, C.J., at York, that there was no proof of the defendant Hoole having submitted to the arbitration, as the only evidence of his being concerned was his signature to the memorandum. It was also said, that the consideration for the promise did not appear, as it should since the new rule of Hilary term, 2 Will. 4. The agreement was likewise objected to, as being a restraint upon trade.

A verdict having passed for the plaintiffs,

with leave to the defendants to move to enter a nonsuit, or to arrest the judgment, *Maule* obtained a rule accordingly.

Cresswell and *Hoggins* shewed cause, contending that the signature of the memorandum by Hoole was sufficient evidence of the submission to arbitration; that the consideration shewn by the declaration, was the agreement by the plaintiffs to submit their differences with the defendants, and the mode of regulating their respective trades in future, to arbitration; and that the conditions imposed were not in restraint of trade, as they were merely such as afforded a fair protection to the interest of the party, and did not interfere with the interests of the public. They referred to the language of *Tindal, C.J.*, in *Horner v. Graves* (1), and cited *Sykes v. Sykes* (2).

Maule, Alexander, and Wightman, in support of the rule, denied that the signing of the memorandum was *per se* satisfactory proof of the defendant Hoole having submitted to the arbitration. *Sykes v. Sykes* did not apply, as that was a case of fraud, where the defendant sold the articles in question as and for the manufacture of the plaintiff. They also argued, that under the plea of non assumpsit, it was incumbent on the plaintiffs to prove not alone the promise, but to prove it in reference to the consideration alleged in the declaration, and that was founded thereon; and they cited *Passenger v. Brooks* (3), and *Barnett v. Glossop* (4).

Cur. ado. vult.

TINDAL, C.J.—There have been two objections urged on the part of the defendants under this rule, one against the verdict which has been found for the plaintiffs, the other in arrest of judgment. The principal objection which was urged at the trial against the plaintiffs' right to recover, and upon which the learned Judge, who

tried the cause, was strongly pressed to nonsuit the plaintiff, was, that there was no evidence of the submission of the two defendants to the reference, the award under which forms the groundwork of the action. But we think the signature of the memorandum of agreement by both the defendants, which agreement was directed by the arbitrators, after the investigation of the case, to be given by the defendants, was a sufficient recognition of the authority of the arbitrators to supply the place of a more regular and formal submission. In the argument before the Court, another objection has been taken, and strongly urged upon our attention, viz. that there is no evidence whatever to connect the promise with the consideration alleged in the declaration; and that, under the plea of non assumpsit, the plaintiff is bound to shew that the promise, which he alleges to have been made, was grounded on the previous consideration, or state of facts alleged by him as its groundwork and support. Without giving any opinion whatever upon that abstract question, we think the objection cannot in any event be allowed in this case; first, because the objection was not taken at the trial, which, if taken at that time, might have been removed by further evidence; and secondly, because we are unable to see, upon the evidence, any state of facts, other than and different from those alleged in the declaration, to which the promise can by possibility apply. The several facts stated in the declaration, were proved, and the promise was proved in writing, by the signature of the parties. We see no other circumstances than those which preceded, which could form the consideration. As to the motion in arrest of judgment, we think the point raised, that the agreement was in restraint of trade, is far too doubtful, upon the allegation in this declaration, to justify us in arresting the judgment. The objection appears upon the record, if the defendants shall be advised further to depend upon it, and we give our

Judgment for the plaintiffs.

(1) 7 Bing. 735; s. c. 9 Law J. Rep. C.P. 192.

(2) 3 B. & C. 541; s. c. 3 Law J. Rep. K.B. 48.

(3) 1 Bing. N.C. 587; s. c. 4 Law J. Rep. (N.S.) C.P. 195.

(4) Ibid. 633; s. c. 4 Law J. Rep. (N.S.) C.P. 174.

CASES ARGUED AND DETERMINED

IN THE

Court of Common Pleas.

HILARY TERM, 7 WILL. IV.

1837. { MARKS AND ANOTHER, ASSIG-
Jan. 16. { NEES OF COLNAGHI, A BANK-
RUPT, v. LAHEE.

Pleading—Evidence—Tender.

In trover for certain etchings, impressions, pictures, and prints, on which the defendant claimed a general lien for work and labour, the plaintiffs in their replication alleged that the etchings, impressions, pictures, &c., were impressed and printed from divers plates, delivered for that purpose to the defendant, and that the defendant was retained and employed to impress and imprint under separate and distinct contracts and agreements: in his rejoinder, the defendant merely denied that he was employed and retained under certain distinct and separate agreements and contracts: upon issue joined, and verdict for the plaintiffs,—Held, that the replication did not lead to an immaterial issue, and consequently that a replender should not be awarded.

The entry by a deceased clerk of the plaintiffs' attorney, in his day-book, of a tender made to the defendant to satisfy a claim of lien, is admissible as evidence to prove the fact of such tender.

An averment of a tender of a certain sum under a videlicet, is good.

Trover for 100 plates, 100 etchings, 100 pictures, impressions, prints, reams of paper, and copper.

The declaration consisted of two counts, the one laying the possession, &c. in the bankrupt before the bankruptcy, the other in the assignees after that event.

1st plea—As to the plates and copper, that Colnaghi, before he became a bankrupt, was indebted to the defendant in a certain sum for money lent and advanced, and interest, and indorsed and delivered to the defendant a bill of exchange drawn by Colnaghi, on and accepted by H. Bayliss, for 45*l.*, due on the 16th of June 1831; that the defendant then had in his custody and possession the said plates and copper, and it was agreed between the defendant and Colnaghi, that they should be placed and remain in his custody and possession as a security, and that the defendant should have a lien thereon for the repayment of the said debt, and for the payment of the said bill of exchange, and that the defendant should hold and retain the said plates and copper, till the said debt and the said bill should be paid; averring that neither the said debt nor the said bill had been paid, &c., and concluding with a verification.

2nd plea—As to the pictures, prints, impressions, and paper, defendant says that the said Colnaghi, before he became bankrupt, and before &c., to wit, on the 1st of January 1831, and on divers other days and times, retained and employed the defendant to bestow his work and labour to impress and print divers etchings, pictures, impressions, and prints upon paper, for the said Colnaghi, for hire and reward to the defendant in that behalf; and, thereupon, defendant afterwards and before the said Colnaghi was a bankrupt, and before the said time when &c., to wit, on the day and year last aforesaid, and on the said other days and times, did, under and by virtue of the said retainer and employment, bestow his work and labour, and impress and print upon paper and otherwise, divers, to wit, 100 etchings, 100 pictures, 100 impressions, and 100 prints, upon divers, to wit, 500 reams of paper and otherwise, being the same identical etchings, pictures, impressions, prints, and paper, in the said declaration mentioned; and thereupon the said Colnaghi became and was indebted to the defendant, for and in respect of his said work and labour, and the said etchings, drawings, impressions, and printing, in a large sum of money, to wit, the sum of 500*l.*; and the said etchings, impressions, prints, and paper, having, at all times remained and continued in the custody and possession of the defendant, and the said debt remaining due and unpaid, wherefore the defendant before and at the time, when &c. did detain, and still doth detain the said etchings, pictures, impressions, prints, and paper, as a security and lien for the said debt, and which is the said supposed conversion, &c.; and this the defendant is ready to verify.

The 3rd plea stated an agreement between Colnaghi, before his bankruptcy, and the defendant, that the defendant should retain the goods and chattels above mentioned, and have a lien upon them for the bill of 45*l.*, accepted by Bayliss, and indorsed to him by Colnaghi, and for a certain sum of 356*l.* 3*s.* 5*d.*, money lent and advanced, work and labour, and materials, &c.; that Colnaghi did suffer them to remain accordingly in the defendant's possession, in pursuance of the agreement, and

that the said debt, &c. was not paid, for which reason, and as a security, defendant kept and detained, and still doth keep and detain, &c.

To the first plea, the plaintiffs replied, a payment of the sum of 104*l.*, had and received by the defendant, on account of the said plaintiffs, and with their consent, which was so received and accepted by defendant, in discharge of so much of the said lien in the said first plea mentioned; and that the plaintiffs were ready and willing, and tendered and offered to the said defendant to pay him a certain other large sum of money, to wit, 100*l.*, in satisfaction and discharge of the residue of the said lien, such last-mentioned sum being more than sufficient to satisfy and discharge the residue of the said lien.

To the second plea, that the etchings, impressions, pictures, and prints, were impressed and printed from divers, to wit, ten different plates, delivered for that purpose, by the said Colnaghi, to the said defendant, and the said defendant was retained and employed by the said Colnaghi to impress and imprint as aforesaid, under separate and distinct contracts and agreements with the said Colnaghi; and this the said plaintiffs are ready to verify.

To the third plea, *de injurid.*

Rejoinders—to the replication to the first plea, as to the tender, that the sum tendered was insufficient to satisfy and discharge the residue of the lien: to the replication to the second plea, denying that defendant was retained and employed by Colnaghi to impress and imprint as aforesaid, under separate and distinct contracts and agreements with Colnaghi, as plaintiffs have alleged; concluding to the country.

At the trial, before Tindal, C.J., at the Sittings after Easter term, 1835, at Guildhall, the plaintiffs, after an objection taken on the part of the defendant, gave in evidence, in support of the issue upon the tender, the following entry in the handwriting of a deceased clerk of the plaintiffs' attorney, in his day or entry book: "9th of October 1834.—Re Colnaghi, Attending Mr. Lehee, tendering him 100*l.*, for each of the plates and the etchings, delivering up of the Queens separately, when he declined letting me have the same, and said

no objection to deliver up the im-
 ons, upon payment of the expenses
 ing them." Upon the issue raised
 the second plea, it was submitted for
 efendant, that he was entitled to a
 ct, on proof that the work, as therein
 d, had been done, but the learned
 d, that as the evidence of the
 upt proved that the orders were given,
 the work done and sent home at dif-
 times, the verdict should be taken
 s issue for the plaintiffs, subject to a
 n in arrest of judgment, on the ground
 was an immaterial issue raised by
 aintiffs' replication. The plaintiffs
 verdict on all the issues, and
 ander had obtained a rule nisi to
 vide the verdict, and in arrest of
 ent.

Mapas, Serj. and R. V. Richards
 l cause.—The issue raised on the
 plea is not immaterial, as it is,
 the work done was an entire work,
 ave the defendant a general lien or
 or it is not disputed, that if an entire
 he had a right to a general lien—
v. Nicholson (1), and *Chase v. West-*
er. The objection as to the admis-
 of the entry of the deceased clerk
 by the late cases of *Doe v. Tur-*
er, and *Poole v. Dicus* (4). In the
 case, it was proved to be the
 course of practice in an attorney's
 for the clerks to serve notices to
 tenants, and indorse on duplicates
 notices the fact and time of service;
 one occasion, the attorney himself
 d a notice to quit, to serve on a
 took it out with him, together with
 ers prepared at the same time, and
 d to his office in the evening, hav-
 rsed on the duplicate of each notice
 randum of his having delivered it
 enant, and two of these were proved
 been delivered by him on that oc-
 —it was held, upon the trial of an
 nt, after the attorney's death, that
 orsement so made by him was ad-
 evidence, to prove the service of
 d notice. In the latter case, it was

Mau. & Selw. 167.
Mau. & Selw. 180.
B. & Ad. 890; s. c. 1 Law J. Rep. (N.S.)
Bing. N.C. 649; s. c. 4 Law J. Rep. (N.S.)

SERIES, VI.—C.P.

decided that an entry of the dishonour of
 a bill of exchange, made in the usual course
 of business at the time of the dishonour,
 in the book of a notary, by his clerk, who
 presented the bill, might be given in evi-
 dence, in an action on the bill, upon proof
 of the death of the clerk who made the
 entry. Now, the entry of the tender
 here was made in a manner conformable
 to the conditions required in those cases.
 Upon the argument of *Poole v. Dicus*, it
 was endeavoured to assimilate the entry
 by the notary's clerk to an entry made by
 the sheriff's officer, of the place where he
 arrested the party, which entry, it was
 held in *Chambers v. Bernasconi* (5), could
 not be received in evidence after the death
 of the officer by whom it was made; but
 the analogy was not admitted, as the entry
 by the notary's clerk of the dishonour of
 a bill is an act of duty, and done in the
 discharge of such; whereas, the entry of
 the place of arrest by the officer is not,
 and is quite unnecessary, as it is per-
 fectly immaterial in what part of the
 county the arrest was made.

Alexander and Butt, in support of the
 rule, contended that the replication to the
 second plea put in issue that which was
 obviously immaterial. With regard to the
 entry, it was inadmissible, as it does not
 charge the clerk with the receipt of any
 sum of money; nor can it be said to have
 been made, as in *Poole v. Dicus*, in the
 performance of a duty in the general course
 of business. The service of notices to
 quit is the ordinary business and duty of
 an attorney's clerk, but the same cannot be
 said of the making of a tender. Besides,
 the question of a tender depends upon law
 as well as fact; and the mere statement
 that a tender has been made, is insufficient
 (6), for according to the language of Tin-
 dal, C. J. in *Poole v. Dicus*, "the case
 wants the accompanying circumstances,
 which tend to confirm its correctness, and
 the link in the chain which gives consistency
 to the whole." The doctrine of Lord Den-
 man in *Chambers v. Bernasconi*, is applic-
 able here. "We are all," said his Lord-

(5) 1 Cr. M. & R. 347; s. c. 3 Law J. Rep.
 (N.S.) Exch. 373.

(6) In *Leatherdale v. Swesepstone*, 3 Car. & Pay.
 342, Lord Tenterden said, "I am always sorry to
 see a plea of tender on the record, because I know,
 from experience, it is so very seldom made out."

L

ship, "of opinion that whatever effect may be due to an entry made in the course of any office, respecting facts necessary to the performance of a duty, the statement of other circumstances, however naturally they may be thought to find a place in the narrative, is no proof of those circumstances." Other cases also shew that this entry was not receivable. In *Sykes v. Marshall* (7), it was ruled, that where entries have been made by a clerk, since dead, proof of his hand-writing will not make such entries evidence. *Calvert v. the Archbishop of Canterbury* (8) shews that an entry made in the books of the plaintiff, specifying the terms of an agreement, is not evidence, where the person who made it is dead, by proving his hand-writing; and in *Gale v. Pakington* (9), it was said by Hullock, B., "that entries in a diary kept by a deceased attorney, are not evidence of business done by him."—It was also objected, that there was no certainty as to the amount of the tender, it having been laid with a *videlicet*.

TINDAL, C.J.—This is an action of trover, brought by the assignees of the bankrupt Colnaghi, for a certain quantity of copper plates, etchings, pictures, and impressions, which they affirm the defendant has converted to his own use. The first plea is confined and limited to the copper plates and impressions; and the answer given to the demand is, that to a certain extent the defendant was entitled to retain them for a demand on the bankrupt. To this, the replication is, a payment of the sum of 104*l.* had and received by the defendant, on account of the said plaintiffs, and with their consent, in discharge of so much of the said lien; and a tender of a certain sum, to wit, the sum of 100*l.* in satisfaction of the residue of the lien, such sum being more than sufficient to discharge such residue; and upon such sufficiency the issue has been taken between the parties. The second plea limits the right of the party to retain the etchings, pictures, impressions, &c.; and I will now make a few observations in regard to this plea, as it is that to which the argument has

been first addressed. Let us look to the terms of it. They are, in substance, that, on &c., and on divers other days and times, Colnaghi retained and employed the defendant to bestow his work and labour, to impress and print divers etchings, pictures, impressions, &c. for hire and reward, and the defendant did afterwards, &c., to wit, on the day and year last aforesaid, and on the said other days and times, under and by virtue of the said retainer and employment, bestow his work and labour, and impress, &c. With regard to this, it is said there must be a repleader, as the parties have gone to trial upon an immaterial issue, which has been raised for the consideration of the jury, and which was inadequate to decide the rights of the parties. The plea, it should be observed, states that Colnaghi was indebted to the defendant in a large sum of money, in respect of his work and labour on the said etchings, drawings, &c. In answer to this, the replication alleges in express terms, that the etchings, impressions, pictures, &c. were impressed and printed from divers, to wit, ten different plates, delivered for that purpose by Colnaghi, and that the defendant was retained, &c. under separate and distinct contracts and agreements. The rejoinder traverses, in precise terms, this replication. Now, first of all (before we go back to the plea), admitting that the plaintiffs have stated and relied upon that which was unnecessary, and have elected to stand upon it, and that the defendant has thought proper to repeat it, and take issue upon the fact of the separate contracts, instead of meeting the allegation with a special demurrer, has he, by acting thus, done anything more than raise with more distinctness and clearness, the very point on which the plaintiffs rely? Has he done more than, by an over degree of caution, narrowed and limited the question which was raised by the replication? And, in such a case, after the jury have found their verdict for the plaintiffs, can we say that they have found it on an immaterial issue? When we consider the precise terms of the issue, we cannot, I think, come to such conclusion. True, the defendant says, that upon divers days and times he did so and so, but when he speaks of his *work* and *labour*, he *re-* lapses into the singular number. The

(7) 2 Esp. 705.

(8) *Ibid.* 646.

(9) 1 M'Cl. & You. 354.

iffs, feeling that they stood upon de-
ground, with regard to a plea framed
such double aspect, and cautious in
enturing beyond the issue thus raised,
ly denied in their replication the al-
on contained in the plea. In such a
of things, when the jury have returned
dict, it would, I think, be too much
ant a replender, as if the verdict were
upon an immaterial issue, and send
ase back to a second investigation,
ly effect of which would be the
g of the same point. Now, as to the
lea, which, in terms, claims the lien
rsuance of the agreement—the re-
on alleges, that after the payment of
ain sum, a tender was made on the
of the plaintiffs of a sum more than
ent to satisfy the residue, which was
d. When I look at the language of
plication, it appears to me to refer
separate facts; the tender of a
f money, and the sufficiency of such
s a tender to satisfy the defendant
e lien which he claimed. The re-
denies the sufficiency of the tender.
erson can, I think, look at the allega-
any other way than that which
lead to the conclusion, that the
on was, whether the sum of 100*l.*
was not a sufficient sum to meet
a. Then, as to the objection founded
the sum tendered being pleaded un-
videlicet, it falls to the ground, as the
ties are sufficient to shew, that even
a tender should be pleaded under
cet, it must be proved to its fullest
the rule which governs the videlicet
cases, being well understood. The
which bears most closely upon the
of this objection is that of *Green-*
Barrett (10), where it was held,
ere an averment is material, the
a of a videlicet does not render it
rial (11). So here, the sum tendered
material and issuable, it does not
the less so in consequence of being
h a videlicet. This view of the
is still further confirmed by the
e of *Williams v. Price* (12).

Term Rep. 460.
pon the subject of the videlicet, vide also
v. Knox, 3 Term Rep. 65.
B. & Ad. 695; s. c. 1 Law J. Rep. (N.S.)

We come now to the main objection—I mean that which arises upon the admissibility of the evidence; and here I may as well observe that I should be most unwilling to extend the determinations of the Courts upon this subject, beyond the limits which are essentially necessary to attain the ends of justice, and thereby establish a tendency to decide the rights of litigating parties without the sanction of an oath, and the benefit and advantages of a cross-examination. With respect to this matter, there are many decided cases, and exceptions have been allowed to the general rule; and it appears to my mind, that the entry in question is within the exceptions. I cannot read the entry in any other way than as going to charge the deceased to the amount of 100*l.*; neither can I look upon it in any other light than as made by him in the regular and ordinary course of his business as a clerk. In my opinion, this entry would be evidence against the clerk, in an action by the official assignee, for the recovery of the 100*l.* It would, I think, be material evidence against him, to shew that he received the money and did not pay it; that he had it in his own hands, and did not hand it over: nay, more, it would go farther—it would enable the official assignee to prove that which would be necessary, namely, that he had received the money for the use of the bankrupt, and that he had not applied it to such use; and it would shew exactly the sum which the clerk kept in his hands, and thus fill up a most important link in the transaction. It should be also borne in mind, that the entry was made when the party was a clerk, and when he had neither object, motive, nor interest, in doing that which he did. The rule should be discharged on both points.

PARK, J.—I am of the same opinion. The great knowledge and experience of my Lord in the science of pleading, will render it unnecessary for me to add any observations to those which he has made, with regard to the replender. As to the materiality of the sum tendered, 100*l.*, though laid under a videlicet, *Greenwood v. Barrett* is decisive on that point. The Judges there entered fully into the subject; and the Court laid down the rule as stated by the Lord Chief Justice. I come now to that which, I think, is the main ques-

tion, the great point of the case, namely, whether the entry made, as described by the deceased clerk, was or was not admissible; and I am clearly of opinion that it was. I quite agree with the very learned and eminent persons who have preceded me in these courts, in thinking that the rules of evidence, which are of such essential importance to the lives and properties of mankind, should not be idly and carelessly relaxed, yet it often happens that exceptions are necessarily introduced, more especially when, as in the present case, the exception is rendered necessary by, and owes its origin to the act of God; and it is also introduced, as observed by my Lord, on the principle and footing that the party charges himself; and it should also be added, that the act should be done, if not always, at least as much as possible, in the ordinary course of the party's business. In the present case, it cannot be denied that the clerk has charged himself with a sum of money. It has been said, that what he had done here, was not in the course of his business:—to this I am not prepared to assent. Lord Mansfield was in the habit of saying, that the *quicquid agunt homines* was the business of courts of justice: if I may venture to extend the sentiment, the same may, perhaps, be said of attorneys' clerks. I will not go into the cases upon the subject. *Chambers v. Bernasconi* has been referred to; but it was not like this; there was no entry there by the bailiff which affected himself; there was merely a writ commanding him to arrest Chambers in the county of Middlesex, and consequently it was no matter whether the arrest took place in South Molton Street or at Paddington, as both places were in the county of Middlesex. There need have been no entry as to where the party was arrested. The *locus in quo* was perfectly unimportant. As to the other case of *Poole v. Dica*, there the entry was of the dishonour of a bill by the clerk of a notary; it was said, the act done there was in the discharge of his particular duty:—no doubt it was; but, by so doing, he made no charge against himself; yet still the evidence was received as within the exception, the act being done in the execution of his particular duty. Perhaps the strongest case upon the subject in modern times is *Doe v.*

Turford. The entry there was a clear admission that the party had done the act, and made himself liable for the consequences; and it was received on both grounds, as being a charge against himself, and as being done in the ordinary course of his business. I will now allude briefly to the case of *Higham v. Ridgway* (13), for the purpose of shewing the anxiety of the Judges to keep the rule within the principle laid down in *Warren v. Greenville* (14), which was, that independently of the doctrine of presumption the attorney's book, in which he charged himself, was admissible as evidence; and this principle was not shaken by anything which fell from Lord Mansfield, in *2 Burr* 1071, when he referred to the case, and said he himself was counsel in it. In fine, I think the rule was well laid down by Bayley, J. in *Higham v. Ridgway*, namely, that the entry is evidence after the death of the party making it, if such party have peculiar means of knowing the fact, and the declaration is against his interest. In the present case, there is no doubt, that if the clerk had lived longer, and an action had been brought against him, this entry would have been evidence that he had received the money and kept it in his pocket.

VAUGHAN, J.—I agree, that the issue raised by the plaintiffs' replication is not immaterial; I also agree that the entry was properly received in evidence. A subject similar to this was much discussed in *Gleadon v. Atkin* (15): and perhaps it would be as well here to state, that Bayley, J. there denied the use of certain words qualifying the rule attributed to him in the report of *Higham v. Ridgway*. The words were, "if he (that is, the party making the entry) could be examined to it in his lifetime:" this qualification the learned Judge pointedly disclaimed, and he rested the rule upon the party's having peculiar means of knowing a fact, and making a declaration of that fact, which is against his interest, and having no interest to misrepresent the fact. Now, here, the clerk acted in the course of his business; he had peculiar means of knowledge, as he alone

(13) 10 East, 109.

(14) 2 Stra. 1129.

(15) 1 Cr. & M. 410; s. c. 2 Law J. Rep. (N. S.) Exch. 152.

cognisant of the fact; he had no motive whatever to misrepresent, and we are not to presume a bad one. In my view, the entry was adverse to his interest, inasmuch as his acknowledgment of making a receipt would have been a clear admission of his having the money for the purpose, and also of the refusal of the other party to return it. The entry would, I think, have supported an action against him, by the assignee in the performance of his duty. In regard to the objection founded upon the illegality of the tender under a *videlicet*, the cases upon the subject are to be found in a note to *Skinner v. Andrews* (16); the doctrine may be considered as established, that if that which is traversed and material, be laid under a *videlicet*, it is not the less necessary, that that which is laid should be pointedly and absolutely proved. This is clearly laid down as to the issue on the sufficiency of the evidence has been here properly found.

Rule discharged.

—Upon the subject of the admissibility of evidence charging those by whom they are made. *Middleton v. Melton*, 10 B. & C. 317; a. c. 8 Rep. K.B. 243.

7. } MORGAN AND ANOTHER v.
20. } FEBRER.

Contract—Gaming—Foreign Securities
Trading—General Issue.

A contract for the delivery of a certain quantity of foreign stock or securities upon a certain day, whether the price or value of said stock shall be on that day higher or lower, or that, at the option of the party to deliver the stock, the contract shall be repounded, by paying the amount of the difference between the price on the day when the contract was made and on the future day, is not a wager illegal at common law. Whether such contract is void within the meaning of the Statute, 14 Geo. 3. c. 48.

A declaration alleged, that in consequence of the plaintiffs, at the request and instance of the defendant, would purchase for the defendant a certain amount of foreign securities, the defendant under-

took to indemnify and secure the plaintiffs against all losses, damages, &c., which he might incur in consequence of his purchasing the said securities, by giving to or depositing with the plaintiffs the value and amount of 10l. per cent. on the market price of the said securities, so to be purchased by plaintiffs, and also in the event of the prices or value of the securities so to be purchased falling or coming lower than the value or amount of 10l. per cent. on the said market price, that the defendant would replace the said amount of 10l. per cent., by giving or depositing with the plaintiffs a further sum or amount of 10l. per cent. upon due notice, or that the said securities so purchased by the plaintiffs should be sold: the defendant pleaded, that the said money was paid and lent, &c. in respect of a certain contract by which the plaintiffs undertook, in consideration that the defendant would employ them as brokers at a certain reward, that the plaintiffs would find money, and purchase for the defendant a large amount of public securities, to wit, Spanish Bonds and Scrip, upon the terms following— that the plaintiffs should reserve a certain interest, to wit, 5l. per cent. on all advances of cash and payments made by them on account of the said purchase, and that they should hold and retain in their hands, as security for all advances and payments, the said securities so to be purchased, and that, as an additional security, the defendant should deposit 10l. per cent. upon the then market price of the securities; and in case the said securities should fall or come lower in price, then, upon notice given, the defendant should deposit such a further amount as would, with the existing market price or value of said stock, keep up the deposit to the value of the securities at the time when the contract was made, and 10l. per cent. thereupon, and that the said plaintiffs should be repaid for all advances and payments in the manner set forth in the plea; and if defendant refused or neglected, &c., that the plaintiffs should be at liberty to sell the securities then in their hands, and apply the proceeds of such sale to the repayment to them of any advances and payments made by them on account of defendant, in respect of the contract of purchase; and that the defendant should afterwards reimburse the plaintiffs for any losses occasioned by such resale:—Held, that such plea was bad, inasmuch as it opo-

rated as a denial in fact of the express promise or contract alleged in the declaration, and consequently amounted to the general issue.

The first count of the declaration alleged, that in consideration that the plaintiffs, at the special instance and request of the defendant, would purchase for the defendant a large amount of a certain foreign security, called Spanish Cortes Bonds; and also in consideration that the plaintiffs, at the special instance and request of the defendant, would purchase for the defendant a large amount of a certain other foreign security, called Spanish Scrip, the defendant undertook and promised the plaintiffs to indemnify and secure the plaintiffs against all losses, damages, and expenses which they should or might incur, bear, pay, or sustain, by reason of their purchasing the said securities for the defendant, by giving to or depositing with the said plaintiffs the value and amount of 10*l.* per cent. on the market price of the said securities so to be purchased by the plaintiffs for the defendant as aforesaid, and also in the event of the prices or value of the said securities, so to be purchased by the plaintiffs for the defendant, falling or coming lower than the value or amount of 10*l.* per cent. on the said market price, the said defendant would replace the said amount of 10*l.* per cent., by giving or depositing with the plaintiffs a further sum or amount of 10*l.* per cent. upon due notice, or that the said securities so purchased by the plaintiffs for the defendant should be sold. The declaration then averred, that the plaintiffs afterwards purchased for the defendant 3,000*l.* of Spanish Cortes Bonds, and 3,000*l.* of Spanish Scrip, of which the defendant had notice; that the defendant did not give or deposit with the plaintiffs the value or amount of 10*l.* per cent. on the market price of the said securities; that the prices or value thereof afterwards fell or came lower than the value or amount of 10*l.* per cent. on the market price, of which depreciation the plaintiffs gave the defendant notice, and requested the defendant to replace the said sum or amount of 10*l.* per cent. on the market price, which the defendant neglected and refused to do; by reason

whereof the plaintiffs were obliged to sell, and did afterwards sell, the said securities so purchased for the defendant, for less prices than those for which they had purchased the same, and that the balance or difference between the prices at which the said securities were purchased, and those for which they were sold, amounted to a large sum of money, to wit, the sum of 2,600*l.*, whereof the defendant had notice, but had neglected and refused to pay the same, or any part thereof. The declaration also contained a count for work and labour, in selling and disposing of various securities; and counts for money paid, money lent, and on an account stated.

Seventh plea to the first count—That the said contract and agreement, in the said count mentioned, was an unlawful contract, as the plaintiffs well knew, to indemnify and save them, the said plaintiffs, harmless in a gambling contract, that is to say, a contract in the nature of putts and refusals, relating to the future price of certain public securities, to wit, Spanish Cortes Bonds and Spanish Scrip, knowingly made by the said plaintiffs, as brokers for the said defendant, for and on account of the said defendant, with certain persons, that is to say, a certain contract before then, to wit, on the 23rd of February 1835, for the purchase of certain public securities, to wit, 10,000*l.* Spanish Bonds, and 30,000*l.* Spanish Scrip, made by the plaintiffs, they then being the brokers of the said defendant, with certain other persons, by which the said plaintiffs agreed, on the part of the defendant, that the defendant should pay, on a certain future day, to wit, the 1st of April 1835, to the said certain other persons, a certain sum, to wit, 10,000*l.* of lawful money of Great Britain, for the delivery to him, the defendant, on a future day, to wit, on the 1st of April, of certain public securities, to wit, 10,000*l.* Spanish Bonds, and 30,000*l.* Spanish Scrip; and that the said securities should, on the day last above mentioned, be delivered to the said defendant by the said certain other persons, whether the price or value of the said securities should be higher or lower on the said future day, to wit, the year and day last mentioned, or that, at the option of the said defendant, the said contract should be compounded

and settled as follows, that is to say, that the amount of difference should then be paid by the defendant, between the price on the day when the contract was made as aforesaid, and the future day, to wit, the 1st of April 1835, to the persons with whom the said last-mentioned contract was made by the plaintiffs, on behalf of the defendant as aforesaid, in case the said securities should fall in value, and that the said defendant should receive, on the said future day, to wit, on the day and year last above mentioned, the amount of difference of the persons with whom the said last-mentioned contract was made by the plaintiffs on behalf of the defendant as aforesaid, in case the said securities should rise in value, between the price on the day when the said contract was made as aforesaid and the said subsequent day, to wit, the said 1st of April 1835, against the form of the statute in that case made and provided. And the said defendant further says, that the said last-mentioned contract of purchase was made by the said plaintiffs on behalf of the defendant, with certain other persons, to wit, in the purchase of 5,100*l.* of the said Spanish Cortes Bonds, of one Rawlins, and 2,040*l.* of the said Spanish Cortes Bonds, of Barbers, and 6,120*l.* of the said Spanish Scrip, of one Mercer, and 4,080*l.* of the said Spanish Scrip, of one Samson. And defendant further says, as to the residue of the said Spanish Bonds and the said Spanish Scrip in this plea mentioned, that the said plaintiffs did not disclose to the defendant nor inform him who the persons were with whom so much of the contract in this plea last above mentioned was made; and this the defendant is ready to verify.

Eighth plea—That the contract to deliver upon a certain day was, in truth and in fact, a wager, made on the day and year, &c., respecting the price and value of certain public securities, given by the lawful government of Spain to the national creditors of Spain, which country and the lawful government thereof was then and still is in amity with this realm, and his present Majesty the now King of this realm, and the price and value of which securities depended upon the prosperity of the said country of Spain, and the maintenance of peace by Spain with this realm and other

nations; and by the said wager, under pretence of a contract, the said plaintiffs, as brokers for the defendant, agreed with certain other persons, to this defendant unknown, that if the price and value of the said securities should be higher on the said future day than on the day when the said wagering contract was made, as in this plea is mentioned, to wit, higher than 60*l.* per cent., he, the said defendant, should then receive the amount of difference between the value of the said securities, to wit, 10,000*l.* Spanish Cortes Bonds and 30,000*l.* Spanish Scrip, on the day when the said contract was made, to wit, 60*l.* per cent., and the higher value on the said future day; and if the price and value thereof should fall, the defendant should, in like manner, pay the amount of difference between the value on the said day, when the contract was made as aforesaid, to wit, 60*l.* per cent., and the value on the said future day; and this the said defendant is ready to verify.

Ninth plea—That neither of the said Spanish Bonds nor said Spanish Scrip, nor either of them, nor any part of either of them, was, nor were at the time when the said contract was so made as aforesaid, to wit, on the day and year aforesaid, in the possession or the property of the said plaintiffs, or the said persons, or either of them, with whom the said plaintiffs so made the contract on behalf of defendant as aforesaid; nor had the said plaintiffs, or the said persons, or either of them, or any part of either of them, any property therein, on the said future day, to wit, &c.; and this the said defendant is ready to verify.

Tenth plea—That the monies in the second, third, fourth, fifth, and sixth counts mentioned, became and were due and owing by force of a certain gambling contract, made by the plaintiffs, as brokers for the defendant (setting forth the contract in the same terms as the seventh plea); that the work and labour mentioned in the second count were performed in and about the making of such contract; that upon the future day mentioned, the securities did become and were lower in value, and thereby the defendant then became liable to pay, to the said persons with whom the said illegal contract was made, either the

sum of 10,000*l.* for a delivery by them to the defendant of the said securities, or the sum of 3,000*l.*, as the amount of the difference in value between the day when the contract was made and the said future day, to wit, the 1st of April; and being so liable, the defendant says, the said plaintiffs knowingly lent to him, the defendant, the said sum of 600*l.*, which is the sum of money in the third count mentioned, to enable him to make to the persons, with whom the plaintiffs made the contract on behalf of the defendant, a payment on account of the liabilities of the said defendant, arising by force of the said illegal contract, in this plea mentioned, which the defendant then consented to do. And the defendant further says, that afterwards, to wit, on the 1st of April, the said defendant delivered to the plaintiffs the said sum of 600*l.*, to be by them paid on account of the liability aforesaid, to the persons with whom the said illegal contract was so made on behalf of the defendant. And the defendant further says, that the plaintiffs did knowingly pay to the said persons, on the account aforesaid, the sum of 600*l.*, in certain shares and proportions, which the plaintiffs did not disclose to the defendant.

The eleventh plea, to the same counts, alleged, that the stock respecting which the contract was made, was not in the possession of the parties at the time when the contract was made.

The twelfth plea—That the contract was an illegal wager, respecting the differences between the value of the said securities on the day when the said contract was made, and the higher value on the said future day; and that the money in the declaration mentioned was advanced by the plaintiffs to defendant, to enable him to make a payment to those who made the contract with plaintiffs.

Thirteenth plea—That the said money was paid and lent, and the said interest accrued, and the said account was stated of and concerning, and in respect and on account of a certain contract made between the plaintiffs and defendant, by which the plaintiffs undertook, in consideration that the defendant, at the request of the plaintiffs, had employed them as his brokers, at a certain reward and commission therefore to them to be paid, that the said plain-

tiffs would find money, and purchase for the said defendant a large amount of certain public securities, to wit, 10,000*l.* Spanish Cortes Bonds and 30,000*l.* Spanish Scrip, upon the terms following, that is to say, that the said plaintiffs should receive a certain interest, to wit, 5*l.* per cent. on all advances of cash and payments made by them on account of the said purchase, and that they should hold and retain in their hands, as security for all advances and payments, the said securities so to be purchased as aforesaid, and that, as an additional security, the said defendant should deposit 10*l.* per cent. upon the then market price of the said securities; and in case the said securities should fall or come lower in price, then, upon notice being given by the plaintiffs to the defendant, that he should, from time to time, deposit with the said plaintiffs such a further amount as should, with the existing market price or value of the said securities, keep up and maintain the deposit to the value of the securities at the time when the contract was made, and 10*l.* per cent. thereupon, and that the said plaintiffs should be repaid for all advances and payments in manner following, that is to say, that if the plaintiffs should, within a reasonable time after the making of the said purchase, give notice to the defendant to repay to them the amount of the advances and payment made by them on account of the defendant, he, the defendant, should, within a reasonable time after such notice, receive the said securities from the plaintiffs, and the deposits thereon, and should repay to them all advances and payments made by them for and on account of the said defendant, in respect of the said purchase, with interest thereon, or that if the said securities should fall or come lower in value than the said 10*l.* per cent. on the market price, and if the said defendant should, on due notice being given by the plaintiffs to the defendant of the said reduction of price, neglect or refuse to deposit such additional sum as should maintain and keep up the deposit to 10*l.* per cent. upon the existing market price, that the said plaintiffs should be at liberty to sell the securities then in their hands, and apply the proceeds of such sale to the repayment to them of any advances and pay-

ments made by them to and on account of the defendant, in respect of the contract of purchase in this plea mentioned, and that the defendant should afterwards reimburse the said plaintiffs for any losses occasioned by such resale, after such notice as aforesaid. The plea then averred, that the plaintiffs, in pursuance of the agreement, purchased 10,000*l.* Spanish Cortes Bonds and 30,000*l.* Spanish Scrip, which the plaintiffs retained in their hands; that the defendant performed his part of the agreement, and did afterwards deposit 10*l.* per cent. on the said securities; that the plaintiffs had given the defendant no notice to repay the amount of advances or payments made in respect of the said contract, or of any depreciation in the value of the said securities, but had sold the said securities so purchased by them as aforesaid, and applied the proceeds in payment of such advances and payments as had been made by them, in pursuance of the contract in this plea mentioned; that the money in the third count mentioned was lent by the plaintiffs to the defendant to purchase the securities aforesaid in this plea mentioned, and the said money was delivered by the defendant to the plaintiffs, and was by them applied to the purchase of the said securities, in this plea before mentioned, and the interest in the fifth count mentioned, in respect of the monies in the third and fourth counts so lent and advanced by the plaintiffs to the defendant, and so paid to his use as aforesaid; and that the account stated, in the last count mentioned, was stated of and concerning the monies in the third and fourth counts mentioned, and the interest thereon, and of no other debt or demand whatsoever; and this he, the said defendant, is ready to verify.

Special demurrers to the seventh, eighth, ninth, tenth, eleventh, and twelfth pleas, assigning for causes, that defendant hath not shewn that the contract mentioned and set forth was an illegal contract, respecting securities for stock in the British public funds; and also because it appears that the contract, therein stated and alleged, was a lawful contract, respecting certain public securities of a foreign country, to wit, Spanish Bonds and Spanish Scrip; and also because it does not appear that the

contract pleaded and set forth as an answer to the action, was in any respect a void or illegal contract. The causes of demurrer to the thirteenth plea were duplicity, multifariousness, and that it amounted to the general issue. Joinder.

Bagley, in support of the demurrers, contended, that there was nothing to shew that the wagers entered into by these contracting parties were bad at common law; for though a transaction might amount to a wager, it did not thence follow, that the contract founded upon it was invalid or bad; on the contrary, there were many authorities to shew, that a wager, if not within certain exceptions, would be supported in a court of law; as, for example, in *Jones v. Randall* (1), where it was held, that an action lay to recover money upon a wager, whether a decree of the Court of Chancery would be reversed or not, on appeal to the House of Lords, there being no fraud or other *turpis causa* in the contract. The case is evidently not within any of the exceptions, which it is admitted would render the present wager illegal and invalid as a ground of action. It does not, like *Da Costa v. Jones* (2), tend to indecent evidence, nor to disturb the peace of the individual, or of society; nor does it resemble *Allan v. Hearn* (3), a wager between two voters, with respect to the event of the election of a member to serve in parliament, laid before the poll began; the consequence and effect of which were to excite a pecuniary influence on those whose duty it was to vote without, and independent of such. The wager here, therefore, being evidently good at common law, it cannot be contended, after the decisions of the Court in *Wells v. Porter* (4), and *Oakley v. Rigby* (5), that the transaction is within the Stock-jobbing Act; and in the former of those cases, three of the Judges expressed an opinion, that the contract was good at common law. With regard to the 13th plea, the principal objection is, that it amounts to the general

(1) Cowp. 37.

(2) Cowp. 729.

(3) 1 Term Rep. 57.

(4) 2 Bing. N.C. 722; a. c. 5 Law J. Rep. (N.S.) C.P. 250.

(5) Ibid. 732; a. c. 5 Law J. Rep. (N.S.) C.P. 256. Vide also *Elsworth v. Cole*, 6 Law J. Rep. (N.S.) Exch. 50.

issue *non assumpsit*, inasmuch as it sets forth a contract essentially different from that declared upon; and in *Grounsell v. Lamb* (6), the Court decided, that the defendant may prove, under the plea of *non assumpsit*, that a special contract was entered into and not performed. This case resembles that of *Jones v. Nanney* (7), where, to a declaration for work and labour as an attorney, the defendant pleaded as to all except two sums, parcel, &c., that the work was done by the plaintiff for the defendant on two occasions, when the defendant was a candidate to be returned a member of parliament; and that on the first, the work was done in the endeavouring to procure the defendant to be returned, under an engagement not to charge for his services, but only for disbursements; and on the other occasion, there was no express contract for the work done, but it was not reasonably worth more than a certain sum, which was one of the sums excepted in the commencement of the plea; and it was held on special demurrer, that the plea was bad, as amounting to the general issue. Could the plaintiffs to this plea reply *de injuriâ*? It is evident they could not; for *Whittaker v. Mason* (8) and *Griffin v. Yates* (9) shew, that such general replication can be used only where the contract is admitted, and its violation or non-performance is excused; not where, as in the present case, the contract is denied, and another is attempted to be substituted in its place.

Gale, contra.—The 13th plea does not amount to the general issue, neither does it resemble the pleas in the cases cited, nor those in *Gregory v. Hartnell* (10). The plea, here, resembles that in *Carr v. Hinchliff* (11), which was, upon special demurrer, held to be good; though according to Littledale, J., the facts alleged in the plea might have been given in evidence

under the general issue, and would in that way have been a good defence to the action. With regard to the other subject of discussion, if the Court should be of opinion that the wager was good at common law, the next question is, whether it was not bad under the statute 14 Geo. 3. c. 48, (12). It certainly is according to the doctrine of Buller, J., in *Atherfold v. Beard* (13), where he says, "For though the statute speaks only of policies, yet I think it may extend to cases like the present, for either the Courts must restrain that act of parliament to such cases as in form are policies, which would entirely repeal the statute, or by preserving the spirit of the act, extend it to all cases; I think, the latter, is the true construction; for a policy is nothing but a promise:" and Lord Ellenborough seems to have agreed with Mr. Justice Buller in the later case of *Gilbert v. Sykes* (14), where he expresses himself thus:—"Upon the whole, therefore, not without some degree of doubt, whether Mr. Justice Buller was not right in saying, that no wagers ought to be sustained where the parties have no special interest in the matter, at any rate where the subject-matter of the wagers has a tendency injurious to the interests of mankind." Indeed, Lord Mansfield seems to have been of the same opinion in *Da Costa v. Jones*; and *Paterson v. Powell* (15) is a strong authority of this Court in confirmation of its correctness; for there it was held, that an engagement in consideration

(12) Intituled, 'An Act for regulating insurances upon lives, and for prohibiting all such insurances, except in cases where the persons insuring shall have an interest in the life or death of the person insured.' The words of the first section are:—"Whereas it hath been found by experience, that the making insurances on lives or other events, wherein the assured shall have no interest, hath introduced a mischievous kind of gaming; for remedy whereof be it enacted, that from and after the passing of this act, no insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made shall have no interest, or by gaming or wagering, and that every assurance made contrary to the true intent and meaning hereof shall be null and void to all intents and purposes."

(13) 2 Term Rep. 610.

(14) 16 East, 150.

(15) 9 Bing. 320; s. c. 2 Law J. Rep. (n.s.) C.P. 13.

(6) 1 Moo. & Wels. 352; s. c. 5 Law J. Rep. (n.s.) Exch. 154.

(7) Ibid. 333; s. c. 5 Law J. Rep. (n.s.) Exch. 155.

(8) 2 Bing. N.C. 359; s. c. 5 Law J. Rep. (n.s.) C.P. 37.

(9) Ibid. 379; s. c. 9 Law J. Rep. (n.s.) C.P. 164.

(10) 1 Moo. & Wels. 183; s. c. 5 Law J. Rep. (n.s.) Exch. 131.

(11) 4 B. & C. 547; s. c. 4 Law J. Rep. R.B. 5.

erty guineas to pay 100*l.*, in case Bra-
n shares should be done at a certain
on a certain day, subscribed by seven
persons, each for himself, was a policy
insurance, and void under 14 Geo. 3.

NDAL, C.J.—The pleas to which the
stiff has demurred, cannot, I think, be
orted in point of law. The gravamen
e question which these pleas involve,
whether the wager, as stated in the
s to which the pleas apply, is bad at
on law, or under the 14 Geo. 3. c. 48.
appears to me, we cannot pronounce
gment in favour of the defendant,
we feel disposed to differ from and
contradiction to all the decisions
similar subjects, from the time of
v. *Elliott* (16) downwards. The
t is the case of the delivery at a cer-
ay of the stock of a foreign state.
wagers, with certain exceptions, are
t common law; and the common law
pport them as good and valid con-
with, as I before observed, certain
ions, one of which is, that they do
erfere in any injurious manner with
airs of foreign countries, or the ad-
ation of affairs at home. Now, for
I am not able to see, at least as far
an judge, from any reasonable or
le construction of facts, or by any
uence to be fairly deduced from
acts, that the wager, the subject of
cussion, can be said to affect the
of the foreign country to which the
elongs; much less am I able to un-
d or to perceive how it can be said
ct the administration of affairs at
hence, therefore, I come to the con-
that the present wager is not bad
on law. Now, with regard to the
14 Geo. 3. c. 48, there is, I be-
o case in which it has been held,
rager between man and man comes
t. The statute was enacted for
pose of restraining insurances on
s of others, in which the insurers
interest; the object of the statute
check and repress the gambling
ions of those who put down their
nes, and stimulated others to put

down theirs, as insurers of lives. It was
enacted for the purpose of repressing
these practices which were carried to a
ruinous extent; but it cannot be said to
comprehend or include within its meaning
or affix illegality to a simple wager, which
cannot by possibility come within the idea
or notion of a policy of insurance; and
therefore, in my opinion, the wager is not
bad under the statute. As to the 13th
plea put upon the record, it is, I am of
opinion, bad, inasmuch as it amounts to the
general issue. It is pleaded to all the counts
in *indebitatus assumpsit*; it begins by stating
certain contracts and agreements between
the parties then existing and subsisting, and
certain conditions to be performed by the
plaintiffs, which were not performed by
him: what in effect is this but saying, you
have not done that which was contracted
to be done?—what is it but a plea of *non*
assumpsit? The plea is, therefore, open
to the objection which has been taken, and
is bad; and our judgment should be for
the plaintiffs.

PARK, J.—With regard to the principal
point taken in the argument by Mr. Gale,
we cannot, I think, decide in his favour,
unless we overturn the case of *Good v.*
Elliott, which has for so long a period
stood the test of Westminster Hall. A wager
is good at common law, unless it comes
within some exception; as, for example,
being injurious to public morality. The
wager, here, is not within any exception;
and therefore it is, I think, good at com-
mon law. Now, with regard to the 14
Geo. 3. c. 48, I admit that the title of the
statute, although it is strong, cannot controul
the enactment; but the ground-work and
foundation of this are, its application to
insurances. This wager, however, is not
such; it is a simple parol contract between
the parties. The statute, as I said before,
refers to insurances on lives, or other events
wherein the assured shall have no interest;
it then enacts, "that from and after the pass-
ing of this act, no insurance shall be made
by any person or persons, bodies politic or
corporate," &c. Now, such policies cannot
be said to mean wagers; and the question
here is, does this contract constitute such
insurance as is intended by the statute?
All the time that I was familiar with
Guildhall, the contracts which were con-

sidered to be the subjects of the clauses of the statute had a precise, defined meaning, very different from that which the present should, I think, bear. The statute refers evidently to the mischievous practice of gaming insurances; and it prohibits the effecting of any policies on the life or lives, &c., without inserting in such the person's name interested therein; as it appears to me, it was the object of the statute to prevent the effecting of that which is properly called a policy of insurance, under certain circumstances. In such a state of things, how can we come to the conclusion—how can we say, that this wager is prohibited by the statute? As to *Paterson v. Powell*, cited in the argument, I was not present at the discussion, being the Judge out of court during that term; but I agree with the decision of the Court, as that was a case of a policy of insurance within the statute.

VAUGHAN, J.—I do not mean to go at length into the subject of this discussion: I will merely observe, that we cannot think of overturning the decision in *Good v. Elliott*, which I remember well, having been present when their judgments were delivered by Lord Kenyon, Justices Ashurst and Grose, and cases referred to from the time of Lord Holt. It was merely doubted by one of these learned Judges, whether certain wagers sanctioned by the Court in former times, such as that in 1 *Lev.* 33, and 1 *K.b.* 56—65, as to whether Charles would be King of England at a certain time, would be now upheld. As to the other point, the same construction which is maintained by my Brother Park, has been always put upon the statute 14 Geo. 3, and it has ever been referred to insurances and written agreements of such nature, and the statute has been thus interpreted and acted upon in a variety of cases. Wagers, no doubt, may be illegal; if, for example, they are contrary to the public policy of the country or to good morals, or if they tend to make a person the subject of ridicule. These topics were discussed at length in *Good v. Elliott*, but the present case is not within any of the exceptions, and the judgment of the Court should be in favour of the plaintiffs.

Judgment accordingly.

1837. } WILKINSON v. HALL AND AN-
Jan. 31. } OTHER.*

Landlord and Tenant—Double Value—Mortgage—Use and Occupation.

An agreement entered into between the Lords of the Treasury and the defendants, by which the latter have engaged to become tenants of a certain wharf, for the quarter, at the rent of 375l. by such quarter, and to give bond with surety in a penalty to pay such rent on or before the first day of the quarter, during which they shall hold the premises, and in respect of which the Lords of the Treasury have given the defendants a three months' notice to quit, is not such an agreement as will enable the purchaser from the Treasury seeking to recover double value under the stat. 4 Geo. 2. c. 28, against the defendant, for holding over after the expiration of a six months' notice to quit, to maintain a count in his declaration, in which he alleges, that the defendants held the premises in question, as tenants to him, for a term of years, that is to say, from year to year, for so long a time as the plaintiff and the defendants should respectively please.

And where the conveyance of the wharf has been duly made to the plaintiff before the expiration of the three months' notice to quit, given by the Lords of the Treasury to the defendants, such agreement will not support a count in the declaration for double value, for overholding after the expiration of the three months' notice to quit, in which it is alleged, that the defendants held and enjoyed an undivided moiety, &c. as tenants thereof for the residue and remainder (1) of a certain tenancy for a term of years to them, the defendants heretofore granted.

A wharf and other premises were mortgaged as a security for money advanced. The mortgage deed contained a clause, by which it was provided that the mortgagor should have, hold, and retain the premises,

* Vide *Wilkinson and Stennett v. Hall and Another*, 2 Bing. N.C. 713; s. c. 4 Law J. Rep. (N.S.) C.P. 204. The action there was brought upon the joint demise of the partners; and, upon demurrer to the plea, which traversed the joint demise, the defendants had judgment.

(1) That is, for the interval between the time when the conveyance was made and the expiration of three months' notice to quit given by the Lords of the Treasury, then the owners.

should receive and enjoy the rents, profits, issues, &c., undisturbed by the mortgagee, to the year 1840, if he, the mortgagor, did not make default in the payment of interest:— Held, that such clause amounted to a redemption of the premises by the mortgagee to the mortgagor, for the term specified, liable to be defeated by such non-payment; and consequently, as no default was made, the mortgagor had such right and title as would enable him to maintain an action for use and occupation.

Quære, whether a tenancy for a quarter of a year is within 4 Geo. 2. c. 28.

The first count of the declaration alleged that the defendants, before and at the time of giving the notice to quit and making the demand as thereafter mentioned, and from thence until a certain day, to wit, the 14th of June 1834, held and enjoyed an undivided moiety of and in a certain quay or wharf, &c. as tenants thereof to the plaintiff, that is to say, as tenants for a term of years, that is to say, from year to year, for so long a time as the plaintiff and defendants should respectively please; and the said defendants had, during all the time aforesaid, held and enjoyed the other undivided moiety of the said tenements, &c., as tenants thereof to W. Stennett, the reversion of and in the said first-mentioned undivided moiety of the said premises, with the appurtenances, during all that time belonging to the plaintiff, and the reversion in the other undivided moiety to the said W. S.; and whilst the said reversion in the first said undivided moiety so belonged to said plaintiff, and the reversion of the other belonged to W. Stennett, to wit, on the 11th of December 1833, he, the said plaintiff, and said Stennett, and each of them, gave notice in writing to the said defendants, and thereby demanded and required the defendants to quit and deliver up the possession of the said tenements, &c. to them the said plaintiff and said W. Stennett, or to either of them, that is to say, possession of the said first-mentioned undivided moiety to him, the plaintiff, or the said Stennett, and the possession of the said undivided moiety to said Stennett or the plaintiff, on the 14th of June 1834, provided the said defendant's tenancy of the said premises originally

commenced at that period of the year, or otherwise at the end of the current year of their tenancy which should expire next after the end of half a year from the time of their being served with the said notice; and the said plaintiff avers, that the said term and tenancy of the said first-mentioned undivided moiety of the said tenements, &c., the reversion of and in which so belonged to the plaintiff as aforesaid, and the said term and tenancy of and in the other the said other undivided moiety of the said tenements, &c., the reversion of and in which belonged to the said W. Stennett as aforesaid, to wit, on the said day of June, and in the year 1834, ended, and were and each of them was duly determined by the said notice. It was then averred, that after the determination of the tenancy as aforesaid, and whilst the plaintiff was entitled, &c. and whilst the defendants were in possession of the entirety, notice was delivered by the plaintiff and by W. Stennett, on the 14th of June 1834, requiring defendants to quit, &c.; nevertheless, the defendants, not regarding the statute in that case made and provided, did not nor would on the determination of the said term and tenancy of the said first-mentioned undivided moiety of the said tenements, or any part of the said moiety, to the said plaintiff, or to said Stennett, or to any person on their behalf, &c. deliver according to said notice or demand, but wholly neglected, &c., and on the contrary thereof, the defendants wilfully *held over the said undivided moiety*, after the determination of the tenancy and term, and *after said notice to quit, and said demand so made*, for a long space of time, to wit, from thence hitherto, during all which time said defendants did keep said plaintiff out of the possession, &c., the said plaintiff being at the time entitled to the possession, contrary to the form of the statute, &c.

The second count alleged, that the defendants, before the giving of the notice, and making of the demand in writing, &c., to wit, on the 3rd of December 1833, and from thence until a certain day, to wit, on the 14th of December in the same year, held and enjoyed an undivided moiety of certain tenements, &c. as tenants thereof to the said plaintiff, that is to say, as tenants thereof for the residue and remain-

der of a certain tenancy for a term of years to them the said defendants heretofore, to wit, on the 12th June 1832, granted, the reversion of the one undivided moiety in this count mentioned of the said tenements during all that time belonging to the said plaintiff, and the defendants all that time enjoyed the other undivided moiety, as tenants to W. Stennett, &c. And the said respective tenancies and terms afterwards, to wit, on the 14th of December 1833, were and each of them was determined and ended, and the said plaintiff and Stennett duly demanded possession on the 16th of December 1833, that is to say, the plaintiff of the first-mentioned moiety, &c.; nevertheless, the said defendants, not regarding the statute in such case made and provided, did not, nor would, on the determination of the said term, and after said demand made, and notice in writing given, deliver the possession, &c. according to such notice and demand, but wholly refused, and, on the contrary, they wilfully held over, &c.

Third count—for use and occupation, from the 13th of December 1833 to the 13th of June 1834, when plaintiff's notice to quit expired, being half a year.

Pleas to the first count—first, a traverse of the tenancy to the plaintiff, of the moiety of the tenements, &c. for the term or time in the count mentioned in manner and form alleged; second, a traverse of the reversion of the said moiety belonging to the plaintiff in manner and form, &c.; third, a traverse of the giving of notice in writing, and of the demand or request of defendants to quit in manner and form as alleged; fourth, a traverse of the termination or ending of the said supposed term or tenancy of the said undivided moiety, in manner and form. To the second count, similar pleas except the traverse of the written notice to quit. To the third count, for use and occupation, never indebted.

On these pleas, issues were joined.

Upon the trial, which took place before Tindal, C.J., at the London adjourned Sittings after Trinity term, 1835, the jury found that the single yearly value of the premises was 1,341*l.*, which finding, as to the value, was to be binding upon the parties in other respects, and they re-

turned a verdict for the plaintiff, subject to the following

CASE.

On the 12th of June 1832, the premises in question, then belonging to his Majesty, and then vested in the Lords Commissioners of the Treasury, in trust for his Majesty, or in the secretary for the time being to the said Commissioners, for the use and service of his Majesty's Customs, the defendants entered into an agreement, of which the following is a copy:—"That Messrs. Hall shall become tenants of the wharf, &c., at the rent of 375*l.* a quarter. The tenancy to commence on Thursday the 14th of June, they paying a quarter's rent on that day. That Messrs. Hall shall give security, to be approved of, &c., to pay one quarter's rent in advance as long as they continue tenants. They shall also give security to pay over to the Commissioners for the benefit of the assignees, such sums as they may receive for rent for goods prior to the 14th of June. Dated June 12, 1832." This agreement was signed by W. S. Hall, as agent for defendants, and by S. G. Walford, as solicitor for the Commissioners of Customs, and agent for and on behalf of their secretary for the time being. On the 13th of June 1832, defendants, with one Thompson, as their surety, entered into a bond, which, after stating that the parties were bound, &c. in a sum of 700*l.* to the King, recited, that the above bounden W. Hall and T. Spencer Hall, became tenants to C. A. Scovell, esq., secretary to the Commissioners of Customs, in trust for his Majesty, of certain premises, &c., at the rent of 375*l.* the quarter, and whereas the said W. Hall and Spencer Hall paid to the said C. A. Scovell, in trust for his Majesty, the sum of 375*l.* for the first quarter's rent, and have agreed to pay the said sum of 375*l.*, on or before the first day of every quarter during which they hold the said premises; and whereas also there are certain sums due and payable for warehouse rent from certain parties, &c.; now the condition of this obligation is such, that if the said W. Hall and S. Hall shall well and truly pay to the said C. A. Scovell, or his successors, the said sum of 375*l.*, on or before the first day of every quarter during which they hold the said premises, and shall at all

times truly account to the said C. A. Scovell, then this obligation to be void, otherwise to remain in full force and virtue.

By indenture of lease and release, dated the 2nd and 3rd of December 1833, these tenements were conveyed by the Lords of the Treasury, and the Commissioners and secretary of the Customs, to the plaintiff and to his partner, W. Stennett, their heirs and assigns, to the uses therein declared, that is to say, as to one moiety to such uses and upon such trusts as the plaintiff should, by deed or deeds, direct, limit, or appoint, &c. Similar uses were limited and declared as to the other moiety in favour of W. Stennett.

The defendants then gave in evidence certain indentures of lease, appointment, and release, dated respectively the 4th and 5th of December 1833. By the latter deed, the plaintiff and the said W. Stennett did, and each of them did, in consideration of 13,000*l.*, direct, limit, and appoint that from and immediately after the execution thereof, the undivided moiety of each of them in the above-mentioned messuages, &c. should remain and be to the use of Wynn Ellis, esq., his heirs and assigns forever, subject to a proviso for redemption thereafter contained, for payment of the sum of 13,000*l.*, with interest on the 5th of June then next. It was by the same indenture further provided, declared, and agreed that the said Wynn Ellis should not be entitled to call in the principal money by him advanced upon the said mortgage before the 5th of December 1840, if the interest, payable by the mortgagors, in respect of such principal money, was in the meantime regularly paid, according to the terms of the said deed. There were also clauses providing, that if the said sum of 13,000*l.*, or the interest, &c. was not paid, according to the agreement, that it should be lawful for said Ellis, his heirs and assigns, to enter and quietly to have, hold, occupy, possess, and enjoy, and receive and take the rents, issues, and profits thereof, without let, suit, trouble, &c.; provided always, and it was thereby further agreed and declared between and by the parties to the said indenture, that it should and might be lawful for the said T. Wilkinson and W. Stennett respectively, and their respective heirs and assigns, peaceably and quietly to

have, hold, occupy, possess, and enjoy the said wharf or quay, and hereditaments thereby appointed and released, or intended so to be, with their appurtenances, and to receive and take the rents, issues, and profits thereof, and of every part thereof, for their respective own use, until default should be made in payment of the said sum of 13,000*l.*, or the interest thereof, or any part thereof respectively, contrary to the aforesaid provisoes or agreements for payment of the same, and the true intent and meaning of the said indenture, without any let, suit, trouble, &c. of, from, or by said W. Ellis, his heirs or assigns, &c.

On the 7th of December 1833, a notice from the Lords of the Treasury, and the secretary of the Customs, and signed by them respectively, was served on the defendants to the following effect:—that they sold and conveyed all the legal wharf, &c. then in possession of defendants, at the rent of 375*l.* the quarter, to T. Wilkinson and W. Stennett, and defendants were directed to pay their rent to these gentlemen, and consider them as their landlords. Prior to the conveyance, mortgage, and notice above stated, and whilst the negotiation for such conveyance was proceeding, viz. on the 13th of September 1833, a notice was served on the defendants, requiring them to quit on the 15th of December next ensuing the date thereof, or other day on which the next quarter of their tenancy may expire, be the same the 12th, 13th, or 14th of said December, the premises in question. This notice was signed by T. Ker, secretary to the Commissioners of his Majesty's Customs, on their behalf, and by their authority, and with the consent of the persons to whom the wharf was agreed to be sold; said Ker was the assistant secretary to the Commissioners of Customs, and acted at the board for and in behalf of the secretary during his absence. On the 13th of September 1833, an order was signed with the initials of Mr. E. Stewart, acting chairman of the board of Customs, approving of the form of notice given to Messrs. Hall to quit Botolph Wharf, and Ker was authorized to sign it, Scovell, the secretary, not being present. On the 16th of December 1833, a demand of possession was served on the defendants, signed by the plaintiff, his

partner Stennett, and Wynn Ellis, their mortgagee. The possession was demanded pursuant to the notice to quit, heretofore served, bearing date the 12th of September 1833, signed by T. Ker, secretary to the Commissioners of Customs, and by their authority, and with the consent of the parties to whom the wharf was about to be sold; and the document also informed defendants, that if they did not quit, they would be held liable for double the value under the statute; and the defendants were also informed that the present notice was not to operate or to be considered or meant to operate as a waiver or abandonment of a certain notice to quit the above premises, heretofore served upon them, signed by the undersigned, and bearing date the 11th of December 1833, in case the said notice, signed by said Ker, and served upon them as aforesaid, should not be legally sufficient to end and determine their tenancy of and in the aforesaid premises, on any of the days in the last-mentioned notice specified. This notice was signed by W. Ellis, the mortgagee, by the plaintiff and his partner Stennett. The notice of the 11th of December 1833, referred to in the above, and signed by the same parties, required the defendants to deliver peaceable possession on the 14th of the next June, of the wharf, &c. provided their tenancy originally commenced at that period of the year, or otherwise that they deliver up possession at the end of the current year of their tenancy, which shall happen next after the end of half a year from the time of service of this notice, and also provided their tenancy did not terminate on either the 12th, 13th, or 14th days of this present December, by reason and in consequence of a certain notice to quit the same premises, served on them, dated the 12th of September 1833, and signed by T. Ker, &c. They were also called upon to observe that the present notice was not meant to operate as a waiver of that previously served, and signed by T. Ker, in case that notice is legally sufficient to end and determine the tenancy, and the undersigned reserved to themselves full power of adopting and acting upon such notice already served as aforesaid, and of holding them liable for double value, in case they held over after any of the days mentioned in the notice so

served, provided the tenancy shall be thereby determined.

The defendants did not quit or deliver up possession of the premises at the expiration of either of the notices to quit, above set forth; and on the 1st of November 1834, an action of ejectment was brought upon the three several demises of the plaintiff, W. Stennett and Wynn Ellis, the mortgagee, for the purpose of recovering possession of the premises. That action was tried on the 23rd of December 1834, when the defendants consented that a verdict should pass for the plaintiff, subject to an order of the learned Judge, that execution thereon should be stayed for five weeks from that day, which order was made accordingly, and judgment in the said action of ejectment was not signed until the 18th of February 1835. Possession of the premises was obtained on the 6th of April 1835, under a writ of possession issued on the judgment. In the interval between the judgment and the obtaining of possession, application was made to the defendants to give up possession. The premises, however, being used for the purpose of bonding goods, and there being on the premises goods bonded, on which duties were due and payable to the Crown, and which goods could not legally be removed until the duties had been paid, the defendants did not give up an unincumbered possession; they, however, tendered possession of the premises, with the above-mentioned goods thereon, which tender was objected to, and possession refused, on the ground that the same was not such a possession as the plaintiff in ejectment was entitled to under the writ of possession. The defendants never paid any rent in respect of the said premises, either to the plaintiff or his partner W. Stennett.

Copies of the pleadings, of the indentures of lease and release of the 2nd and 3rd of December 1833, of indentures of lease, appointment, and release of the 4th and 5th of December 1833, and of the record of the judgment in ejectment of the 18th of February 1835, were annexed to, and were to be considered as parts of the case, and either party to be at liberty to refer to them or either of them as such.

The defendants object that the plaintiff is not entitled to a verdict on any of the

counts in the declaration. The objections to a verdict on either of the counts for double value, were, first, that there was no proof whatever of any such tenancy as is stated in the first or second counts of the declaration, which tenancy the defendants having put in issue by their pleas, the plaintiff was bound to establish; secondly, that there was no evidence to prove, but, on the contrary, that the evidence, and particularly the deeds of the 2nd and 3rd of December 1833, and of the 4th and 5th of December 1833, disprove that the plaintiff was seised of the reversion at the times and in manner and form as in the first and second count alleged, which allegation, the defendants having traversed, the plaintiff was bound to sustain; thirdly, that the tenancy created by the agreement of the 12th of June 1832 was not a tenancy for any term of life, lives, or years, within the meaning of 4 Geo. 2. c. 28, so as to subject the defendants to an action for double value, if, in other respects, the requisites of that statute had been complied with; fourthly, that the tenancy created by the agreement of the 12th of June 1832, was not so put an end to as to entitle the plaintiff to sue for double value, either by notice to quit of the 12th of September, or by that of the 11th of December 1833; that, as respects the notice of the 12th of September, there was no proof of sufficient authority given to Ker, who signed the same, and because the notice, if given by the authority of the persons then entitled to the reversion, would not entitle a party to whom the reversion was conveyed after the giving of the notice, and whilst it was running, to take advantage thereof, in order to sue for double value; and with respect to both notices, that if either of them determined the tenancy, still the reversion, at the time the tenancy was so determined, was not in the plaintiff, but in Wynn Ellis, the mortgagee, who, if any one, ought to have sued. The defendants further objected, that if liable to double value at all, they were not liable for any time after the day of the demise in the before-mentioned declaration of ejectment. As to the count for use and occupation the defendants objected, that plaintiff could not recover, inasmuch as before the 15th of December 1833, the reversion of

the premises had been conveyed to Wynn Ellis, and that defendants were liable to him, not to plaintiff.

The questions for the opinion of the Court were—whether the four objections of the defendants to the claim for double value, and the objection to the claim for use and occupation above stated, or any of them, were well founded. If the Court should be of opinion that, notwithstanding the objections above stated, the plaintiff was entitled to a verdict on either or both of the counts for double value, then a verdict was to be entered, on either or both counts, accordingly, for a sum calculated at the rate of 335*l.* 11*s.* 3*d.* per quarter, the double value for such time as, in the opinion of the Court, the plaintiff was entitled. If the Court should be of opinion that the plaintiff was entitled to recover on the count for use and occupation, then a verdict was to be entered on that count for such sum as the Court should direct; if the plaintiff was not entitled to a verdict on any of the counts, then a nonsuit was to be entered; if entitled to a verdict on one or more, but not on all the counts, then a verdict to be entered for the defendants on the others or other, as the case might be.

Sir F. Pollock, for the plaintiff.—The plaintiff is entitled to recover double value either from the expiration of the three months ending the 12th, 13th, 14th, or 15th of December, according to the notice to quit given by the Commissioners of Customs, signed by T. Ker, or from the 14th of June, according to the six months' notice given by the plaintiff, his partner Stennett, and W. Ellis, the mortgagee. The defendants must, of necessity, admit an existing tenancy of some kind or other; they cannot lay claim to the possession as special occupants; and the main question for the decision of the Court will be, as to the description of tenancy which does exist. It is objected for the defendants, that the tenancy is not one which brings them within the terms, or makes them liable to the consequences which attach to those who overhold, under the statute 4 Geo. 2. c. 28. s. 1. (2), as it is not a tenancy for

(2) The words are, "In case any tenant or tenants, for any term of *life, lives, or years*, or other person or persons, who are or shall come into possession of lands, tenements, &c., by, from, or under,

any term of life, lives, or years, but at the utmost a tenancy by the quarter, and consequently not within the letter or spirit of the act. It is submitted, however, that by the original agreement of the 12th of June 1832, between the defendants and the Lords of the Treasury, the defendants should hold generally, paying the rent quarterly, a yearly tenancy was created; and as the statute 11 Geo. 2. c. 19. s. 18. (for rendering a tenant liable to double rent who does not quit according to the notice which he has given,) is made *in pari materia* with the 4 Geo. 2. c. 28, and a tenant from year to year is within the former—*Timmins v. Rowlison* (3),—so should a tenant from year to year be within the other statute. The principle contended for is further confirmed by *Litt.* sect. 67, in which it is said, "Also, if tenements be let to a man for term of half a year, or for a quarter of a year, &c., in this case, if the lessee commit waste, the lessor shall have a writ of waste against him. and the writ shall say, *quod tenet ad terminum annorum*," &c.; and, in his Commentary upon the section, it is said by Lord Coke, 54, B, "In this particular case, the statute of Gloster, c. 5, which giveth the action of waste against the lessee for life or years, which lay not against them at the common law, speaketh of one that holdeth for term of years in the plural number, and yet here it appeareth, by the authority of *Littleton*, that although it be a penal law whereby treble damages, and the place wasted shall be recovered, yet a tenant for half a year being within the same mischief shall be within the same remedy, though it be out of the letter of the law." The dictum of Lord Ellenborough, in *Lloyd v. Rosbee* (4), that the statute must be construed strictly, and does not apply to a weekly tenancy, or to a tenancy for less time than a year, is not supported by any judicial decision. The objection to the validity of the notice to quit at the expiration of three months,

or by collusion with such tenant or tenants, after the determination of such term or terms, and after demand made, and notice in writing given for delivering the possession thereof by his or their landlord, &c., then the persons so holding over, for and during the time they shall hold over, or keep out of possession, shall pay at the rate of double the yearly value," &c.

(3) 3 Burr. 1603.

(4) 2 Campb. 453.

upon the ground that T. Ker had no authority to sign, is also untenable, inasmuch as by the 7th section of the 3 & 4 Will. 4. c. 59. s. 1, for the management of the Customs, a person employed by the commissioners is deemed an officer for such purpose. The objection to the want of legal title in the plaintiff, in consequence of the mortgage to Ellis, cannot be sustained, as the tenant cannot set up the title of the mortgagee against the mortgagor, per Buller, J., in *Doe v. Pegge* (5); and per Lord Mansfield, C.J., in *The King v. St. Michael's, Bath* (6),—referred to by Lord Kenyon, in *The King v. Edington* (7),—"it is an affront to common sense to say the mortgagor is not the real owner, or has no interest in the mortgaged premises." So in *Balls v. Westwood* (8), an action for use and occupation, where defendant came in under the plaintiff, it was ruled that he could not shew that the plaintiff's title had expired, unless he solemnly renounced the plaintiff's title at the time, and commenced a fresh holding under another person. If this were an ordinary mortgage, the defendants could not set up the *jus tertii* against the plaintiff, but the proviso precludes the mortgagee from entering before 1840 if the interest be paid; and as default will not be presumed, the mortgagor has a right to the possession, and the mortgagee could not bring ejectment and turn him out. That proviso, in the deed, in effect, amounts to a lease by mortgagee to mortgagor, defeasible by non-payment of interest. The words of the clause are, "that it shall and may be lawful for the said Wilkinson, &c., to have, hold, occupy, possess, and enjoy the said wharf," &c., and in *Evans v. Thomas* (9), Taunfield said, "that it had been adjudged in one *Pleasance's case* (10), if one covenants and grants with another, that he shall have and hold his lands for so many years, it is a good and absolute lease; but if he covenants and grants that he shall enjoy his lands for ten years, it is not a lease, because it sounds only in covenant." So in

(5) 1 Term Rep. 758, n.

(6) Dougl. 630—2.

(7) 1 East, 288—93.

(8) 2 Campb. 11.

(9) Cro. Jac. 172.

(10) 1 Roll. Abr. 848.

Powely v. Blackman (11), the mortgagor was, in consequence of the clause in the deed, a tenant at sufferance, instead of being, as he otherwise would have been, a tenant at will. So in *Richards v. Sely* (12), it was held, that a covenant made to enjoy a copyhold *de anno in annum*, was a lease, and so a forfeiture (13).—He also cited *Jemmot v. Cooley* (14), *Wilkinson v. Colley* (15), and *Soulsby v. Neving* (16).

Bompas, Serj., contra.—The case states, that no rent was paid by the defendants to the plaintiff; there was, therefore, no such recognition or acknowledgment of title by them, as would bring them within the provision of 4 Geo. 2. c. 28, by which it is required, that the possession shall be wilfully and contumaciously overheld. The preceding part of the 67th section of *Littleton* is admitted to be in favour of the plaintiff, inasmuch as it is an authority to shew that an action of waste will lie against the lessee for a quarter of a year, and the writ shall say, *quod tenet ad terminum annorum*; but the author adds, "he shall have an especial declaration upon the truth of his matter, and the Court shall not abate the writ, because he cannot have any other writ upon the matter;" and to the same effect is *Coke* in his *Commentary*, 54, B(17). But there is no special declaration here. *Lloyd v. Rosbee* is, as far as it goes, in favour of the defendants; for there Lord Ellenborough says, "I do not remember any instance of a tenant, for a less time than a year, being within this act of parliament." He makes no distinction between the case of a tenant by the week, and a tenant for any other portion of a year.

[TINDAL, C.J.—No doubt, according to the authority of *Littleton*, a difficulty does arise from this mode of statement in the declaration.]

But even putting this objection out of

the question, it must be admitted that the tenancy is improperly laid; it was never an annual tenancy, nor intended to be so. The original agreement between the parties may be compared to that in *Kemp v. Derrett* (18), where the tenancy was held to be quarterly. The objection to the authority of Ker to sign the notice to quit, must be also attended to. The taking was from Scovell, the secretary, and his authority to give the notice could not be denied; but Ker had none under the 31st section of the 3 & 4 Will. 4. c. 51, and his notice could not be made good by any subsequent ratification by the person properly qualified—*Right v. Cuthell* (19). The construction attempted to be put upon the proviso in the deed is, that Wynn Ellis could not enter upon the wharf until 1840, if default was not made; but even if such be the construction, it cannot avail the plaintiff, for such default was made on the 5th of June next after the execution of the deed, when the 13,000*l.* were not paid. The right of the plaintiff to bring this action of ejectment cannot be sustained, as he was himself but tenant at will, in some respects a tenant at sufferance to the mortgagee; and his situation and position, with regard to the mortgagee, has been much discussed in *Moss v. Gallimore* (20), *Keech v. Hall* (21), *Smartle v. Williams* (22), *Burt v. Wright* (23), *Thunder v. Belcher* (24), *Pope v. Biggs* (25), *Com. Dig.* 'Estate,' H, 1, 'Tenant at Will,' *Ex parte Temple* (26). He also referred to *Morgell v. Paul* (27), to shew that no tenancy can be implied under a party who has not the legal estate,—to *Cobb v. Carpenter* (28), as an authority that the plaintiff, where the defendant did not come in under him, could recover in an action for use and occupation only from the time he had the legal estate in him, although he might have the equitable

(11) Cro. Jac. 659.

(12) 2 Mod. 80.

(13) Such is the marginal note of the case; but at the conclusion it is said, "The Court inclined to think it was a good lease, and by consequence a forfeiture of the copyhold; but they gave no judgment."

(14) 1 Lev. 170.

(15) 5 Burr. 2094.

(16) 9 East, 310.

(17) This case of a general writ and a special count was frequent in the old law—Bro. tit. 'General Brief,' pl. 13.

(18) 3 Camph. 510.

(19) 5 East, 491.

(20) 1 Dougl. 265.

(21) Ibid. 21.

(22) 1 Salk. 245; s. c. 3 Lev. 387; Comb. 247.

(23) 1 Term Rep. 387.

(24) 3 East, 449.

(25) 9 B. & C. 243; s. c. 7 Law J. Rep. K.B. 216.

(26) 1 Glyn & Jam. 216.

(27) 2 Man. & Ryl. 303; s. c. 6 Law J. Rep. K.B. 290.

(28) 2 Campb. 13.

estate long before,—and to *Bacon's Abridg.* 'Leases,' K, to shew that the case should be decided by the intention of the parties, and that it was not their intention to pass a present lease for years, as most assuredly it was not the intention of Wynn Ellis to pass a lease of the mortgaged premises to the plaintiff until 1840.

Pollock, in reply, submitted, that the objection to the form of the declaration should have been taken at *Nisi Prius*, when the Judge could have amended under stat. 3 & 4 Will. 4. c. 42. s. 23; and he denied the authority of the dictum of Lord Ellenborough in 2 *Campb.*, as the plaintiff there had obtained a verdict on the count for use and occupation, and, therefore, had little interest in further discussing the question.

TINDAL, C.J.—[After stating the nature of the action and the pleadings, his Lordship said]—In support of the first two counts, the plaintiff refers to and relies on the agreement of the 12th of June 1832, entered into between the defendants and the Lords of the Treasury; and the first question is, whether, upon reference to that agreement, the allegation of a tenancy, as stated in those two counts, is made out. I am of opinion, that it is not; neither is it, as I think, sustained by the bond entered into by these defendants on the 13th of June 1832. The construction which, as it appears to me, should be put upon those documents is, that it was a tenancy for a quarter, and a quarter only, and that it was not, as alleged, a tenancy from year to year. This inference can, I think, be more clearly deduced from the recital of the bond, which is, "that the defendants became tenants of certain premises, at the rent of 375*l.* the quarter." If the case rested here, there might still, perhaps, be some doubt and uncertainty; but the bond goes on to recite, that the defendants paid the said sum for the first quarter, and that they agreed to pay the said sum on or before the first day of every quarter during which they should hold the premises. This, to my mind, does not carry the interest of the parties farther than for one quarter of a year, for which the rent of 375*l.* was paid down. By the terms, the parties agree to pay the rent on the first day of every quarter, as long as they agree, and not for every

quarter. We shall, I think, come with more certainty to the conclusion, that the tenancy was by the quarter only, when we look to the situation of the parties. The Lords of the Treasury purchased and acquired the premises in question, under the act of parliament, for the purpose of parting with and disposing of them to the greatest advantage; and to me it appears, that this object would be more likely to be attained by the creation upon their part of a quarterly, rather than of a yearly, tenancy. But the case does not even stop here. Admitting for a moment, that it was a matter of doubt, that it was *in ambiguo*, whether the construction contended for by the plaintiff should be put upon the agreement, what have the Lords of the Treasury themselves done?—have they not given the defendants notice, on the 12th of September 1833, to quit at the expiration of the quarter? What is this, I ask, but an assertion on their parts that the tenancy was to be understood as one for a quarter? Upon these counts, therefore, the plaintiff is not entitled to recover. We are not, therefore, called upon to consider those other objections, which have arisen out of them; neither are we called upon to determine whether the statute of 4 Geo. 2. c. 28. applies to a tenancy by the quarter. For my part, I neither affirm nor deny; I come to no conclusion, either in favour of or adverse to the proposition. The utmost that can be inferred from the authority referred to is, that if the parties had pleaded as they ought to have done, the statute might apply to a tenancy by the quarter. The authority upon the subject is not decisive; it is merely of a negative nature.

With regard to the count for use and occupation, I perfectly agree in the proposition that, if the defendants had not paid rent to the plaintiff, if there was no recognition upon their part of the legal title being in him, they would not be estopped from asserting in an action in a court of law, that the legal title was out of him; but we are now to inquire if such a construction as would support this proposition should be put upon the mortgage deed to Wynn Ellis, of the 4th and 5th of December 1833. From a statement of the facts upon this part of the case, it appears, that after the property was conveyed to them, the lega-

estate vested in Wynn Ellis, as a security for 13,000*l.* with interest; that the plaintiff had the legal estate in him, only from the time at which the conveyance was made to him to that period of the same year when he executed the power of appointment; and that no act of recognition of his legal title had taken place during the very short time which intervened. Now, what meaning is to be extracted from these facts? Is it not that the legal estate and inheritance vested in Wynn Ellis, from the day the mortgage deed was executed? The first proviso in the deed is, that the undivided moiety of each of the parties should remain and be to the use of Wynn Ellis, his heirs and assigns; then a proviso at a subsequent period in favour of the mortgagor, by which it is contended that the fee simple did not vest in Ellis. Now, let us see if this proviso did not operate as a re-demise from the mortgagee to the mortgagor, if the interest of the sum lent was paid; and, in my opinion, the deed has this particular effect. The first proviso was, that the parties should have the power of redemption, on payment of the sum, &c., on the 5th of June then next. There was then a clause by which it was provided, that if the sum, &c. was not paid, Ellis, his heirs, assigns, &c. should have power to enter, quietly to have, hold, enjoy, &c. the rents. It is contended, that this was to be done by Ellis on the 5th of June next following the date of the mortgage deed, as the money was not then paid; but it should be recollected, that the proviso in favour of the mortgagee has been altered; that there is a subsequent clause in favour of the mortgagor, which prohibits Ellis from disturbing the possession and the enjoyment of the rents and profits until 1840, if the interest is regularly paid. The clause, in the most general and unequivocal terms, allows the plaintiff to have, hold, occupy, and enjoy the said wharf, and receive and take the rents, issues, profits, &c., until default shall be made. This clause gives the mortgagor an estate for seven years, defeasible, no doubt, by a certain event—the non-payment of the interest. Now, what is the interest of the plaintiff in the premises, under circumstances like these? How can it be said—how can it be maintained, that no legal interest, or scintilla of legal interest,

has gone back from the mortgagee to the mortgagor, and this at the very time when the latter is let into possession and enjoyment of the premises, and is allowed to retain them until 1840, if he do not make default in the payment of the interest? The construction now put upon this deed is not a peculiar one; it comes within the principle laid down, and well laid down, in *Bac. Abr.* 'Leases,' K, supposed to be written by Chief Baron Gilbert—viz. "It may be laid down as a rule, that whatever words are sufficient to explain the intent of the parties that one shall divest himself of the possession, and the other come into it, for such a determinate time, such words, whether they run in the form of a licence, or covenant, or agreement, are of themselves sufficient, and will in construction of law amount to a lease, as effectually as if the most proper and pertinent words had been made use of." In fine, I am of opinion, that such an estate vested in the plaintiff on the execution of the mortgage deed, not yet divested out of him, as, by the terms of the condition contained in such deed, entitles him to the judgment of the Court upon the third count in the declaration, that for use and occupation; but our judgment should be against him on the first and second, as the tenancy has not been made out as alleged.

PARK, J.—I am unable to add anything to the luminous judgment pronounced by my Lord, and I will merely say, that I agree perfectly in the opinion he has delivered.

GASELEE, J., not having heard the argument, gave no opinion.

VAUGHAN, J.—Attention must be paid to the state of the facts here, for the purpose of ascertaining whether an action for double the value is, or is not, maintainable. The question depends upon the agreement, and there is nothing in it which points at a yearly taking; but the intention is, that the taking should be by the quarter. This, I think, may be also inferred from considering the state of the parties. We are led more forcibly to the conclusion when we recollect, that the penalty in the bond given by the defendants, and their surety Thompson, to the Commissioners, is only 700*l.*, merely the rent of two quarters. These circumstances, I repeat, lead to the inference, that the taking was one by the

quarter. As to whether a taking from quarter to quarter is within the 4 Geo. 2. c. 28, and renders the party liable to the penalties of the statute—this is a grave and important question, and I forbear from giving an opinion upon it now; but when the question does arise, I will give that opinion. With regard to the count for use and occupation, it is, I have no doubt, maintainable. This, I think, cannot be doubted, when we look at the terms of the deed, which studiously retain his legal rights for the mortgagor up to the year 1840, if he do not forfeit them by making default in the payment of interest. The words upon this subject are as strong as they can be; every precaution has been taken to give, until such period the controul of the property to the mortgagor. The effect of the proviso is, that he should, on payment of the interest, retain the possession until the time above referred to. We need not decide the other points, as the defendants have been precluded from taking advantage of them. In fine, those incidents necessary to support the action for use and occupation—namely, the occupation by permission of the landlord, and the value—have been proved here. But it is said, there is not here an express permission. This may be so: but a permission may be implied by law, and such was the case here. The defendants are, in my opinion, liable on the count for use and occupation, and our judgment should be against them on that count; but it should be for them on the first and second counts, in which the plaintiff sought to recover the double value under the statute.

Judgment accordingly, for the plaintiff on the third count; for the defendants on the first and second.

1837. }
Jan. 23. } VAUGHAN, ESQ. V. MENLOVE.

Action—Case—Negligence.

An action on the case lies against a party who makes up a stack of hay so negligently, and with such carelessness as to the state of the hay at the time it is put up, that the stack ignites, and does injury to the property of another.

In such case, it is not sufficient for the defendant to have acted honestly and bonâ fide. He is bound to exercise in the management of his property, that degree of care, caution, and skill which a man of ordinary prudence is required to exhibit in similar circumstances.

This was an action on the case, tried before Patteson, J., at the last Assizes at Shrewsbury, which was brought under the following circumstances.

The defendant, who was a farmer, had made up a large stack of hay upon his own premises. Whilst the work was in progress, he was told that the hay was too green, and advised to make some alteration, in order to prevent bad consequences. To these suggestions he appeared to pay little attention, and satisfied himself with removing some of the hay from the upper part, and placing it in a lower situation in the stack. Upon the stack being completed, and symptoms of danger appearing from the smoke, he was again warned of the danger by the neighbouring farmers, and advised to remake the stack. He, however, retained his indifference upon the matter, and said in answer, that “he would chance it.” Finally, ignition did take place, and the stack, a valuable barn of the defendant’s contiguous thereto, and several cottages of the plaintiff’s contiguous to the barn, were consumed. The action was brought for the injury thereby sustained.

The learned Judge told the jury, that it was not sufficient for the defendant to have acted *bonâ fide*, and in that manner which appeared to him the best to prevent mischief, but that he was bound to exercise in the management of his property that degree of care and caution which every prudent man was bound to exercise. He also adverted to the liability imposed on the defendant, if he was guilty of gross negligence.

A verdict having passed for the plaintiff, with 5*l.* damages,

Maule, in last Michaelmas term, obtained a rule for arresting the judgment, on the ground that the action could not be maintained. He also objected to the summing up of the learned Judge. Upon the first point, he said, that the action was one *primæ impressionis*, and bore neither ana-

logy nor resemblance to those actions which were brought against a party for not keeping the mound which enclosed his water sufficiently strong, or for burning weeds in his field, and thereby doing mischief to the property of his neighbour. In these and similar cases, the defendant was an active agent, was the direct cause, the *causa causans* of the injury, but such was not the case here. The ignition was spontaneous; it was not caused by the defendant, and, therefore, he should not suffer. As to the summing up, he contended, that the responsibility of the defendant was put to the jury in a wrong point of view. The maxim, *sic utere tuo ut non lædas alienum*, was admitted; but the rule was perfectly satisfied when the party acted as the defendant here did, *bonâ fide*, and to the best of his skill and judgment. He was not required to do more. He was not required, as laid down by the learned Judge, to exercise such care and skill as a prudent man would be bound to exhibit. This rule was vague, uncertain, and undefined. Where was the line to be drawn? Who was to decide the question as to the degree of care and skill to be exhibited by a prudent man? Such care and skill must evidently depend upon and be in proportion to the habits, the disposition, and education of the individual. The case was not one of bailment or contract, where the party assumed a certain duty. This might, in some respect, be compared to those cases where an action was brought against the owner of a ferocious animal, where the success of the action would in a great measure depend upon the *scienter*. Nothing like the *scienter* could be imputed here. It was evident that the party could have no knowledge or expectation of the fire, for, if he had, he would have taken steps to protect his own valuable barn. The rule, with regard to due caution, as laid down by Lord Tenterden in *Gill v. Cubitt* (1), would not assist the plaintiff, as it was much qualified indeed in *Foster v. Pearson* (2), and *Crook v. Jadis* (3).

Talsford, Serj. and Whateley, in shewing cause, contended, that although the

circumstances of the case were new, the action was clearly maintainable upon principle. They also submitted that the summing up was correct, or that the verdict might be supported on the ground that the misconduct of the defendant amounted to gross negligence.

R. V. Richards, in support of the rule, repeated the arguments used by Maule on moving for the rule, and cited *Wyatt v. Harrison* (4), as an authority that the defendant could not be made responsible for placing the rick upon his own land, so as to endanger the plaintiff's property. He also contended, that the phrase, "gross negligence," used by the Judge, and associated with his observations respecting the degree of prudence to be exercised by the defendant, had misled the jury, and had infused into their minds the belief that the defendant had been guilty of the gross negligence commented on in the summing up, and it was in consequence of such erroneous impression they had found for the plaintiff.

TINDAL, C.J.—Though the case which is now submitted to the Court for its judgment is one *primæ impressionis*, there is, as I think, no doubt as to the principle of law by which it should be decided. This certainly is not a case either of bailment or of contract, therefore the principle applicable to such cases does not apply here. There is, however, a more general principle, which applies and refers to all cases of this and of a similar description, namely, that you are bound to use and enjoy your own property, so as not to injure the property of your neighbour. The great principle which governs all cases of this description is, that in the enjoyment of your own property you must exercise such care and caution as not to injure that of others. It is said here, for the defendant, that he did not set fire to the stack. This, no doubt, is very true; but it is equally true that he was intermediately the cause of the conflagration as certainly as if he had himself applied the candle or the match. It is well known, that if hay be put up in a certain state, as was the case here, the

(1) 3 B. & C. 466; a. c. 3 Law J. Rep. K.B. 48.

(2) 4 Law J. Rep. (N.S.) Exch. 140.

(3) 5 B. & Ad. 909; a. c. 3 Law J. Rep. (N.S.) K.B. 87.

(4) 3 B. & Ad. 871; a. c. 1 Law J. Rep. (N.S.) K.B. 237.

process of fermentation will take place, and if not checked and prevented, it will go on and make head to such a degree, that ignition will of necessity be the consequence; and upon a similar principle it has been decided in the courts, that if a person burn weeds on the bound of his own lands, and by so doing burns the property of his neighbour, he is liable for the mischief of which his act is the occasion. *Tubervil v. Stamp* (5) is decisive on the subject. There, in an action against the defendant for the negligent keeping of his fire in his close, so that it burnt the corn in another's close, and verdict for the plaintiff, it was said, "every man must use his own so as not to hurt another; but if a sudden storm had arisen, which he could not stop, it was matter of evidence, and he should have shewn it." Suppose a man, for the purpose of making certain experiments, and in the exercise of his legitimate trade and calling, had mixed together certain ingredients, innocent in themselves, but which, from the combination, would be apt to ignite, and when deposited in a certain situation, they had taken fire and injured the property of another, would there be any doubt of the party being liable in an action for the mischief occasioned by his conduct? Would there be any doubt of the injured party being entitled to his remedy by action? Thus, therefore, though the present is a case *primæ impressionis*, it is to be governed by those principles which apply to and govern other actions on the case. It is then said, that the learned Judge mistook the extent of the defendant's liability, and that he told the jury that the defendant should exercise and exhibit that degree of care and caution which a man of ordinary prudence was bound to exhibit; that it was not sufficient for him to have acted honestly and *bond fide*; and that he also said, that if there should be gross negligence on his part, the jury should find against him; and it is then said, that these words, "gross negligence," were so mixed up with that part of the summing up which referred to the degree of care and caution which he was bound to exhibit, that the jury were misled, and were induced to believe that the inci-

dent last mentioned, "gross negligence," was that which was to constitute the deciding line; and it is also said, that the defendant was not bound to adopt that degree of care and caution which a man of ordinary prudence was bound to adopt, but that it was sufficient for him to act honestly and *bond fide*, and to the best of his skill and judgment. The first objection to the summing up of the learned Judge is, that the requiring of the defendant to act with that degree of care and caution with which a man of ordinary prudence should act, is, if considered as a rule, too uncertain and too vague to govern the rights of interested parties; that it is impossible to define, or understand with any certainty or precision, what that degree of care and caution is, which must of necessity depend upon the feelings and disposition of another, upon his application, his education, and the mode in which he was brought up; that it could not be adopted as a general rule of law; that, in fine, there was nothing intelligible or certain about it. Notwithstanding, however, these objections, the rule, that a person should exhibit that degree of care and caution which a prudent man should possess, is the rule which holds place in all cases of bailment and contract; and in the great case of *Coggs v. Bernard* (6). Lord Holt refers to that care and caution which a prudent *paterfamilias* is bound to exhibit; and though there are different bailments with different degrees of liability, yet the same principle of care and caution, in some degree or other, appears to pervade them all; as to the objection, that the degree of care and caution required is, as a rule, unintelligible, no doubt it is so, and must remain so until all the circumstances are investigated and submitted to the jury, who, not the Judge, are to decide, and are to say, on their oaths, whether the care and caution exercised by the party are such as would be exercised on a similar occasion by a prudent man. Now, in my opinion, that which is contended for by the defendant, namely, the making of the rule co-extensive with the judgment and opinion of the party himself is that which is really uncertain and vague, and which is,

(5) 1 Salk. 13; s. c. 1 Ld. Raym. 264.

(6) 2 Lord Raym. 909.

not, as if the matter were to be decided by the length of his foot, or by his height or stature; therefore, the rule being as we stated, the defendant has not, I think, meaned himself in the enjoyment of his property with the ordinary care and prudence required at his hands; and I am of opinion, that if we were confined to the question of gross negligence, the jury has exhibited it upon the present issue. The rule should be discharged.

ARK, J.—I concur.—Though the facts in this case are new in specie, they are not in the principle which affects them, by which they are to be governed. The case is to be decided by that rule to which my Lord has referred, namely, that a man is to enjoy his own property so as not to injure that of his neighbour. *Tuttle v. Stamp* resembles the present in principle. There, Holt, C.J., Rokesby, and Eyre, J., decided in favour of the plaintiff, against the opinion of Turtton, who went upon the difference between a house, which is in a man's custody and power, and fire in a field, which is not under his control; and it would discourage husbandry, it being usual for farmers to burn stubble, &c. This case appears to me to vary most closely to the present. With regard to the summing up by the learned judge, it was perfectly correct. The reason that the damages were so small was this: the jury felt that the defendant was an obstinate man, who had injured himself severely by his negligence. He had been warned of the event five years before it had occurred, and it was possible for the jury to come to any other conclusion, than that he had been guilty of gross negligence. The only alteration, strictly speaking, perhaps, the verdict would require is, that the damages should be increased.

WELLS, J. agreed.

UGHAM, J.—Every case must be distinguished by its own peculiar circumstances, and though these are upon the present occasion new, yet, in my judgment, the principle which is to be applied to this is not new. The action here is maintained on the principle upon which an action may be supported against the party who turned the weeds, and who thereby injured the property of another. Upon the present case, VI.—C.P.

moving for the rule, Mr. Maule said, that the defendant had not assumed or taken upon himself the performance of any duty. With this proposition I do not agree. I think the duty is imposed on every man of so using his property as not to injure that of another. With regard to the summing up, the only objection that I make to it is, that it was too favourable for the defendant. It has been said, that it was sufficient if the defendant acted *bona fide* and honestly: so far however was this from being the case, that, when apprised of the danger, he said, "he would chance it." What is the ordinary rule in insurance cases, when the captain sells the ship abroad? The question for the jury there is, whether the captain, not himself insured, acted as a prudent man ought. I think the defendant here was guilty of gross negligence. He was warned of the state of things for five weeks, and yet he did nothing till the fire actually took place, except merely cutting some parts of the hay. In short, the testimony of every witness loads him with the responsibility of having done everything the reverse of what a prudent and careful man ought to do. The rule should be discharged.

Rule discharged.

1837. { RICHARDS AND WIFE, EXECUTRIX OF PEGGY MANLEY, v. Jan. 25. { BROWNE, EXECUTOR OF MISS WITHERS WADE.

Executor—Devastavit—Promissory Note.

The maker of a promissory note for 100*l.*, dated in 1815, continued to pay interest thereon until his death in 1825. He bequeathed certain furniture to W, his sister and executrix, for her life, with remainder to C. W. also paid interest on the note, and in 1831 the attorney of the plaintiffs (the holders of the note) wrote to the defendant, the attorney for W, stating, that payment was claimed of W, not as executrix, but individually, and a receipt for interest subsequently paid was afterwards given, wherein W. was not described as executrix. The defendant, as the executor of W, shortly after her death permitted C, the legatee in remainder, to take possession of the furniture, which was worth 200*l.*:—Held, that

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this was a devastavit, and that he was liable to pay the amount of the promissory note de bonis propriis.

The plaintiffs declared on a promissory note, bearing date the 12th of April 1816, by which Barry W. Wade, deceased, promised to pay Peggy Manley, deceased, 100*l.*, with lawful interest for the same; also on an account stated between P. Manley, deceased, and Withers Wade, as executrix of Barry Wade.

Pleas—First, that, at the time of the commencement of this suit, and ever since, defendant had no goods or chattels of Barry Wade, deceased, at the time of his death, in the hands of defendant, as executor as aforesaid, or otherwise, to be administered; and also at the time of the commencement of this suit, and ever since, he had had no goods or chattels of the said Withers Wade, deceased, at the time of her death, in the hands of the defendant, as executor as aforesaid to be administered. Second, *nulla bona* of Barry Wade. Third, payment of several specialty debts due from Withers Wade, and allegation of others outstanding. Fourth, *Plene administravit* of all the effects of Withers Wade.

Replication to first and fourth pleas—That, at the commencement of this suit, defendant had in his hands effects of Barry Wade, deceased, at the time of his death to be administered.

At the trial, at Taunton, before Bolland, B., a verdict was found for the plaintiffs, subject to the opinion of this Court upon a

CASE,

stating, in substance, the following facts:—The plaintiff's wife is executrix of Peggy Manley, deceased. The plaintiffs sued on a promissory note for 100*l.*, given by Barry Wade to Peggy Manley in 1816, the interest on which had been regularly paid by Barry Wade during his life, and by Withers Wade after his death, up to 1831. Barry Wade died in 1825, bequeathing to Miss Withers Wade, his executrix, his household furniture for her life, and after her death he bequeathed it to Miss Sarah Chapple. Withers Wade died in 1832, leaving defendant her executor. In July 1831, J. Waldron, the plaintiffs' then attorney, wrote to the defendant and his brother on the subject of this promissory note, as follows:—

" July 16, 1831.

" Gentlemen—Richards & Wade.—As I am apprehensive we have in some measure misunderstood my clients' demand, I write you by return of post. My clients do not claim from Miss Wade payment of this money as executrix or administratrix of Barry Wade, Esq., but they claim from Miss Wade individually, Miss Wade having become liable to this debt from payment of interest from time to time.

" Yours, J. Waldron."

Waldron was not called as a witness, and there was no evidence of his authority to write the letter, except that he had at that time acted as the plaintiffs' attorney. The letter was not stamped, nor was there any evidence of payment made in consequence thereof. The plaintiffs had previously, in May 1831, given the defendant and his partner, who were the attorneys of Miss Wade, the following receipt for the interest on the sum claimed in the action:—" Received from Messrs. R. & M. Browne, by payment of Mr. J. Waldron, the sum of 5*l.*, being one year's interest of 100*l.* due to us from Miss Withers Wade, on the 12th of April last;" signed by plaintiffs.

Upon the death of Barry Wade, Miss Withers Wade took possession of the furniture, &c. bequeathed to her for life, and, upon her death, Miss Sarah Chapple, with the consent of the defendant, took possession of the same furniture, and which had been bequeathed to her by the will of Barry Wade. The plaintiffs proved, that the furniture was now in the hands of Miss Sarah Chapple, and that it was worth 200*l.* The question for the opinion of the Court was, whether, under the foregoing circumstances, the defendant was liable to pay the promissory note on which the plaintiffs sued. The defendant contended, that, after the letter written in 1831 by W. Waldron (the plaintiffs' then attorney) and the receipt given by them in the same year, the plaintiffs were precluded from calling on him to account for the furniture taken by Miss Sarah Chapple, as legatee of Barry Wade.

Beere, for the plaintiffs.—The maker of the note which forms the subject of discussion, left, as appears by the case, assets sufficient to discharge the debt; and the question is, whether the plaintiffs have

nothing which may have the effect of relieving the defendant from the payment. That on which the defendant chiefly relies, is the letter written by Waldron, the attorney of the plaintiffs, from which it is contended, that the personal character of Miss Wade, the executrix of her brother Henry Wade, was substituted for her representative one. But suppose an action had been brought against Miss Wade in her lifetime for the amount of the note, she could not have availed herself of this letter; and the defendant, her executor, cannot be placed in a better situation. There was nothing to shew that Miss Wade adopted or assented to the arrangement. There was nothing in writing by her to answer for or satisfy the debt or default of another, required by the Statute of Frauds; there was nothing to make her legally responsible in her individual capacity; there was no notice of the payment of interest by Waldron antecedent to the date of the letter. The letter was stamped, as it should be, to make it the evidence of a contract between the parties. The account stated between Peggy Manley and Miss Withers, as executrix, as set forth upon the record, was not admitted—it was not traversed or denied. Then, with regard to the plea of *plene administravit*, there is no principle of law clearly established than that, if the administrator or executor gives legacies without discharging debts, or pays the debts of the deceased before those of a superior nature, without notice of the latter, the plea cannot be supported (1). The precipitation with which the defendant gave the furniture to Chapple, the legatee, is also a well-founded objection to the conduct of the defendant; not more than five or six weeks elapsed from the death of Miss Wade when the transfer was made; and in *Davis v. Blackwell* (2) it was held, that when the assets were disposed of, and all that was left was handed over to the residuary legatee in six months after the proof of the will, the time was too

short, and in such case the executor could not plead such payment in discharge of his testator's liability on a covenant. *The Governor of Chelsea Waterworks v. Comper* (3), where it was ruled, that on *plene administravit*, the defendant might shew he had paid over the residue to the residuary legatee, after discharging debts and legacies, the year after the testator's death, is admitted; but there, the creditor did not make his claim until thirty years after the executor had paid over the assets, and he was justly precluded by his laches from recovering.

Erle, contra.—It is objected to the plaintiffs' right to recover, that they have been guilty of laches, and have by their conduct misled the defendant, and induced him to permit the transfer of the furniture to the legatee before the discharge of the debt, and to administer the assets in a mode not sanctioned by law. It is also objected, that no assets of Miss Wade came into the hands of the defendant; she left none, or, if she left any, there were bond debts far beyond them in value and amount—in fact, she died insolvent. Under such circumstances, the plaintiffs have no right to require of the defendant the payment of the note in question *de bonis propriis*. The plaintiffs are evidently guilty of laches in seeking to recover the amount of a note nearly twenty years after its date, the maker of which died in 1825, and thus far they are within the principle of *The Chelsea Waterworks v. Comper*. It is also evident that they misled the defendant, and induced him to act as he has, by the letter of their attorney in July 1831, in which they repudiated altogether the representative character of Miss Wade, and looked to her in her personal capacity alone. Their receipt for the interest in the same year in which they treated the debt as due from Miss Wade personally had also the same tendency and effect. In this respect, the case may in principle be compared to that of *Skyring v. Greenwood and Cox* (4), where the paymasters of a military corps gave credit in account to an officer in the corps, from the 1st of January 1817 to the 5th of November 1820, for certain increased pay erroneously supposed to

Upon this subject, vide *Hickey v. Hayter*, 6 Rep. 384, *Steele v. Rooke*, 1 Bos. & Pul. 307. the reducing of judgment debts not docketed to the level of those merely personal, vide 4 & 5 W. c. 20. Upon the liability of executors as to debts before the enactment, vide *Little-Hibbins*, Cro. Eliz. 793.
9 Bing. 5; s. c. 1 Law J. Rep. (N.S.) C.P. 140.

(3) 1 Esp. 275.

(4) 4 B. & C. 281; s. c. 6 D. & R. 401.

be granted by a general order to an officer of his situation. The paymasters continued to receive the officer's pay after they had given him this information. And, in an action by the personal representative of the officer against them, it was held, that they could not retain any such sums of money on account of the sums which they had credited him for, by way of increased pay, and which they had allowed him to consider his own for so long a period of time. There, Abbott, C. J. said—"It is of great importance to any man, and certainly not less to military men than others, that they should not be led to suppose that their annual income is greater than it really is. Every prudent man accommodates his mode of living to what he supposes to be his income; it therefore works great prejudice to any man if, after having credit given him in account for certain sums, and having been allowed to draw on his agent on the faith that these sums belonged to him, he may be called upon to pay them back." *Steinman v. Magnus* (5) also shews, that, when a person enters into an arrangement by which a third party is induced to adopt a certain line of conduct, the person entering into such agreement must take the consequences, and not retrace his steps. Besides, it does not appear that the defendant had notice of this debt; and if he had not, there is nothing irregular in his conduct—*Brookes v. Jennings* (6), *Harman v. Harman* (7). The defendant could not be guilty of the imputed *devastavit*, inasmuch as no assets came into his hands from Miss Wade; and it was for such as came to him, and for such alone, that he should be responsible. If any one was guilty of such conduct, it was she, not the defendant. No assets, properly speaking, passed on the death of Miss Wade. What did pass to Miss Chapple was the furniture alone, and of this she might be said to be in possession before, as, in the case of a specific legacy, the possession of the party having the present use is the possession of him in remainder.

[TINDAL, C. J.—It is the inchoate possession, always subject to be devested.]

Beere, in reply, distinguished the case of

Skyring v. Greenwood and Cox, as the decision there rested mainly upon the fact, that, though the defendants were informed in 1816 that the payments would not be made, they did not communicate the intelligence to the officer until 1821, and in the meantime gave him credit for the allowances.

TINDAL, C. J.—The defendant, upon this occasion, advances two objections to the right of the plaintiffs to recover against him. First, he asserts that the plaintiffs misled him by writing a letter of a particular description in the year 1831, and by so doing, and by their laches in proceeding, they induced him to adopt a mode of administration different from that pointed out and required by the law, and which he would not otherwise have adopted. The second objection is, that it was Miss Wade who had been guilty of the *devastavit*; that she left no assets of the testator, and, consequently, the defendant, as her executor, could not be liable for the administration of that which she had not. Now, as to the first objection, I am most ready to admit, that if the plaintiffs, by letter or by any other intercourse that may have taken place between them, have misled the defendant and induced him to adopt a mode of administration not sanctioned by the law, and which he would not have adopted but for such interposition, in such case the plaintiffs should not avail themselves of the false step which has been taken at their own solicitation. But when I look into the circumstances of the case, I cannot bring myself to think that the defendant has brought himself within the principle for which he contends. Miss Wade, it appears, survived her brother, who died in 1825. Her death took place in 1832. She, the executrix of her brother, paid interest on the note, and such payment can only be referred to the liability which she contracted in her capacity of executrix, not in her personal capacity. It then appears, that, on the 16th of July 1831, in the lifetime of Miss Wade, some communication by letter took place between the defendant, who was her attorney, and a Mr. Waldron, the then attorney of the plaintiffs. The letter which occasioned the correspondence, and to which the one that has been read was an answer, has not been produced,

(5) 11 East, 390.

(6) 1 Mod. 175.

(7) 3 Mod. 115.

and therefore we have only to attain, in the best way we can, a knowledge of the conduct of the parties. The date of the letter is the 16th of July 1831, and it begins thus "Richards & Wade." Now, from this, we are not to infer, according to the well-known practice of attorneys, that some demand, that some application had been made with respect to this very transaction? The only fair and reasonable inference we can, I think, draw is, that the letter should be referred to this very subject; it does not appear that there was any other matter in dispute between the parties. The words of the letter are—"As I am apprehensive we are in some measure misunderstood the nature of my clients' demand, I write to you by return of post. My clients do not demand from Miss Wade payment of this money as executrix or administratrix of the estate of my brother, but they claim from Miss Wade individually, Miss Wade having become liable to this debt from payment of interest from time to time." Here, it might be observed that no reason is given for the alteration of the character of Miss Wade from the representative to the personal, an alteration which is perfectly unlawful in law. There is no consideration expressed for the change—there is no promise in writing to shew that she submitted to the change. It is, therefore, a mere gratuitous statement on the part of Walcott, that the plaintiffs looked to Miss Wade in her individual, not her representative capacity; therefore, the letter would be unimportant if the case stopped here. Suppose the parties had changed their minds upon the next day, as they might have done, there being nothing to prevent them, they had brought an action against Miss Wade in her representative character, the letter could not have been set up as an answer to the action,—she would still have been liable in her original representative character, which there was nothing to shew had been waived. If this letter were attended to, might not the consequence be this—the action had been brought against her in her individual capacity, she would have defended that she was liable only in her representative character, and if sued as the administratrix of her brother, that she was not to be proceeded against in that character, as the plaintiffs' attorney had formerly told her that she was to be looked to

in her personal character? Thus, she would be able to give a double answer, and in neither case could any action be sustained. The letter, therefore, cannot have the weight attempted to be attached to it, and cannot be allowed to present this double aspect.

I think also, that the case is clear from the imputed laches, as, here, the defendant knew at the moment of Miss Wade's death that she was liable as the representative of her brother, and, therefore, no question of laches arises from the want of notice. There is, therefore, in my opinion, no ground for the objection, that the plaintiffs misled the parties into an improper administration of assets, either directly by their letter, or impliedly by their laches. Miss Wade had, it appears, furniture in her hands to the value of 200*l*. These assets were not administered duly and rightly; and consequently, the defendant has not made out his plea of *plene administravit*. Now, with regard to the second objection, that Miss Wade was guilty of a *devastavit*, and died insolvent—the answer is, that it does not appear that she committed a *devastavit* at all. It is admitted, that when a specific legacy is left to A for life, with remainder to B, and in such case the executor assents to the legacy, it becomes vested in A and B, and cannot be revoked. But the case is different when, as here, the devise is to the executrix. She in such case may revoke the assent if she think proper. Why, then, are we to be told, under circumstances like these, that Miss Wade took as legatee, which would be a wrongful title, and not as executrix, which would be a rightful one? The proposition is not alone not founded upon any authority, but it is directly contrary and opposed to the principle of law, which, if a party hold by two titles, one good and the other bad, assumes that he holds by that which is good, and remits him to that. Since, therefore, the remainder vested, on the death of Miss Wade, in Miss Chapple, with the consent of the defendant, I am of opinion that he (the defendant) has failed in making out his second objection. It is, I think, also probable, that, though Miss Wade's estate was insolvent, Mr. Wade's was not so; and, consequently, the defendant will recoup himself by some means or other. Our judgment should be for the plaintiffs.

PARK, J. was of the same opinion.

VAUGHAN, J.—From the law, as it appears applicable to the facts of this case, the plaintiffs, I think, are entitled to recover. To ascertain this, we have only to look at the plea on which issue has been joined, viz., if at the time, &c. it was true that Miss Wade had assets. Now, it does appear that there were assets, that is to say, certain furniture worth 200*l.*, which she claimed as representative of her brother. It also appears that the defendant assented to the immediate possession of this by Miss Chapple; it was handed over to her in six weeks at farthest from the death of Miss Wade. This was, I think, at the least, a precipitate administration of assets.

Judgment for the plaintiffs.

1837. }
Jan. 19. } ANONYMOUS.

Judgment—Satisfaction.

The Court will not allow satisfaction to be entered upon the roll, where the warrant of attorney, to authorize the same, is signed by only four out of five plaintiffs; no other reason being given for the absence of the signature of the fifth, than that he is resident out of the kingdom.

This was an action brought by five plaintiffs, who had recovered a verdict, with 1,000*l.* damages, which were afterwards reduced to 1*s.* The costs and damages had been paid, but the officer refused to enter up satisfaction on the roll, on the ground that the warrant of attorney given for that purpose was signed by only four of the plaintiffs.

Stephen, Serj. on an affidavit, that the fifth defendant had left this country and resided in America, moved to be allowed to enter up satisfaction on the roll.

Per Curiam.—What in such case can we do? This plaintiff has not, for aught that we know, been paid his portion of the costs. We cannot, in such circumstances, deal with the rights of an absent man. Inquiry must be made of the party's agent, before the Court can think of granting this application.

Rule refused.

Note.—Vide *Wood v. Hurd*, 2 Bing. N.C. 166; s. c. 5 Law J. Rep. (N.S.) C.P. 312, where the Court

would not allow satisfaction to be entered on the roll without a warrant of attorney from the plaintiff, though the parties had consented to the omission.

1837. }
Jan. 24. } NORRIS V. SALAMONSON.

Promissory Note—Notice of Dishonour.

An admission to a friend, by the maker of a promissory note, that he was aware of the note being dishonoured, that he had received a civil letter upon the subject, and that he would attend to it, is sufficient to warrant the jury in the conclusion that he had received formal notice of the dishonour.

Assumpsit against the maker of a promissory note.

At the trial, at the Sheriff's Court, the proof of notice of dishonour was, that a common friend of the plaintiff and the defendant, but not the agent of either party, met the defendant at the theatre, informed him of the dishonour of the note, and asked him if he was aware of the fact. He answered in the affirmative, and said, he had received a very civil letter on the subject, and that he would attend to it.

The plaintiff obtained a verdict; and now *Gurney* moved to set it aside, on the ground that the evidence to fix the defendant with the notice of the dishonour was not sufficient. He relied on *Solarte v. Palmer* (1), where it was held, that the notice should inform the party to whom it was addressed, either in express terms or by necessary implication, that the bill had been dishonoured, and that the holder looks to him for payment of the amount. He also referred to *Hartley v. Case* (2), where it was decided, that a notice of the dishonour of a bill of exchange, must contain an intimation that payment of the bill has been refused by the acceptor; and that, therefore, a letter merely containing a demand of payment was not a sufficient notice.

TINDAL, C.J.—In the cases referred to, the notice of dishonour appeared to be insufficient, but here the notice derives its importance and effect from the party's own

(1) 7 Bing. 530; s. c. 9 Law J. Rep. Exch. 121; 1 Bing. N.C. 194, D.P.

(2) 4 B. & C. 339; s. c. 3 Law J. Rep. K.B. 262.

mouth. He, in fact, gives evidence against himself. This, I think, may be included amongst a class of cases in which a certain act, otherwise necessary, may be held to be waived, inasmuch as it is evident from the party's own conduct, that he is aware of that of which the notice is necessary. The rule should be refused.

The other Judges concurring—

Rule refused.

1837. }
Jan. 31. } *DOE d. PHIPPS v. ROE.*

Ejectionment—Judgment against the Casual Ejector—Date of Declaration.

Judgment against the casual ejector may be obtained, though the declaration is dated of a term not yet arrived, if the notice at the foot thereof is correct.

Swann, on a former day, had moved for judgment against the casual ejector.

PARK, J. (sitting alone,) rejected the application, on the ground of the date of the declaration being of Michaelmas term, 8 Will. 4, a time not yet arrived. However, on this day, his Lordship, in full Court, and after having consulted the Judges, revoked his opinion, and ordered the rule to go, as cases had occurred in the Court of King's Bench, in which the date of the declaration was considered as surplusage; the notice at the foot being correct. *Doe d. Gore v. Roe* (1) and *Doe d. Smithers v. Roe* (2) were referred to.

1837. }
Jan. 31. } *HOLLIDAY v. LAWES.*

Affidavit of Debt—Second Arrest—Judge's Order—Waiver.

It is not necessary, in an affidavit of debt, to set forth either the connexion between the deponent and the plaintiff, or the means possessed by the former of knowing the nature and amount of the debt sworn to.

Quære—Whether a defendant can be arrested a second time without a Judge's order, where the writ upon which he was first arrested has been set aside for irregularity. Such order, however, is waived by the defen-

dant's attorney acquiescing in a proposal by the plaintiff's attorney, that upon the suing out of the second writ, the former shall give an undertaking to put in bail, in order to save his client from the inconvenience of an arrest.

In this case, the defendant had been arrested on the 19th of December last, upon a writ which was set aside by a Judge at chambers, for irregularity. The plaintiff then issued a new writ, upon the same affidavit of debt, which affidavit was made by W. J. Holliday, and stated, that the defendant was indebted to John Holliday, (the plaintiff,) for money paid by the said John Holliday for the use of the said Thomas Lawes, (the defendant,) at his request.

Wilde, Serj. had obtained a rule, calling upon the plaintiff to shew cause why the bail-bond given to the sheriff of London should not be delivered up to be cancelled on entering a common appearance. The application was made on the ground, first, that it did not appear that there was any connexion between the party making the affidavit of debt and the plaintiff; and secondly, that the defendant had been arrested a second time for the same cause of action, and without a Judge's order. It appeared, however, from the affidavits in opposition to the rule, that at the time when the defendant was discharged from the first arrest, the plaintiff's attorney informed the attorney of the defendant, that it was intended to sue out a second bailable writ, and proposed that the latter should give an undertaking to put in bail, in order to save his client from the inconvenience of an arrest; that the defendant's attorney acquiesced, and that the defendant in consequence had not been actually arrested.

Atcherley, Serj. shewed cause, and contended, that it was now clearly settled, that an affidavit to hold to bail made by a third person, need not shew any connexion between the deponent and the plaintiff. He cited *Pieters v. Luytjes* (1), *King v. Turner* (2), *Short v. Campbell* (3), *Brown v. Davis* (4), and *Androni v. Morgan* (5).

(1) 1 Bos. & Pul. 1.

(2) 3 Chit. Rep. 58.

(3) 3 Dowl. P.C. 478.

(4) 1 Chit. Rep. 161.

(5) 4 Taunt. 154.

(1) 3 Dowl. P.C. 5.

(2) 4 Dowl. P.C. 374.

Upon the second objection he contended, that the case was not within the 7th rule of Hilary term, 2 Will. 4, which directs, that "after a *non pros.*, nonsuit, or discontinuance, the defendant shall not be arrested a second time without the order of a Judge," the object of which was to prevent a plaintiff from vexatiously harassing a defendant by repeated arrests, to which he cited *Richards v. Stuart* (6); and he urged, that even if a Judge's order was necessary, it was waived by the arrangement between the attorneys.

Wilde, Serj., in support of the rule, upon the first point, denied the application of the cases cited. In *Pieters v. Luytjes*, and *Andrioni v. Morgan*, the plaintiffs were foreigners residing abroad, and could not make the affidavit; and in *Skott v. Campbell*, the deponent described himself as agent and collector to the plaintiff, and, acting in such capacity, he was likely to know the nature and amount of the debt more accurately than the plaintiff himself. The second objection is supported by the indorsement usually made upon the writ in case of a second arrest, which is, "arrested by order." In *Richards v. Stuart*, the plaintiff had the permission of the Court to arrest a second time, and the case turned on another point.

TINDAL, C.J.—As to the first objection, I cannot get over the authority of the case of *King v. Turner*, where the very point on which this discussion is raised was decided. That was an action in which the defendant was held to bail; and the objection being, that it did not appear on what ground the deponent, a mere stranger, made the affidavit of debt, Bayley, J. said, "I think this affidavit sufficient." He then goes on and observes, "It may be true, that it does not appear in what relation the deponent stands to the plaintiff, nor need it; for the deponent would be liable to an indictment for perjury upon this affidavit;" and of a similar opinion were Holroyd, J. and Best, J. The cases cited from *Bos. & Pull* and 4 *Taunt.* are certainly different in this respect, that the plaintiffs were abroad; but I am not able to overrule the case in *Chitty's Reports*.

The first objection, therefore, falls to the ground. With regard to the second, I am not about to lay down a general rule as to when a second arrest for the same cause of action should or should not be made, without the order of a Judge, or of the Court; but here a conversation took place between the attorneys of the respective parties, which amounted, in my opinion, to a waiver of such order.

PARK, J.—Upon the first objection I was of opinion, that the course of practice was the other way, and have often so decided at chambers; but as the subject has been so long and frequently considered by able Judges, particularly well skilled in the practice of the Courts, it would be improper in me to set myself against the current of decisions; I, therefore, yield to their authority. As to the second objection, I am glad that we are not called upon to lay down a general rule upon the question, whether the second arrest, under circumstances like the present, could or could not be made without the order of the Court or of a Judge. If we were called upon to lay down such rule, I would take time to consider; but the conversation which took place between the attorneys here, did, I think, operate as a waiver.

GASHEE, J.—I agree with my Lord and my Brother Park upon both points; but whilst I do so, I admit that I have considered and acted upon the idea, that it was necessary to shew the connexion between the plaintiff and the party who made the affidavit of debt. But the cases cited and former decisions prove, that the appearance of such connexion is not necessary.

VAUGHAN, J.—I am of the same opinion. After the concurrent decisions of the Courts upon this subject, it would be too much for us to act against them; and for myself, in the exercise of my judgment, I would not oppose them. As to the second point, I also agree, that the conversation between the attorneys amounted to a waiver of the order.

Rule discharged, with costs, with four days time to defendant to put in bail.

(6) 3 Moo & Scott, 778.

1837. }
 Jan. 13. } ROBSON V. FALLOWS.

Stockjobbing — Pleading — Variance — Time.

In an action against the defendant as acceptor of a bill of exchange, he pleaded that the bill, of which he was the accommodation acceptor, was indorsed by the drawer without consideration to a third party, who deposited it with the plaintiff as a security upon certain unlawful wagers and contracts relating to the future prices and value of certain stock and public securities, to wit, Spanish Cortes bonds, &c., whereby the payment of certain monies to the plaintiff was made to depend on the future prices of said stock, and that if the price thereof should be less than 67l. 7s. 6d. for the 100l. in the said stock, at certain times, to wit, the month of June, in the year aforesaid, the third party should pay the plaintiff the difference which might then be between the said respective prices; but if the price of the said stock should be more than the said specified price, then the plaintiff should pay the difference or excess. On the trial, it appeared in proof, that the price of the stock at a future day was to be 67l. 2s. 6d., not, as alleged, 67l. 7s. 6d.:—Held, that such difference between the allegation and the proof did not amount to a variance, the plea being substantially supported by proof of the smaller sum.—Held, also, that it was not necessary to allege the date of the settling day, time not being of the essence of the contract, as it is in actions for usury.

This was an action by the indorsee against the acceptor of a bill of exchange for 60l.

The defendant pleaded, that the bill was accepted for the accommodation of W. and Robert Allanson, the drawers, and not for any consideration whatever; that the drawers indorsed the same without any consideration to one Henry Allanson, that he, the said Henry, might apply it to his own purposes; that afterwards and before the delivery of the said bill of exchange by the said Henry Allanson to the plaintiff, as hereinafter mentioned, to wit, on the 1st of May 1835, certain unlawful wagers, and contracts in the nature of wagers, and puts and refusals, were made and entered

into between the said Henry Allanson and the said plaintiff, relating to the future prices and value of certain public stock and public securities, to wit, Spanish Cortes bonds and Spanish scrip to a large extent, to wit, to the extent of 20,000l., whereby the payment of certain monies, by the said H. Allanson to the said plaintiff, or by the said plaintiff to the said H. Allanson, was made to depend on the then future prices of the said Spanish Cortes bonds and Spanish scrip, and thereupon it was then unlawfully agreed between the plaintiff and the said H. Allanson, that there should not be any actual or *bond fide* sale or transfer of the said stock, but that in case the price thereof should be less than a certain price, to wit, 67l. 7s. 6d. for 100l. in the said stock and securities at certain times, to wit, the month of June, in the year aforesaid, that the said H. Allanson should pay the said plaintiff the difference which might then be between the said respective prices; but that if the price of the said stock at those times should be more than the said specified price, then the said plaintiff should pay the said H. Allanson such difference or excess. And the defendant further saith, that afterwards, to wit, on the day and in the year last aforesaid, the said plaintiff requested the said H. Allanson to give him, the said plaintiff, some security for the balance which might thereafter become due to the said plaintiff, under and by virtue of the said wagers, and thereupon afterwards, and before any of the said times when the prices of the stock were to be taken as aforesaid, to wit, on the day and in the year last aforesaid, the said H. Allanson being possessed of the said bill of exchange as aforesaid, delivered the same to the said plaintiff, as a security for the said balance which might become due to him, the said plaintiff, under and by virtue of the said illegal wagers and contracts; and the plaintiff then took and received the said bill of exchange as such security as aforesaid; and the defendant further saith, that the plaintiff did not at any time give any consideration whatever for the said bill of exchange, except as aforesaid; and this the defendant is ready to verify.

Replication—joining issue on the first plea; and to the last, *de injurid. Similiter.*

P

At the trial, before Gaselee, J. at Guildhall, a verdict was found for the defendant, with leave to the plaintiff to move to have it entered for him, on the ground of a variance between the proof of the price of the stock agreed upon, which was 67*l.* 2*s.* 6*d.*, and the allegation thereof, which was 67*l.* 7*s.* 6*d.*, and also that the date of the settling day was not ascertained.

Kelly had obtained a rule accordingly.

Talfourd, Serj. and Cleasby, shewed cause.—As no attempt is made to impugn the decisions in *Wells v. Porter* (1) and *Oakley v. Rigby* (2), the course adopted by the plaintiff is manifestly wrong, for he should have moved to enter up judgment *non obstante veredicto*. The price of the stock and the date of the settling day were immaterial, and therefore it was unnecessary to prove them precisely; for it is enough to prove the substance of the issue—1 *Phil. Evid.* 190, 6th ed. In *May v. Brown* (3), Lord Tenterden said, "A variance between the allegation and the proof will not defeat a party, unless it be in respect of matter which, if pleaded, would be material: if the variance be in respect of matter not essential to maintain the action or the plea, it is of no importance." And Little-*dale, J.* referred to *Peppin v. Solomons* (4) in support of the doctrine. No doubt, in cases of usury, the day from which forbearance is to begin, and the day of the usurious contract, must be stated and proved correctly. *Partridge v. Coates* (5) and *Fox v. Keeling* (6) confirm the view now taken; for time is of the essence of the usurious bargain, and must be proved as alleged, though stated under a *videlicet*, whereas the precise sum and day of settlement are not of the essence of the contract stated in the plea; and, therefore, proof in substance is sufficient.

Kelly, in support of the rule.—The price of the stock was an essential part of the contract, for it would not be enough to

say, that the bill was lodged as a collateral security for fulfilling a contract, the price and terms of which were not known. The plea would not have been sufficient had it merely alleged that a certain unlawful contract (without stating what it was) had been entered into between the parties, and the unlawful contract, which is stated, could not be said to be set out if the prices of the stock were omitted. *Fox v. Keeling* bears no analogy to the present case. The discussion there was as to the particular day, but here there was no day at all. The case is analogous to those which arise upon bonds given to accept certain compositions from bankrupts, in fraud of other creditors; and *Tuck v. Tooke* (7) shews, that a defendant in such case cannot give evidence of any other fraud but that which he has averred.

TINDAL, C. J.—As it appears to me, the plea has been found in effect and substance in favour of the defendant. I agree entirely with the doctrine laid down, that where it is material and necessary that a contract, upon which the defendant seeks to avoid liability, should be pleaded, it must be pleaded according to its precise terms; and that the defendant will not be exonerated from the exact proof of such contract, by laying that which is intended to be an answer to the action under a *videlicet*; the reason and office of the *videlicet* being perfectly well understood, and it being equally well understood that the laying of that which is material with a *videlicet* will not exempt the party thus laying it from rigid proof (8). With regard to this bill of exchange, of which the defendant was the accommodation acceptor, it appears that it was lodged or deposited with the holder, (the plaintiff,) as a security for certain transactions, alleged to be illegal, which took place between the plaintiff and Henry Allanson, the indorsee of the bill in question. The proceedings between the parties, for which the bill was a security, are described as certain unlawful wagers, and contracts in the nature of wagers, and puts and refusals, relating to the

(1) 3 Bing. N.C. 722; a. c. 5 Law J. Rep. (N.S.) C.P. 250.

(2) 2 Bing N.C. 732; a. c. 5 Law J. Rep. (N.S.) C.P. 256.

(3) 3 B. & C. 113; a. c. 2 Law J. Rep. K.B. 212.

(4) 5 Term Rep. 496.

(5) R. & Mo. 153; a. c. 1 C. & P. 534.

(6) 1 Ad. & El. 670; a. c. 4 Law J. Rep. (N.S.) K.B. 104.

(7) 9 B. & C. 437, in error.

(8) See upon this subject, *Marcks and another, assignees of Colnaghi, v. Lahee, ante*, p. 69.

future prices and value of certain public stock and public securities, to wit, Spanish Cortes bonds and Spanish scrip. The plea then goes more minutely into the transaction; and, from the detail, it appears clearly that these transactions were time bargains, and that if the prices of these bonds, &c. were at a certain period less than 67*l.* 7*s.* 6*d.* in the 100*l.*, the said Henry Allanson, the indorsee of the bill, should pay the plaintiff the difference which might then be between the said respective prices, &c. It is also alleged, that it was unlawfully agreed between the parties that there should be no actual or *bond fide* sale or transfer of the said stock; but that the defendant was to pay upon the happening of a certain contingency. Now, it appears to me, that, for the purpose of maintaining this action, it was quite immaterial whether the contract between these parties depended upon the price of these stocks being a greater or less sum. The allegation in the plea lays it down, decidedly and clearly, that this was a time bargain; and the reliance of the plaintiff is mainly placed upon this, that the defendant's plea has not been so framed as to shew the precise sum to be paid. The cases cited at the trial, on which the plaintiff principally rested his case, were those in which actions have been brought for usury; and in such cases, generally speaking, all things which go to make the contract must appear on the face of the plea. The usury must be set forth in the precise terms of the contract, for there it is a material circumstance for the Court to see if more than 5*l.* per cent. has been received for the forbearance of the sum in question. There the time, even though laid under a *videlicet*, is of the positive essence of the contract, and it must be precisely averred in a plea, the object of which is the avoidance of such contract; but here such allegation, for the purpose of avoiding a time contract, is immaterial. To me it appears, as well by the evidence given by Allanson, as by the production of the books, that this was a time bargain; and though there has been a difference between the sum as stated in the plea and that proved, sufficient has been done for the purpose of the defendant in this respect. The rule should be discharged.

PARK, J.—I am of the same opinion. Whether the laying of a fact with a *videlicet* does or does not exempt a party from the necessity of precise proof, depends upon circumstances. The point contended for, is here immaterial; it is not that which is in issue between the parties. The question of time, in discussions upon usury, is, it is clear, most important and material. How can it be decided, whether the contract is or is not usurious, if it is not shewn what the precise time of forbearance is?

VAUGHAN, J.—I agree. The plea has, I think, been substantially proved. The materiality or immateriality of certain allegations depends, in a great measure, upon the nature of the action. There are many contracts in which time, place, price, &c., must be proved as alleged. Suppose, for example, an action were brought for use and occupation, the time should be proved for the purpose of recovering that which is claimed. There, time would be a substantial allegation; but the allegation here is not so, as it was perfectly equal what sum was paid upon the appointed day.

BOSANQUET, J.—I merely say, that I concur in opinion with my Brothers.

Rule for entering a verdict for the plaintiff, on the ground of variance, discharged.

Kelly then obtained a rule for entering judgment for the plaintiff *non obstante veredicto* (9), upon which there was no discussion during the term.

1837. } DOE *d.* PETER AND ANOTHER
Jan. 17. } v. WATKINS.

Attorney—Privileged Communication.

A person being desirous of raising money on mortgage, to pay off a previous mortgage debt, applied to an attorney to advance the money, and obtained for him an abstract of the title, and an inspection of the title deeds, from the mortgagee:—Held, in an action of ejectment against the mortgagee, that the abstract thus delivered, and the information

(9) From the decision in *Weston v. Foster*, 3 Bing. N.C. 701, s. c. 5 Law J. Rep. (N.S.) C.P. 242, it may be inferred, that the application for this rule was made too late.

thus obtained by the attorney, were privileged communications, of which he ought not to be allowed to give evidence, to impeach the defendant's title, and establish that of the lessor of the plaintiff.

This action was tried, before Lord Denman, C. J., at the last Assizes for the county of Brecon, when it appeared, that in 1828, Mrs. Williams, the wife of Williams, (through whom the defendant claimed title as mortgagee of the estate in question,) applied to Church, an attorney residing in the country, to raise a sum of 160*l.* on mortgage, to pay off the defendant's debt. Church thereupon requested an abstract of the title, which was made out by Jones, the defendant's attorney, who had prepared his mortgage deed; and he also inspected the deeds in the defendant's possession, and on discovering a supposed defect in the conveyance of the property to Williams, (the mortgagor,) refused to advance the money. It was objected for defendant, on Church being called upon to produce the abstract, and disclose the defect in the defendant's title, that the abstract and deeds had been put into his hands professionally, and the knowledge thence acquired ought to be considered as derived from a privileged communication⁽¹⁾. A verdict was found for the defendant, with leave to the lessor of plaintiff to move to have it entered for him.

J. Evans had obtained a rule accordingly.

Chilton shewed cause.—The plaintiff ought to have been nonsuited, as the abstract given to Church was a privileged communication, and not admissible in evidence. This case is not distinguishable from *Taylor v. Blacklow* ⁽²⁾, as the defendant there stood in precisely the same situation as the attorney here. The circumstance that no suit was in existence, or in prospect, at the time of the communication, is immaterial, as privilege extends to all communications made by a client to his attorney, in all cases where the relation of

attorney and client subsists, and to all cases where the client applies to an attorney in his professional capacity—*Doe v. Harris* ⁽³⁾.

Evans and *E. V. Williams*, in support of the rule, denied the applicability of *Taylor v. Blacklow*, as the relation of attorney and client did not exist in the present case, Church having been applied to merely as a person who had money to lend, and not as an attorney. Besides, the communication was not made, or the abstract delivered by the defendant as a client, and there was no breach of professional confidence or duty. The case, therefore, was within the rule laid down in *Sug. Vend. & Purch.* 9th edition, p. 299, that privilege does not extend to communications from collateral quarters, although made to the party in consequence of his character of attorney. The privilege is restricted to communications, whether oral or written, from the client to his attorney.

TINDAL, C. J.—The question whether the relation of attorney and client, existed between the parties, as to the subject on which Church was called upon to give evidence, may be decided from what appears upon the notes of the learned Judge by whom the cause was tried. The witness, it appears, resided in the country, when Mrs. Williams made inquiries amongst her neighbours, for the purpose of raising a sum of money upon mortgage, to pay off her husband's debt; and for my part, I do not see why Church should not be considered her attorney, or why he should not be looked on as a professional man, because she applied to him under such circumstances to raise money. Upon the application being made, he expressed a wish to see the abstract; with this wish she could not then comply, as the document was in the possession of the defendant, a mortgagee, who, upon request, delivered the necessary papers to Mrs. Williams. It is said, there was but one attorney, Church, in the transaction. To this, however, I see no objection; it is usual, especially in the country, that there should be but one between mortgagor and mortgagee, and there is necessarily no reason for the interference of an-

⁽¹⁾ It was also urged, that the action could not be maintained under the 3 & 4 Will. 4. c. 27, as the plaintiff had not shewn a possession within forty years; but, as the judgment proceeded on the other point, the arguments on this head are not noticed.

⁽²⁾ 3 Bing. N.C. 235; s. c. 6 Law J. Rep. (N.S.) C.P. 14.

⁽³⁾ 5 Car. & Pay. 592.

other; and the question is, if in such state of things the attorney had a right to disclose the circumstances of the person by whom he was employed; and I am of opinion, he had not. Suppose the transaction, in regard to which he was consulted, had been continued to its termination, and the mortgage had been completed, we cannot shut our eyes to this fact, that bills would have been made out to Mrs. Williams, that she would have been charged with attendances for the investigation of the title, for the inspection of deeds, for the perusal of the abstract, for the submitting of various documents to counsel, &c.; nay, more, that she would have been charged with the procuration money of 5*s.* in the 100*l.*, still allowed by the statute 12 Ann. c. 16. s. 2. Who, I ask, in such a case, and under such circumstances, would doubt that the relation of attorney and client subsisted between the parties? And I do not understand why it should be said to subsist the less, because the negotiation was, as is alleged, broken off by the defendant. I also think that it would be attended with dangerous consequences indeed, if because there was but one attorney between mortgagor and mortgagee, that therefore he, the attorney, should be at liberty to disclose to all the world the defects in the title of the party who was obliged to consult him. The attorney should not, in my opinion, be called upon to make the disclosure. He should not be examined with such object. A new trial, not a nonsuit, should, I think, under all the circumstances, be granted; and the plaintiff may, if it be within his power, supply that which is defective by evidence of an unobjectionable nature.

PARK, J.—I agree. I cannot distinguish this case from *Taylor v. Blacklow*. The passages cited there from *Com. Dig.*, that if a man, being instructed in his profession, deceive him who instructed him; as, if a man retained of counsel become afterwards of counsel with the other party in the same cause, or discover the evidence or secrets of his cause," go, in my opinion, to the whole of this case. The point with which counsel have properly pressed the Court, that this person was the attorney of the other party. But that was also the case in *Taylor v. Blacklow*. There, the privilege allowed to communications made in con-

sequence of the professional confidence reposed, was not held to be waived by the incident of the same person being the attorney of both parties; nor should it here, in consequence of Church being in the same situation. In fine, I coincide entirely in the decision in *Taylor v. Blacklow*; I adopt that decision here; and consequently, in my opinion, the party should not have been examined on the subject.

VAUGHAN, J.—The single question here is, if the relation of attorney and client subsisted between these parties, and the negative of the proposition cannot be maintained. I cannot see the transaction in any other sense. It has been said, that this principle does not extend to all communications; it is confined to those which are professional;—and this proposition must again be qualified, for by the word "professional" must be meant, the profession of an attorney. It does not, as is well known, extend to that of a divine, of a physician, or a surgeon. I myself remember Thompson, C. B. on circuit, telling a physician of some note, who claimed the privilege of not disclosing certain matters of a nature peculiarly delicate, that if he persisted in his refusal to state what he knew, he would make him feel the weight of his authority; that he, the Chief Baron, was merely acting upon the rule laid down in *The Duchess of Kingston's case* (3); and that the witness was exhibiting a resistance similar to that exhibited by Sir Cæsar Hawkins upon that occasion. Thus, therefore, it appears that the privilege does not apply to all cases where professional communications are made; and this of the attorney or solicitor differs from the others. The communication on which this discussion arises was, in my opinion, one to which the privilege applies; it cannot be considered as any other than a professional communication between attorney and client; and the party should not have been examined as a witness.

Rule for a new trial absolute. If the verdict on the second trial be for the defendant, he to be allowed the costs of both.

(3) 20 How. State Trials, 571.

1837. } HENRY AND ANOTHER v.
Jan. 28. } BURBIDGE.

Bill of Exchange—Pleading—Promise to pay.

A count in assumpsit by the indorsee against the drawer of a bill of exchange for default of payment, is bad on special demurrer, if it contain no allegation of a promise to pay by the defendant.

Assumpsit. The first count of the declaration stated, that whereas the defendant on the 15th of March 1836, made his bill of exchange, &c., and directed the same to one J. P. and thereby required the said J. P. to pay to the order of the defendant 29l. 18s. 10d., four months after the date thereof, which period has now elapsed, and the defendant indorsed the said bill to the plaintiff, and the said P. did not pay the said bill, although the same was presented to him on the day when it became due, whereof the defendant had notice.

Special demurrer, alleging as one cause, that the count contained no promise by the defendant to pay the monies therein mentioned, or any part thereof. Another cause assigned was, that it did not appear in or by the said count, that the bill therein mentioned became due or payable before the commencement of this suit, and that the words, "which period has now elapsed," contained in that count, have reference to the date of the said declaration, and not to the issuing of the writ for the commencing of the action; but this ground of demurrer was abandoned on the authority of *Owen v. Waters* (1).

Joinder in demurrer.

Whitehurst in support of the demurrer.—As a promise is the very foundation of the action of assumpsit, an allegation of a promise is essential.

[TINDAL, C.J.—In the case of *Mountford v. Horton* (2), it was held, that the allegation of a promise by the defendant was not necessary.]

In that case, it was stated in the declaration, that the parties had entered into an agreement, and the word "agreement" was held to import a promise. In *Starkey*

v. Cheeseman (3), a declaration against the drawer was held good, without laying an actual promise, inasmuch as the drawing of the bill was an actual promise. But that was on motion in arrest of judgment. Besides, in the forms, from which the Court should allow no deviation, the promise is alleged; and it is said in 1 *Chitty on Pleading*, 266, 4th edit., that it is more correct in pleading in all cases, to state that the defendant *super se assumpsit*, or words to that effect.

Martin, contra, urged that the forms were not imperative, but were to be adopted and used according to circumstances. They were framed for the purpose of saving expense, and were not created by statute, but depended merely upon the discretion of the Judges. The authority of Lord Holt in *Starkey v. Cheeseman*, is expressly in favour of the plaintiffs; and in *Bayley on Bills*, 330, 4th edit., it is said, "This clause is unnecessary in an action against either the acceptor of a bill or maker of a note, and it may be doubted whether it is essential in any other." So in *Wegersloffe v. Keene* (4), Fortescue, J. speaks of the drawing as an actual promise, and he refers to *Starkey v. Cheeseman*, where the *super se assumpsit* was left out, and yet it was well enough, for the law raises a promise. It is true, that the case of *Wegersloffe v. Keene* was an action against the acceptor, but that makes no difference; for if the allegation of a promise is unnecessary in one case, it is equally so in the other.

TINDAL, C.J.—There is a broad distinction between the case of the drawer and that of the acceptor; the former being only liable upon a contingency. This action is against the drawer; it is not an action of debt, though such might lie against the drawer at the suit of the payee, but not against the acceptor of the bill. This is an action of assumpsit, and, strictly speaking, in all such actions, the promise must be alleged. All the authorities go to this, and Mr. Baron Bayley merely expressed a doubt as to whether the allegation of a promise was or was not essentially necessary in the count against the drawer. *Starkey*

(1) 6 Law J. Rep. (N.S.) Exch. 13.

(2) 2 New Rep. 62.

(3) 1 Salk. 123; s. o. 1 Lord Raym. 538.

(4) 1 Barn. 215.

v. Cheeseman, where Lord Holt expressed his opinion, was after judgment by default, and though the judgment was not arrested in consequence of the imputed defect, it does not thence follow that the error would not have been noticed and corrected by the Court, if it had been challenged by the opposite party at the proper time; if, for instance, it had been met, as here, by special demurrer. As the promise was omitted in this count, why was it not also omitted in the count for goods sold and delivered, &c.? Since I am called upon to give an opinion, I must say that I think the objection must prevail. Our judgment must be for the defendant.

The other Judges concurring—

Judgment for the defendant.

1837. }
Jan. 16. } BETTELY *v.* THOMAS M'CLEOD.

Witness—Subpœna—Reasonable Sum.

What is a reasonable sum to tender a witness on serving a subpœna, depends upon circumstances; not merely upon the amount of the sum, his condition, the distance he has to travel to give evidence, or the expenses he must actually incur.

Therefore, where a witness residing at Camberwell, upon being served with a subpœna to attend a trial at Guildhall, stated that he had previously been subpoenaed by the opposite side, and had received a guinea, and the party serving the subpœna then gave him a shilling, to which he made no objection:—Held, in an action for disobeying the subpœna, and an issue on the reasonableness of the sum tendered, that the jury were warranted in finding a verdict for the plaintiff.

Case against the defendant for not appearing to give evidence at Guildhall, in obedience to a writ of subpœna, in a trial in which Bettely was the plaintiff, and M'Cleod, the father of the present defendant, was defendant; in consequence of which disobedience, the plaintiff withdrew the record, and had to pay the defendant in the action, 27*l.*, the costs of the day, and incurred other costs and expenses, &c. The declaration alleged, that the party who served the subpœna paid the defendant a certain

sum of money, viz. the sum of one shilling, being a reasonable sum of money for his costs and charges in and about his attendance as a witness according to the tenor of the subpœna. The defendant pleaded, first, not guilty, and secondly, denied the tender of a reasonable sum; and on these pleas issues were joined.

At the trial, before Tindal, C. J., at Guildhall, the plaintiff's attorney stated that he served the defendant at Camberwell with a copy of the subpœna, and that the defendant then told him he was also subpoenaed upon the other side, and had received a guinea for his expenses, &c.; and to questions from the witness whether he required a guinea from the opposite party, he answered in the negative; and consequently, witness on serving him with the copy of the writ, gave him a shilling, with which he was satisfied.

The jury having found a verdict for the plaintiff,

Platt had obtained a rule to set that verdict aside, on the ground that it was against evidence, as it was impossible to maintain that one shilling was a reasonable sum to tender a witness for the expenses of coming from Camberwell to attend a trial at Guildhall (1).

Talfourd, Serj. and R. V. Richards, shewed cause, citing *Benson v. Schneider* (2), and—

Platt and *W. H. Watson* were heard in support of the rule.

TINDAL, C. J.—The ground upon which this application has been made is, that the plea to which a traverse has been taken, and on which issue has been joined, cannot possibly be reconciled with the evidence which has been given. There is a direct allegation in the declaration, that a reasonable sum of money had been tendered or

(1) He also objected that the testimony of the plaintiff's attorney was contradicted by several other witnesses, and produced an affidavit of the defendant denying the correctness of his statement; but, upon discharging the rule, the Court were clearly of opinion that the jury were the proper judges of the value of the evidence, and the degree of interest and of credit of the witness. The discussion on this point is therefore omitted.

(2) 1 Mo. 76.

paid. Now it is well known, that before any action can be maintained, or before the Court can be moved to grant an attachment for the contempt, the party seeking to set the law in motion must shew, that he has tendered a reasonable sum for the expenses of the party coming and going, &c. ; and the only question is, if the sum tendered here, (one shilling,) can, under existing circumstances, be considered a reasonable one. Now, that which is a reasonable sum, depends upon circumstances, besides and independent of those of the *status* and condition of the party in the community, and of the actual amount of that which might be the party's expense. That, for example, which would not of itself be reasonable, may be perfectly so, if the witness had been subpoenaed and paid by the opposite party; and that appears to be the situation of the individual here, who, as it came out, received a guinea from the other side. Nor did the case rest here. Evidence was given, the effect of which was, that there was something tantamount to an admission by the defendant, that a shilling was a reasonable sum, for when he was asked by the plaintiff's attorney, if he was not subpoenaed by and had not received a guinea from the opposite party, he acknowledged that he had. It was then observed that there was no necessity for giving him another, and to this he assented. This looked like a mutual agreement that a shilling was a reasonable sum, and, in such a state of facts, I am of opinion that the rule should not be granted upon this ground. It should be discharged altogether.

PARK, J.—The counsel for the defendant object very speciously that a shilling is not a reasonable sum for the expenses of a witness coming from Camberwell. This, no doubt, is very true; but such is not the real question. The real question is, whether under present circumstances, *rebus sic stantibus*, when the party had received a guinea from the one side, a shilling was not a reasonable sum from the other. The guinea was more than sufficient, and he ought not to have required another from the opposite party, unless, if I may so express myself, his object was to make himself perfectly impartial. The rule should be discharged.

VAUGHAN, J.—I am of the same opinion.

If a party choose to treat a shilling as a reasonable sum, he is estopped from saying afterwards that it is not so.

Rule discharged.

1837. }

Jan. 24. }

ABBOTTS v. KELLY.

Process—Distringas.

A distringas sued out after the expiration of the four months allowed for the duration of the writ of summons, is invalid, and will be set aside.

Bagley obtained a rule, calling on the plaintiff to shew cause why a writ of *distringas* issued in this case should not be set aside, on the ground of the four months allowed by the 10th section of 2 Will. 4. c. 39, for the duration of the writ of *distringas* having expired before the writ of *distringas* had issued. He cited and relied upon *Lemon v. Lemon* (1), where it was held, that a *distringas* to compel an appearance could not issue after the expiration of the writ of summons.

Talfourd, Serj. shewed cause, and endeavoured to distinguish the case cited, inasmuch as the application there merely was, that a writ should issue, that something should be done; whereas the object here was, to set aside a writ which had issued, and to undo that which had been actually done; besides, the defendant had not in his affidavits negatived the fact of the writ having come to his hands.

TINDAL, C.J.—I think the rule should be made absolute. The difficulty in refusing the application is this—the writ of *distringas* is sued out to enable the plaintiff to enter an appearance for the defendant, or to outlaw him; and how can a man be called upon to appear to a writ which is exhausted and gone by?

The other Judges concurring—

Rule absolute, for setting aside the distringas.

(1) 2 Scott, 506.

1837. { MASTER AND WARDENS OF THE
Jan. 25. { GUILD, &C. OF THE SKINNERS'
COMPANY V. JONES.

Bond—Forfeiture—Bankrupt—Certificate.

The defendant, with one H, entered into a joint and several bond, with a penalty, conditioned for repayment by H of a sum of money lent, at the end of three years, and for payment of interest on the 1st of March in each year. In 1833, the interest was not paid until the 30th of March, after which the defendant became a bankrupt and obtained his certificate:—Held, that the certificate was a bar to an action against the defendant for a subsequent default by H in not paying the principal, as the bond was forfeited by the non-payment of interest on the appointed day before the bankruptcy, and the forfeiture could not be purged by the subsequent payment: consequently the penalty became the debt in law, and was proveable under the commission.

This was an action of debt against the defendant, as surety in a bond conditioned for payment of interest on the 1st of March, and repayment of the sum of 200*l.* lent by the Skinners' Company, for three years, to one Butler, pursuant to a scheme for the disposal of certain monies, approved of by an order of the Court of Chancery on the 1st of August 1832, *In re Thomas Hunt's Charity* (1). The declaration alleged, that,

(1) The following was a part of the scheme set forth in the declaration—"That the annual sum of 400*l.* should be lent by the company to as many young men as were freemen of the said company as the same would be sufficient for until it should have accumulated to 40,000*l.*, sums of 200*l.* each for the space of three years, at interest after the rate of 2*l.* 10*s.* per cent. upon security to be approved of by the masters and wardens of the said company for the repayment of such sum of 200*l.* with the said interest payable yearly, at the end of the said three years, and that such young men, in order to be qualified to accept of such loans, should have served an apprenticeship of seven years to their trade, &c.; and, at the time of making such application for such loan, should be householders of good repute, and produce proper testimonials, &c. of their capability to give the required security to the satisfaction of said master, &c.; and in case any young man, who should have such loan advanced to him, should, during any part of the time which he was entitled to retain and

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although Butler duly paid the two several sums of 5*l.* each, the first two years' interest on the 1st of March 1833 and the 1st of March 1834; and although the day in and by the said condition appointed for payment of the said sum of 205*l.*, that is, the sum lent and the interest for the third year, elapsed long before the commencement of the suit, yet the said Butler did not pay on the day and year aforesaid, according to the tenor and effect of said condition, and said sums remained due and unpaid.

The defendant pleaded, that Butler did not pay the interest which became due under and by virtue of the said writing obligatory and the said condition thereof, on the said 1st of March 1833, &c., but wholly neglected and omitted so to do, and therein failed and made default, whereby the said writing obligatory became forfeited; and that, after the same writing obligatory became forfeited, and before the commencement of this suit, to wit, on the 11th of June 1833, the defendant became bankrupt within the true intent and meaning of the statute, &c., and that the said debt in the declaration mentioned, and thereby demanded, became due and was payable, and the cause of action for or in respect thereof accrued to the plaintiffs before he, the defendant, became a bankrupt; and of this he puts himself on the country.

The plaintiffs joined issue, and the following

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was submitted, under the statute 3 & 4 Will. 4. c. 42. s. 25.—By bond of the 1st of March 1832, described in the declaration and executed as well by J. Butler as the defendant, they became jointly and severally bound to the plaintiffs in 400*l.*, subject to the condition above mentioned. The sum of 200*l.*, as therein stated, was advanced to the said Butler, who paid to the plaintiffs the first year's interest, 5*l.*, on the 30th of March 1833, and the second year's interest on the 5th of April 1834, but has not paid the sum of 205*l.*, which was payable on the 1st of March 1835,

hold the same, fall into decay by riot or ill husbandry, or any dishonest or immoral conduct, the said master, wardens, &c. should be at liberty to call in and enforce the repayment of the loan, with the interest due, and lend the same again to others."

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according to the condition, &c. Defendant, being a trader, committed an act of bankruptcy on the 10th of June 1833, and a commission of bankruptcy was duly issued against him on the 11th of June 1833, under which the said act of bankruptcy was proved, and he was thereon duly declared a bankrupt, and on the 24th of August 1833, a certificate of his conformity was duly signed and allowed. After the 1st of March 1835, several applications were fruitlessly made to Butler for payment of the 205*l.*, but no application was made to defendant as his surety for payment of that sum until the 20th of May 1835, nor did defendant receive any notice from the company that they should look to him for payment of either principal or interest before the last-mentioned day. The plaintiffs never proved or claimed, or attempted to prove, any debt whatever on the estate of the defendant under the commission.

The question for the decision of the Court was, whether the bankruptcy and the certificate of the defendant barred the claim of the plaintiffs in the action.

Henderson, for the plaintiffs.—Admitting that the bond was forfeited at common law, by the non-payment of interest at the time prescribed, it does not follow that the forfeiture was such as to bring the case within the 56th section of 6 Geo. 4. c. 16 (2). The forfeiture was of a mere technical nature, for if an action had been brought, and the non-payment alleged as a breach, the plea of *solvit post diem* might have been relied upon under the 4 & 5 Ann. c. 16. s. 12. Neither is the case within the spirit or letter of the 121st section (3), the object of which

(2) Which enacts—"That if any bankrupt shall, before the issuing of the commission, have contracted any debt payable on a contingency which shall not have happened before the issuing of such commission, the person with whom such debt has been contracted may, if he think fit, apply to the commissioners to set a value upon such debt; and the commissioners are hereby required to ascertain the value thereof, and to admit such persons to prove the amount so ascertained and receive the dividends upon them."

(3) The words of which are—"That every bankrupt who shall have duly surrendered and in all things conformed himself to the laws in force concerning bankrupts at the time of issuing the commission against him, shall be discharged from all debts due by him when he became bankrupt, and from all claims and demands hereby made proveable under the commission."

was to extricate the bankrupt from all contingent liabilities. The principle established in *Thompson v. Thompson* (4) is equally applicable here. There it was held, that the instalments of an annuity, for the payment of which a bankrupt is surety only, and which he covenants to pay in case of the default of the grantor, are not barred by his certificate. The case resembles in substance that of *Winter v. Mousley* (5), where, there having been no forfeiture of the bond, it was held that it did not constitute a debt proveable under the commission. *Sammon v. Miller* (6) is admitted, where the party was allowed to insert the debt in his schedule when seeking the benefit of the Insolvent Debtors Act; but here there was an actual forfeiture. Neither is there any analogy between this case and *Wylie v. Wilkes* (7), where the certificate of the bankrupt was held to be a discharge from future demands. What, in this case, was to be proved?—not the penalty of the bond, for the 21 Jac. 1. c. 19. s. 9. expressly provides, that "creditors having security by specialty, with or without penalty, shall not be relieved upon such specialties for any more than a rateable part of their just and true debts with the other creditors of the bankrupt, without respect to any such penalty." Neither could it be the interest, for it was uncertain whether it would be due or not. Another objection is, that the debt is not capable of valuation, and therefore not proveable under the commission,—per Lord Ellenborough, C.J. in *The Overseers of St. Martin v. Warren* (8), per Littledale, J. and Parke, J. in *Clements v. Langley* (9), *Taylor v. Young* (10). He also cited *Boorman v. Nash* (11), *Atwood v. Partridge* (12), *Yallop v. Ebers* (13), *Ex parte Davis in re Wentworth* (14), *Ex parte Lancaster Canal*

(4) 2 Bing. N.C. 168; s. c. 4 Law J. Rep. (N.S.) C.P. 311.

(5) 2 B. & Ald. 802.

(6) 3 B. & Ad. 596; s. c. 1 Law J. Rep. K.B. 168.

(7) Dougl. 519.

(8) 1 B. & Ald. 491.

(9) 5 B. & Ad. 372; s. c. 2 Law J. Rep. (N.S.) K.B. 173.

(10) 3 B. & Ald. 521.

(11) 9 B. & C. 145; s. c. 7 Law J. Rep. K.B. 150.

(12) 4 Bing. 209; s. c. 5 Law J. Rep. C.P. 150.

(13) 1 B. & Ad. 698; s. c. 9 Law J. Rep. K.B. 105.

(14) 1 Mont. 297.

Company (15), *Ex parte Tindal* (16), *Ex parte Thompson* (17).

Fish, contrà.—The argument for the plaintiffs assumes, that the payment of interest on the 30th of March was equivalent to a payment on the 1st; but, at common law, a payment after the day was not equivalent to a payment on the day, for otherwise the statute of Anne, which gives the plea of *solvit post diem*, would have been unnecessary. Consequently, payment after the day did not do away with the forfeiture, and the plaintiff might upon the first default have proceeded against the defendant, as in *Van Sandau v. —* (18). Neither can it be contended, that the bond here was within the statute 8 & 9 Will. 3. c. 11, for it is clearly within that of Anne—*Murray v. Earl of Stair* (19), *Smith v. Bond* (20). The objection founded upon this being a debt on a contingency not capable of valuation, is equally unavailing. The case is within the principle of *Perkins v. Kemp* (21), where it was held, that an annuity bond, if forfeited before the bankruptcy, should be valued and proved under the commission, and the bond being once forfeited at law is always considered as forfeited. *Ex parte Myers* (22), *Ex parte Simpson* (23), *Ex parte Grundy* (24), *Ex parte Lewis* (25), *Ex parte Winchster* (26), *Ex parte Roulatt* (27), *Ex parte King* (28), are also authorities for the defendant. Besides, there is no difficulty in making the valuation, as all that is required is to make deduction of the rebate of interest, according to the principle laid down in the 1st section of the statute.

Henderson was heard in reply.

TINDAL, C. J.—The question which is submitted to our consideration, and upon

(15) 1 Mont. 27.

(16) Ibid. 462.

(17) 1 Mont. & Bl. 219.

(18) 1 B. & Ald. 214.

(19) 2 B. & C. 82.

(20) 10 Bing. 125; a. c. 2 Law J. Rep. (N.S.) P. 269.

(21) 2 W. Black. 1106.

(22) 1 Mont. & Bl. 229.

(23) 1 Mont. & Ayr. 541.

(24) 1 M. & M'Ar. 293; a. c. 8 Law J. Rep. 54.

(25) Ibid. 426; a. c. 8 Law J. Rep. Chanc. 56.

(26) 1 Atk. 118.

(27) 2 Rose, 416.

(28) 8 Ves. 334.

which we are called upon to decide, is, whether the debt, which arises upon the bond given by the defendant to the plaintiffs, was proveable against the estate of the defendant, he having become bankrupt; for if it was, the certificate will undoubtedly be a bar to the demand. To determine the point, it will not be necessary to go into the construction of the 56th section of the statute, nor into the consideration of the various cases decided upon it. According to the best construction which I can put upon the different circumstances of this transaction, I come to the conclusion that the bond was forfeited before the bankruptcy, and consequently that the debt was proveable under the commission. Let us look to the terms of the engagement entered into between the parties. This was the joint bond of Butler and the defendant, and being so, it was exactly the same thing as if they had given two separate bonds to the obligees. The condition of the bond is, that the interest of the sum is to be paid by Butler on the 1st of March 1833, &c. To me it appears, from the facts as stated in the case, that, upon the 1st of March 1833, default was made; and from that time, if proceedings had been taken, no one could doubt that, in a court of law, it would have been held that the bond was forfeited, and that the penalty was the legal debt due from the defendant; and it is equally clear, that if things had continued precisely in that state until the 11th of June, the date of the defendant's bankruptcy, no argument could have arisen at all upon the subject. The bond would remain as a forfeited bond, and the penalty would be the debt due in a court of law. But it is contended, that another state of things has occurred, in consequence of Butler having paid the interest on the 30th of March, and of its being accepted by the party; and it is now said for the plaintiffs, that the legal effect and operation of such acceptance by them are substantially the waiver of the forfeiture. Now, I am not aware of any principle of law upon which this position can be said to depend. The case might admit of a different consideration if this proposition were advanced by the borrower of the money himself upon having made such payment. In such case, the statute of Anne, which gives the plea of *solvit post*

diem, puts him in the same condition as if he had made the payment upon the day. The enactment, which allows such plea to be used, shews the necessity of the statute, without which the plea would not be good; for the old law with regard to accord and satisfaction shews, that that which is allowed by the statute could not be done. In *Com. Dig.* 'Accord and Satisfaction,' (A 2,) it is said—"Accord is no plea where a certain duty accrues by deed merely, for a deed ought to be avoided by a matter of as high a nature—6 Co. 44 (A)." The act of Anne, for the purpose of avoiding a debt due on a deed by payment on a day subsequent to that fixed for payment, gives a remedy by the plea of *solvit post diem*; but it gives it only to him who is to pay; it does not give it to a guaranty; nor does it give it when principal and interest are to be paid together; and this bond, which was broken on the 1st of March 1833, must be considered in a court of law as broken still, notwithstanding any payment which may be said to have afterwards taken place. I am not prepared to say how a court of equity would act upon the occasion, or to affirm or deny what the effect of a petition to the Lord Chancellor would be, for the purpose of preventing a party from proving under a commission of the surety when he still continues to treat with the principal. I neither affirm nor deny what might be the probable result of such proceeding; I merely decide that, according to the construction of law, the bond is forfeited and the penalty became the debt, and all know that such debt may be proved under the circumstances, with no other proceeding than a rebate of the interest for the time. Thus, as it appears to me, the debt was proveable under the commission, without reference to any contingency, and, consequently, the certificate was a bar.

PARK, J.—I am of the same opinion. The case has been extremely well argued on both sides, and I was for some time induced, by the ingenuity of Mr. Henderson's argument, to come to a conclusion different from that at which I have finally arrived. I was at first almost induced to believe that the debt was of a nature which was incapable of calculation or of valuation; and that it

would be impossible for the parties to shew to what extent they had been damnified, and that the immorality of Butler, the party to whom the money was lent, and the other circumstances, should be taken into consideration for the purpose of forming an estimate of the valuation. This, I allow, was for some time, though it is not at present, the impression upon my mind. Mr. Henderson candidly admitted, upon the outset of his argument, that the bond was forfeited by the non-payment of the interest upon the appointed day; and if, at that period, the plaintiffs had proceeded against the surety, they would undoubtedly have maintained their claim of debt against him. As to what has been said by my Lord in respect to an appeal to the Court of Chancery, we have nothing to say to it. The only question for our decision is, whether this debt, forfeited at law, might be considered as due and proveable under the commission, upon offering to allow a rebate of the interest; and I am of opinion that the debt was thus proveable, and, consequently, that it was barred by the certificate.

VAUGHAN, J.—The apparent hardship of this case would induce me, if it were possible, to put upon this transaction a construction favourable to the plaintiffs; but I think it is impossible to come to another conclusion, or to put a different construction upon the 121st section of the statute; and the question is, was there or was there not a debt proveable under the commission? The transaction has arisen upon the debt of two parties who gave a joint bond, which is just the same, as observed by my Lord, as if the plaintiffs had given two bonds perfectly separate. By the condition, the interest was to be paid on a certain day. Upon the first appointed day it was not paid; neither was it paid on the second, but it was paid on a subsequent day. It is impossible to contend, that, if a forfeiture took place, it could be purged or done away with by the subsequent payment. I do not take upon myself to say what relief may be obtained in the Court of Chancery, but I am of opinion that this debt was proveable under the commission, and that the certificate is a bar.

Judgment for the defendant.

1837. }
Jan. 23. } REMINGTON v. BAKER.

Interest—Bill of Particulars—Evidence.

In an action to recover two quarters' interest upon the principal sum of 700*l.*, the bill of particulars delivered to the defendant, after stating the amount of the demand, added, "and for which principal sum of 700*l.*, the note of hand, of which the following is a copy, was given by the defendant to the plaintiff." The declaration made no allusion to the note as the ground of action. Upon the trial, the note was not produced, as was found to be on a wrong stamp, but the plaintiff supported his case by other evidence, and obtained a verdict. On a rule for entering nonsuit, on the ground of the non-production of the note, Tindal, C.J. and Gaselee, were of opinion, that it necessarily appeared that the note was the only contract between the parties, on which the cause of action was founded; consequently, that the rule for the nonsuit should be made absolute. Park, J. and Vaughan, J., *contra*, thought that it did not necessarily appear that the note was the only contract between the parties on which the claim was founded; that the plaintiff in such case might be remitted to his original contract; and consequently that the rule should be discharged.

In this action, (tried before the under-sheriff of Middlesex,) in which the plaintiff sought to recover two quarters' interest, at 5 per cent., due upon the 11th of May, on a debt of 700*l.*, the bill of particulars delivered by the plaintiff's attorney was as follows:—"The action is brought for the recovery of the sum of 17*l.* 1*s.*, which the plaintiff claims to be due to him from the defendant, at the rate of 5*l.* per cent. per annum, due the 11th of May now past, and for which principal sum of 700*l.*, the note of hand, of which the following is a copy, was given by the defendant to the plaintiff, on the 11th of January 1834." To the bill was added the copy of the note, payable at three years after date, at interest at 5*l.* per cent., payable quarterly.

It appeared at the trial, that the defendant, who was a poulterer, had a variety of dealings with the plaintiff, then a banker, the result of which was, that he was in-

debted to the plaintiff in the sum of 740*l.* Upon some discussions which took place between plaintiff's attorney and the defendant, it was agreed to strike off 40*l.* of the debt, and the note referred to was given at three years' date with interest; and the defendant wrote to the plaintiff a letter, stating in substance, that as he, (the plaintiff,) upon taking the defendant's note of hand for 700*l.*, at three years, with interest at 5*l.* per cent., payable by the quarter in the meantime, had struck off 40*l.*, the writer would not charge him anything for articles furnished in the way of his trade.

The note, in consequence of being upon a wrong stamp, could not be produced; and the plaintiff went into other evidence, and obtained a verdict, with leave to the defendant to move to enter a nonsuit, upon the ground of the non-production of the note.

Kelly obtained a rule accordingly, submitting that the plaintiff was not entitled to recover, as his demand for interest, as appeared from the bill of particulars, was founded on a written contract, viz. the promissory note, and that written contract was consequently the only proper and sufficient evidence to sustain the action.

Hoggins shewed cause, and contended, that there was nothing in the bill of particulars, to shew that the claim for interest was founded upon the note. The bill merely stated, that the demand was for two years' interest upon the sum of 700*l.*, due from defendant to plaintiff on the 11th of May, and did not allege the interest to be due on a note for that amount. Neither could that statement be collected from the declaration, which was in the common form, for the forbearance of monies due and owing from the defendant to the plaintiff, and on an account stated. He referred to *Singleton v. Barrett* (1), where the particulars of the plaintiff's demand were on an account stated, "as appeared by a memorandum under the hand of the defendant of this date;" and the memorandum being inadmissible for want of a promissory note stamp, it was held, that the account stated might be proved by other evidence than the memorandum.

Kelly was heard in support of the rule.

(1) 2 Cr. & Jer. 368.

TINDAL, C.J.—If a difference of opinion exists amongst my learned Brethren upon the bench, it does not exist with regard to the law of the case, or the principle on which, according to law, it should be decided; but it is in respect to the facts, as they appeared in evidence. There is no doubt as to the law, that where there is a contract between any parties which becomes the subject of litigation, that original contract must be produced for the inspection of the jury; and certainly, as it strikes my mind, the contract for the payment of the interest evidenced by the promissory note, is the contract, which, as it appeared by the testimony given, was that entered into between the parties. As it appears to my mind, there was nothing by which the payment of interest was to be obtained, except the promissory note. Upon an investigation of the facts, it appears that there was originally a debt of 700*l.* due from the defendant to the plaintiff, for goods sold and delivered. On the 4th of February, an arrangement was entered into between the parties, when the defendant required three years' time to pay the debt, to which the plaintiff assented, the opposite party having agreed to give a promissory note for the amount, with 5*l.* per cent. interest, at quarterly payments. Now, to my mind, it seems that there was no contract for the interest at all, except by this note; and when it appeared upon the cross-examination of a witness that the note was given, the Court was bound to be satisfied as to when the note was given, the day on which it was to fall due, &c.; but the note, not being on a proper stamp, was not admissible as evidence. But it is said for the defendant, that this promissory note was not the contract for the payment of the interest on the debt; that, in fact, it did not appear to be the security for the debt and interest; and that when a party fails to recover upon such note, he is remitted to his original contract. To this I have only to say, that the facts in the shape in which the evidence was given, do not appear to warrant such conclusion: they, I think, serve to shew that the promissory note was the only contract by which the interest was given. The rule, therefore, for a non-suit should, in my opinion, be absolute.

PARK, J.—It is satisfactory, upon this

occasion, to know that there is no difference of opinion as to the law. I am, of course, most sorry that I cannot agree with my Lord Chief Justice in the opinion which he has expressed, but I am decidedly of opinion that there is no ground for this application. Much has, I think, been given up with regard to the bill of particulars. Without referring to the case cited from 2 *Cro. & Jer.*, that part of the bill of particulars on which stress has been laid, is, I think, nothing more than surplusage on the part of the attorney, and one consequence of this will be, to make Judges at chambers diffident as to the granting of orders for further and better particulars. In this case, the bill first states the demand to be for two quarters' interest on the sum of 700*l.*, due from the defendant to the plaintiff. The attorney then goes on and amplifies, and says, "for which principal sum of 700*l.* the note of hand, &c. was given by the defendant." The reason of his making this statement was, in my judgment at least, to shew how the matter arose, and the nature of the transaction. This is the construction which should, I think, in justice be put upon the bill of particulars. The next point, I think, for consideration is, whether there was evidence for the jury to support the plaintiff's case, without the production of the note; and I think there was: I think there was evidence sufficient for the jury, on which the plaintiff might stand in support of his claim to the interest, without talking of the note at all; and the justice of the case should not be defeated, because the note to which the objection is taken has been set up.

GASELEE, J.—It is not for us to consider whether or not this is a gracious application; we are only to decide whether it is good in point of law, and I am sorry to say I think it is. If there was a mere verbal contract between the parties, an action could, no doubt, be maintained upon it; but I think it is evident here that there was no contract to pay the interest, until the writing was entered into. The payment of interest was no part of the original contract, and it could not be recovered without the production of the promissory note.

VAUGHAN, J.—There is no disagreement on the Bench with regard to the rules of

law or evidence. The difference of opinion applies merely to the application of those rules, to the facts of the present case, which, in my opinion, warranted the finding of the jury. The party should not be prevented from referring to the original contract for goods sold and delivered, and it does not appear that the present was not such contract. The question which we are to consider with regard to the evidence is, if the note was not produced at all, was there was there not sufficient to enable the plaintiff to maintain his action? In my opinion there was, and I think he should not be placed in a worse situation by the production of the note. It appears that a settlement or arrangement had been entered into between these parties, by which the sum of 700*l.* was to be paid at the end of three years, and suppose the question to this contract, were put thus to the jury, "were they of opinion that the debt was justly due, and acknowledged to be by the defendant? and did he, the defendant, agree and assent to the payment of the 5*l.* per cent. interest, before the note was given?" If such were the case, the note would be nothing more than a collateral security, and the jury would, I think, be warranted in finding as they have, even if the note were not produced at all. And in my opinion, the party would be warranted in standing upon that, on which, for the reason, he has not stood, he should be punished for his indiscretion. The verdict should consequently, I think, stand. The result of our decision (which, indeed, is not much regret) is, that things remain as they are, and the case stands as if the note were refused.

Verdict to stand.

1837. } *DOE dem. THOMAS BATH v. STE-*
1839. } *PHEN CLARKE AND OTHERS.*

Witness—Competency—Interest.

Where, in ejectment to recover certain lands, the lessor of the plaintiff claimed as heir-at-law to the purchaser, and a witness produced by the defendants, for the purpose of proving, that he himself, not the father of the plaintiff, was the heir of such purchaser:—Held, that he was admissible

to prove such fact, and was not incompetent through interest.

This was an action of ejectment, to recover the great or rectorial tithes of upwards of 500 acres of land, at Norbury and Thornton Heath, in the parish of Croydon. The lessor of the plaintiff claimed as heir-at-law of John Bath, the purchaser of the tithes in question, and father of Mary Bath, otherwise Clarke, who held them during her coverture with her husband. She died in 1823, and her husband held possession, as it was said, tortiously, until the time of his death in 1832, and the defendants (who defended as landlords) claimed as his devisees. To rebut the title of the lessor of the plaintiff, the defendants called a witness, one John Bath, who described himself as the real heir-at-law of John Bath, the purchaser of the disputed property, being, as he stated, the descendant of John Bath, an elder brother of Henry Bath, through whom the lessor claimed. He was objected to as incompetent, on the ground of interest. The learned Chief Baron, however, before whom the cause was tried, overruled the objection; and a verdict was found for the defendants.

Platt obtained a rule for setting it aside and for a new trial, on the ground of the improper admission of this witness.

Thesiger and *Channell* shewed cause.—It is admitted, that the incompetency of a witness, interested in the event of a suit, cannot be removed by the indorsement of his name on the record, under 3 & 4 Will. 4. c. 42. s. 26—*The Bailiffs of Godmanchester v. Phillips* (1); and it is not intended to dispute *Doe v. Tyler* (2), where a remainder-man, after a tenant in tail, was held not to be a competent witness in ejectment for the entailed property. There is no analogy, however, between those cases and the present; but the witness here was admissible upon the same principle that, in an action of trover, where there is a dispute as to the property of the goods, a witness is competent to prove that they belong to neither party, but are his own property. The case resembles *Doe v. Maisey* (3), where the mother of a defendant in ejectment,

(1) 6 Nev. & Man. 211.

(2) 6 Bing. 390.

(3) 1 B. & Ad. 437; s. c. 9 Law J. Rep. K.B. 2.

who claimed to retain possession of premises, as heir-at-law to his father, was held to be a competent witness for the defendant, although the effect of her testimony might be to prove a seisin in law in her husband, which would give her a claim to dower. The rule laid down in *Gilbert's Evidence*, 106, 107, is, that "the law looks upon a witness as interested, where there is a certain benefit or disadvantage to the witness attending the consequence of the cause one way;" and *Bent v. Baker* (4), according to Lord Kenyon in *Smith v. Prager* (5), establishes, that no objection can be made to the competency of a witness, on the ground of interest, unless he is directly interested in the event of the suit, or could avail himself of the verdict in the cause, so as to give it in evidence in support of his own interest. This doctrine is supported by the cases referred to in *Phillipps on Evidence*, 55, 7th edit., and is further illustrated by *Nix v. Cutting* (6), and *Ward v. Wilkinson* (7). If tried by this test, no objection can be made to the evidence of the party here, either affirmatively or negatively. The result of this cause cannot, upon the one hand, relieve him from any responsibility to which he would otherwise be liable; nor, upon the other, can it procure for him any positive benefit or advantage. It is admitted that the defendants here could not call, as a witness, the tenant in possession who holds under them; nor would a person be competent to whom the lessor of the plaintiff had agreed to demise the lands in question, in case he should recover them by the verdict in ejectment; but the present case is clear from such objections.

Platt, in support of the rule.—The effect of the evidence of the witness and of the verdict, may be to enable him to recover the property in question, for in case he should bring an action of ejectment against the defendants, their act in calling him as a witness would operate as an attornment, or as an acknowledgment of his title as heir-at-law. How could the defendants pretend to controvert the evidence of an individual, whom they themselves had put into

the box to establish that fact? They would not be allowed to dispute the verdict which had been found; and not alone that verdict, but the evidence on which it rested, would find its way to the jury. Thus, therefore, it is obvious that the witness was interested to the last degree, in having a verdict pass for the defendants; that is to say, he was interested in the event of the suit, and consequently, according to the authorities and the rule of law, he was incompetent.

TINDAL, C.J.—The evidence to which an objection has been made, was, in my opinion, most properly received. The lessor of the plaintiff brought his action for the recovery of certain tithes, and he sued as heir-at-law to John Bath. The defendants, who defended as landlords, for the purpose of defeating the claim of the lessor produced the witness John Bath, now objected to, the grandson of the elder son of the common ancestor; and this they did to shew that the lessor claimed under a younger son; and the question is, was the witness competent or not? Now, it is perfectly well established that the only interest which goes to the competency of a witness is an immediate interest in the event of the suit; if, for example, the verdict passing on the side of the party for whom he is examined, could be used for himself; or if, being an adverse verdict, it could be used against him. We are therefore to consider and to decide, whether this witness was within either of these predicaments, in respect of the subject-matter of dispute. I agree entirely that he could not have been examined as a witness on behalf of a person holding under him, for in such case he would have had an immediate interest in preventing the tenant from being turned out, inasmuch as the consequence of an adverse verdict would have been a writ of possession to the sheriff, who, in the performance of his duty, would have removed the party in possession, and the witness being liable upon the covenant for quiet enjoyment, his interest would thus have been immediately affected. It is also, I think, incumbent on the party who raises this objection, to shew, that the witness objected to has an interest of such a nature as would be affected in one way or the other by the event of the

(4) 3 Term Rep. 27.

(5) 7 Term Rep. 62.

(6) 4 Taunt. 18.

(7) 4 B. & Ald. 410.

is, so as that the verdict might be used either for or against him, according as it should be found for the plaintiff or the defendants. Now, I do not see how a verdict for the defendants could be of use to the witness. If he were to bring an action upon his own title, I cannot perceive how a verdict, which goes to the establishment of the defendant's title to these tithes, could aid or assist him in the maintenance or furtherance of his suit. It is said, however, that the objection may be carried further, that not only the verdict, but the evidence upon which it was obtained, might be made available; but I never before heard that evidence given on a trial by a party could be used in his favour in a suit by him against a third person. In short, it appears to me, this case comes within the principle of *Nix v. Cutting* and *Ward Wilkinson*. It is true, that in the cases referred to, the subjects of the suits were personal chattels; but I do not comprehend how any difference can arise, or why the same reasoning should not be applied, because the subject matter happens to be right to tithes, and not to personal chattels. The rule should be discharged.

PARK, J.—I am of the same opinion. In some of the older cases the rule of law is not, I believe, well understood; and there may have been a few erroneous decisions at Nisi Prius, but they were never brought before the Court. I am old enough to remember the famous case of *Bent v. Barker*, where the rule was laid down, that objection could be made to the competency of a witness upon the ground of interest, unless he were directly interested in the event of the suit, or could avail himself of the verdict in the cause, so as to give it in evidence on any future occasion in support of his own interest: and in *Smith v. Prager*, Lord Kenyon expressed his approbation of what had been said, and said, that he, as Chief Justice, endeavoured to regulate his conduct by the rule. The case of *Doe v. Maisey*, which I myself decided at Nisi Prius, and which was afterwards upheld by the Court in *King's Bench*, comes, in my opinion, up to the present. I think it was necessary for the party making the objection, to shew that the witness was in such a situation as rendered him incompetent. This he has

endeavoured to do, but he has not succeeded. There is, therefore, no ground for the application; and the rule should be discharged.

VAUGHAN, J.—The rule has been clearly laid down in *Smith v. Prager* and in later cases. There is no such interest in this case as that which is contended for; there is nothing to prevent the evidence from being received. I remember *Nix v. Cutting*. I was counsel in the case. True, the subject of discussion there was a chattel; but there is no distinction in this respect between personal chattels, and property of another description.

Rule discharged.

Note.—Upon this subject, vide *Smith v. Blackburn*, 1 Salk. 283, where it was said, by Treby, C.J. "An heir apparent may be a witness concerning the title of the land; but a remainder-man cannot, for he hath a present estate in the land, but the heirship of the heir is a mere contingency."

1837. { DUMSDAY, DEMANDANT;
Jan. 20. { HUGHES, BART., TENANT (1).

Writ of Right—Limitations.

In a writ of right, when the demandant counts upon the seisin of his ancestor, by his taking the esplees, &c., though it is not actually necessary to allege that such seisin, in fact, was within sixty years next before the teste of the writ, yet there must be something on the face of the count, from which the Court may infer judicially that the seisin was within such time.

When the ancestor, from whom title is deduced, converts himself (for the uses of his marriage settlement) into a tenant for life, with remainder to his issue male in tail, and on failure thereof, the reversion to himself and his heirs, and the heir of the settlor is kept out of possession, his remedy is by writ of formedon in the reverter, not by writ of right; and such writ should be sued out, by the 21 Jac. 1. c. 16, within twenty years next after the title and cause of action first descended.

(1) Vide the writ of right in 3 Bos. & Pul. 433, in which Damsday was demandant, and Hughes, bart., tenant; the writ there was for the recovery of lands in Sussex; the demandant failed on special demurrer, because, in deducing his title, he did not shew how certain persons were the nieces and co-heirs of John Bundell.

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Writ of right to recover lands in the parishes of East Bergholt, Brantham, and Strafford, in the county of Suffolk. The demandant alleged in his count, *that Shadrach Blundell was seised of the said tenements above demanded, with the appurtenances, &c. in his demesne as of fee and of right, in the time of peace, in the time of our Lord George II., late king, &c., by taking the esplees thereof to the value, &c.; and being so seised thereof, afterwards, to wit, on the 8th of June 1750, in the county aforesaid, by a certain indenture of bargain and sale, (which was set out,) conveyed the lands to trustees, to the use and behoof of the said Shadrach and his heirs, until the solemnization of his intended marriage, and from and immediately after such event, subject to a certain term of ninety-nine years, if said Shadrach, and Ann his intended wife, should live so long, to the use of said Shadrach for life, without impeachment, &c.; and from and after the determination of that estate by forfeiture or otherwise, in his life, to the use and behoof of said trustees, to keep up and preserve contingent uses and estates, &c.; and from and after the decease of said Shadrach, to the use and behoof of Ann, his intended wife, for and during her natural life; and from and after the decease of the survivor of them, said Shadrach and Ann, to the use and behoof of the first son, and of the heirs male of such son; and in default of such issue, to the use of the second son of Shadrach and Ann, in tail male: in default of issue male, to the daughters, share and share alike, and for want of such issue, to the use and behoof of Shadrach, his heirs and assigns for ever. It was then alleged, that the marriage took place on the 10th of June 1750; that Shadrach died on the 1st of January 1753, without issue, and thereupon the said Ann became seised of the tenements in her demesne, as of freehold and right, for the term of her natural life, in the time of peace, in the time of our Lord the King, George II., by taking the esplees thereof, to the value, &c., and continued so seised, &c. *within sixty years now last past*, by taking the esplees thereof, to the value, &c. and died so seised on the 13th of October 1777, whereupon the right descended and came to Mary Bushley (formerly Mary Blundell), Eliza Blundell,*

Jane Dumsday (formerly Blundell), and Hannah Gregory (formerly Blundell), as cousins and heirs of the said Shadrach Blundell, (setting forth how they were cousins). The count then stated that Eliza died on the 1st of January 1778, without issue and intestate, upon which, the right descended to the surviving cousins and heirs. On the 1st of January 1779, Jane Dumsday died, leaving one son and heir, John Dumsday, whereupon, all her right came to her son John. On the 1st of January 1783, Mary Bushley died, intestate and without issue, whereupon all her right came to Hannah Gregory and the said John, and afterwards, the said Hannah died, intestate and without issue, whereupon, all her right came to said John, from whom it came to the demandant, as his grandson and heir, and that such is his right, &c.

Special demurrer, assigning for causes, that though demandant deduced his supposed title from Shadrach Blundell, it did not appear in form, or by the count, that the said Shadrach was ever seised of the tenements, &c. in his demesne as of fee or right, by taking the esplees thereof within sixty years next before the teste of the writ in the said count mentioned. The same objection to the title deduced from Ann Blundell, widow of Shadrach. It was also said, that the demandant had not shewn that any ancestor, from whom he claimed, was seised in fact; and though title was deduced from John Dumsday, it did not appear that Jane, his mother, was married; nor was it shewn that John was dead, &c.

Joinder.

Bayley, for the demurrer.—The demandant, having counted on the seisin of his ancestor, is bound to shew such seisin within sixty years of the teste of the writ, as such is the limitation established by 32 Hen. 8. c. 2 (2). This he has not done, but has clearly made out, that the seisin of Shadrach, his ancestor, was eighty-two or eighty-three years since, viz. in the time

(2) By the 1st section of which, it was enacted, "That no person suing out a writ of right should declare or allege any further seisin of his ancestor, than that of threescore years next before the teste of the writ;" and by the 3rd section, it was enacted, "That he who counted on his own seisin, should be limited to thirty years next before the teste of the writ."

George II. At the time when the statute of Hen. 8. was passed, the demandant might count on a seisin in fact from the time of Richard I., a period of 340 years, and the recital of the statute shews the extent of the mischief consequent thereon, and that the statute is of a disabling nature. This is the first attempt to evade its provisions. In the case of *Widdowson v. the Earl of Arrington* (3), it was held, that the demandant, in a writ of intrusion by a remainder-man or reversioner, after a life estate, must allege and count upon an actual seisin by the person creating the estate, taking the esplees within the period of fifty years, allowed by the 2nd edition of 32 Hen. 8, next before the teste of the writ; and the Master of the Rolls said, "It is the duty of the Court not to assist the prosecution of stale demands. Upon every principle of sound policy, objections that have been long suffered to remain at rest, ought not to be agitated, even if the action here proposed could be maintained, we ought not lightly to encourage it." *Dally v. King* (4) establishes the same principle. The allegation of the seisin within sixty years, of Ann, the widow of Shadrach, by her taking the esplees, cannot cure the neglect of alleging an actual seisin within the same period, as a writ of right cannot be maintained under a writ for life. Upon the other grounds of demurrer, he argued that John Dumsday might be illegitimate, as it was not alleged that Jane Dumsday was married; or that he might still be alive, as his death was not alleged, in which case he should be the demandant.

Stephen, Serj. contra.—Although the statute of Hen. 8. limits the time of him who counts through the actual seisin of an ancestor to sixty years, and the time of him who counts through his own to thirty years, before the teste of the writ, a reference to the early precedents, when this mode of pleading was more frequent and better understood, will shew that such allegation is necessary in the count. In *Rastal's Case*, 241, B, 'Droit,' the precedent is, "et seisitus de tenementis, &c., tempore pacis, tempore domini regis nunc."

Similar precedents are to be found in the same book, fol. 205, 206, B. Here there is no allusion to the period within which the demandant was actually seised. It should be also observed that this work was compiled in the year 1564, within twenty years of the passing of the statute of Hen. 8. So in *Coke's Entries*, 'Droit,' fol. 181, 'Writ of right of advowson,' where the demandant claimed on the actual seisin of his ancestor, the words are, "tempore pacis, tempore dominæ nuper reginæ;" and in the next folio is a precedent where the demandant counted on the actual seisin of himself; and the words are, "tempore pacis, tempore dominæ nunc reginæ." The allegation is also omitted in the precedents of the count, which are to be met with in *Booth on Real Actions*, fol. 94, 104. Neither does *Bracton*, the early writer on the subject, deem such allegation in the count necessary; for when commenting upon the count, and stating its essential parts, he writes, in p. 372, B: "Non enim sufficit simpliciter proponere intentionem suam sic dicendo, 'Peto tantam terram ut jus meum,' nisi sic illam fundaverit quod doceat ad ipsum jus pertinere, et per quam viam et per quos gradus jus ad ipsum debeat descendere." And he adds, "Si autem in narratione facienda aliquis articulorum prædictorum omittatur, et narratio à petente advocetur, ita quod error non revocari possit, et petens clameum suum pro se et hæredibus suis, amittet in perpetuum," &c. It would also appear from the *Year Book*, 10 Ed. 3, fol. 20, that this allegation of time of seisin, in such a king's reign, which is said to be so important, was not the subject of a traverse at common law, though it is now by the statute of Hen. 8, according to *Booth*, 113, and the custom was for the tenant to tender the demi-mark to have it inquired by the Grand Assize. The objection that the demandant cannot count upon the actual seisin of Ann, the widow of Shadrach, she being merely tenant for life, is met by the passage in *Co. Lit.* 281, A, where it is said, "Lands are letten to A. for life, the remainder to B. for life, the remainder to the right heirs of A. A. dieth, B. entereth and dieth, a stranger intrudeth; the heir of A. shall have a writ of right of the seisin which A. had as tenant for life." No conclusion can be deduced

(3) 1 Jac. & W. 532.

(4) 1 H. Black. 1.

from *Widdowson v. the Earl of Harrington*, as that was a writ of intrusion.

Bayley, being desired to confine himself to the Statute of Limitations, contended, in reply, that the passages cited from *Bracton*, and the doctrine attempted to be founded upon them, did not apply, as the author wrote before the passing of the stat. of Hen. 8, upon which the limitation depended.

TINDAL, C.J.—As it appears to me, the count which the demandant has put upon the record is bad, inasmuch as he has not made it appear that the seisin in fact of his ancestor, on which he has counted, was a seisin within the period of sixty years next before the teste of the writ. In coming to this conclusion, I am not about to say that an express allegation to that effect is essentially necessary in the count, because there are many precedents in which such allegation is altogether omitted; but upon perusing the 6th section of the 32 Hen. 8, we cannot help seeing that it was required by the legislature that it should appear expressly on the record, or judicially to the Court, that the seisin of the ancestor, under whom the demandant claimed, was within sixty years next before the teste. The words of the section are in substance, "that if any person sue any of said actions, &c., and cannot prove that he or his ancestor was in actual possession or seisin at any time within the years before limited in this act, and in manner and form, &c., if the same be traversed or denied by the party, &c., that then, and after such trial, all and every such person shall be barred for ever," &c.

Here it appears affirmatively that there must be in the writ some averment or statement of facts to enable the Court to see that the writ of right was properly brought; for the Court would not have authority to try the writ if the seisin in fact of the ancestor, on which the demandant relies, were not within sixty years next before the teste. The Statute of Limitations, 21 Jac. 1. c. 16. s. 1, only enacts, "that if the actions there mentioned are not brought within twenty years," &c. the party shall be barred from bringing such action. Neither of the statutes enacts that there should be of necessity that alle-

gation of seisin in the ancestor within the periods prescribed; the words in the 1st section of the 32 Hen. 8. simply amount to a bar to the action, if it be not brought within the time limited; accordingly, in the interpretation of the statute, the courts and usage have been that if he who denies the seisin of the ancestor counted upon to be within sixty years, tender the demurrer, mark, he, by so doing, puts the demandant upon proof of the seisin, by the 6th section of the 32 Hen. 8, and then, unless the demandant prove the fact, such failure operates as a perpetual bar to his recovery in a writ of right. Undoubtedly, it is not expressly alleged in terms that the writ should be tested within the sixty years in which the seisin was, but yet there have been some circumstances shewing, in a satisfactory manner to the Court, that the seisin of the ancestor has been within the sixty years, and that the writ of right has not been tested or sued out beyond the term. This, I think, furnishes an answer to the objection founded upon the precedents cited by my Brother Stephen, for every one of them, though there is no allegation of the seisin in fact being within sixty years of the teste, yet there is some allegation, by means of which the Court might have notice judicially of the time. In the first instance, which took place in 1561, the allegation *tempore regis nunc* gave the Court such notice; so in the other instance did the allegation *tempore regis nuper*. And if, in the count which is now under discussion, the seisin were alleged to be in the time of the late king or of the present king, such allegation would completely away with all objection raised to the writ of its not being within the sixty years. It is for this reason I think the demandant should have removed any doubt that might exist from the mind of the Court. It was, I think, a duty imposed on the demandant to shew clearly that his writ was sued out within a certain time of the seisin in fact of his ancestor. It will not do for him to tell the Court that the writ was sued out long time ago, and was kept alive for perhaps twenty years by continuances, more especially when it was easy for him, relying on a certain seisin, to tell it in the ordinary way by the teste of the writ. It is, therefore, it appears that the dem-

dent has not brought himself into court, inasmuch as in his writ he has not taken himself out of the Statute of Limitations. The case, however, does not rest here. The original settlor, under whom the fee is now claimed, and who enjoyed the estate for life, is said in the writ to have taken the esplees in the time of George II. Here, therefore, is not alone the absence of an allegation that he was actually seised within sixty years, but an express allegation that he was out of the seisin for more than sixty years. There is also another reason for which I think this writ of right cannot be maintained. When I look into the count, I come to the conclusion that the facts there disclosed are not such as by law will entitle the party to have this writ. He is not in a situation analogous to that of the person in the passage from *Co. Litt.* 281, a, cited by my Brother Stephen, where it is said, "Lands are letten to A. for life, remainder to B. for life, remainder to right heirs of A. A. dieth, B. entereth and dieth; a stranger intrudeth; the heir of A. shall have a writ of right of the seisin which A. had as tenant for life;" for, according to the rule in *Shelley's case* (5), "when the ancestor, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail, always in such case the word "heirs" is a word of limitation of the estate, and not a word of purchase." Consequently, as there was here a gift or conveyance to the ancestor for life, with a mediate limitation to his right heirs, he was tenant for life, with the seisin in fee. But in the case before the Court, the tenancy in tail is interposed; and under such circumstances the law has provided an express remedy for the ouster, namely the writ of formedon, and not, as here, the writ of right. Ever since the statute *De Donis Conditionalibus*, (West. 2.) if the tenant in tail be ousted, his remedy is by the writ of formedon; if the issue be ousted, the remedy is by formedon in the descender; if he in the reversion be ousted, his remedy is by the formedon in the reverter (6).

(5) 1 Rep. 104.

(6) Lord Coke, in his exposition of the statute, says, "The formedon in the descender did not lie at common law, nor did a formedon in remainder,

This is the case of a gift in tail. The reversion is in the donor and his heirs. Somebody has wrongfully kept the heir out of possession, and his remedy is not by the writ of right, but by the writ of formedon in the reverter, if such remedy were sought in proper time. Now, what is the time when the demandant here should have sued out his writ in this droitural action? The 21 Jac. 1. c. 16. specifies such time, for it enacts, "that all writs of formedon in descender, formedon in remainder, formedon in reverter, shall be sued and taken within twenty years next after the title and cause of action first descended" (7). Now, when did the right of the demandant accrue here? Upon the death of the tenant for life, when his estate tail was spent; consequently, the party should have used his remedy within twenty years of such time, either by ejectment or by the formedon in the reverter: he might have availed himself of one or the other; but the law did not allow him the double remedy. In fine, as it appears to me, the demandant, in his effort to take this estate tail out of the Statute of Limitations, has clothed himself with a piece of armour, with which the law has not furnished him, and the judgment of the Court should be for the tenant.

VAUGHAN, J.—I am of the same opinion. In this form of action, the demandant claims a right to the lands in fee simple, and such right is to be made out by the seisin in fact of the ancestor, or of the demandant himself, which seisin must appear upon the face of the count. Amongst other writers on the law of real property, the late lamented Mr. Roscoe has considered the question, and has stated pointedly, that the seisin in fact must be within sixty years, if it be that of the ancestor which is relied on, and within thirty years next before the teste of the writ, if it be the seisin of the demandant himself on which the party hopes to succeed. When we look into the old statute of 32 Hen. 8, we find

upon an estate tail, because it was a fee simple conditional at common law; but after this statute a remainder may be limited upon an estate tail, in respect of the demise of the estates. The formedon in reverter did lie at common law."

(7) In the 32 Hen. 8. s. 5, the time of limitation affected only the formedon in reverter and that in remainder; but the statute of James corrects the omission, and includes the formedon in the descender.

it said, "that the demandant shall not declare and allege any further seisin than," &c., and the common averment in declarations in modern times is, that the ancestor, on whose seisin the demandant counts, was seised in fact within sixty years next before the teste.

PARK, J., not being present at the argument, gave no opinion.

Judgment for the tenant.

Note.—In confirmation of the doctrine, that a writ of right cannot be maintained if it do not appear by some means or other in the count, that the actual seisin relied on was within sixty or thirty years next before the teste of the writ—vide *Lilburne v. Heron*, Cro. Jac. 292; s. c. Yel. 211. Error on a writ of right from Durham. The judgment was reversed chiefly for this cause: the writ bore teste Feb. 20, 6 Jac., and the declaration of the espousal was alleged of the time of Queen Elizabeth, of the seisin of the demandant himself; and by 32 Hen. 8, 'Of Limitations,' a writ of right of his own seisin cannot be but within thirty years before the writ brought, and this seisin may be before that time. In the report in Yelverton, it is said, "It would be good if the demandant had counted on his own seisin in the time of the king generally, for the Court will know judicially whether this is within thirty years; and, in this case, the king had not reigned so long; but Elizabeth reigned more than forty years."

1836. } STOVELD AND ANOTHER v.
May 28. } UPTON.*

New Trial—Principal and Surety—Bond—Banker.

The Court will not send a cause to a second trial, upon a question peculiarly within the province of the jury to decide, unless they see clearly and beyond a doubt that the first verdict was wrong.

Semble—that the surety in a bond conditioned for the good conduct of the principal as a banker's clerk, is not liable for misbehaviour consequent upon his being allowed to become a customer, and to keep an account with the bank.

Therefore, in an action against a surety on a bond for the good conduct of an individual in his capacity of banker's clerk to the plaintiffs, where it was involved in some doubt whether the alleged misbehaviour was in the capacity of clerk or of customer, the Court being of opinion that the intention of the surety was to guarantee the plaintiffs merely against the misconduct of the party in

* This case was decided in Trinity term.

his character of clerk, and that the plaintiffs themselves had caused the difficulty, and imported the doubt into the cause, by suffering the person for whom the guarantee was given to assume the character of customer, refuse to set aside a verdict for the defendant.

This was an action against the defendant as surety in a bond given to the plaintiffs bankers at Petworth, for the good and honest conduct of a person named Osborne in his capacity of clerk in the banking concern. Upon oyer craved, the material part of the bond appeared to be as follows: "Whereas the said W. Stoveld and J. Stoveld have lately retained and employed the above-bounden J. Osborne as their clerk in the banking business carried on by them at Petworth, at and under a yearly salary stipend, and other perquisites and emoluments as mutually agreed on: now, the condition of this obligation is such, that the above-bounden J. Osborne, his executors or administrators, shall and do from time to time and at all times hereafter, often as requested by the said W. Stoveld and J. Stoveld or either of them, or either of their executors, administrators, or assigns, well and truly pay or cause to be paid unto the said W. Stoveld and J. Stoveld or either of them, or either of their executors, assigns, &c. all such sum and sums of money as said J. Osborne shall have had or received of the said W. Stoveld and J. Stoveld or of any other person or persons whatsoever, for or on account of the said banking business, and shall render to the said W. Stoveld and J. Stoveld, their executors, administrators, and assigns, a true, just, perfect account of all and every sum and sums of money that shall be by him said J. Osborne had, received, paid, lent, out, or disbursed, of, from, or on account of, the said banking and the said premises thereof, or on account of the said W. Stoveld and J. Stoveld, their executors or administrators, in the course of the said banking business, then this obligation to be in full force, or else to remain in full force."

The defendant pleaded performance of the conditions of the bond by Osborne his lifetime, and Rebecca Osborne, his ministratrix, since his death.

In their replication, the plaintiffs assigned as a breach, that during the time J. Osb

retained and employed by them as clerk, to wit, on the 1st of June 1828, and divers other days and times after that day, and before the death of said J. Osborne, the said J. Osborne had and received of and from the said plaintiffs and divers other persons, for and on account of the said banking business, divers sums respectively, amounting in the whole to a large sum of money, to wit, the sum of 350*l.*, yet neither the said J. Osborne in his lifetime, nor the said Rebecca Osborne, as the administratrix as aforesaid, since the death of the said J. Osborne, hath paid to the plaintiffs, either of them, the said sum of 350*l.* any part thereof, although the said Osborne in his lifetime, to wit, on the 1st of June 1835, and the said Rebecca Osborne, as administratrix after the death of the said J. Osborne, to wit, on &c., were respectively requested by the plaintiffs to pay them the said sum of 350*l.*, and the same is due and in arrear. There was no other breach to the same effect.

In his rejoinder, the defendant alleged, that the several sums of money mentioned in the replication were duly paid by J. Osborne on request in his lifetime; concluding to the country.

Similiter.

At the trial, before Tindal, C. J., the case appeared to be as follows:—The plaintiffs, bankers at Petworth, received J. Osborne into their service as clerk, upon the defendant and others entering into a bond for his correct conduct in such capacity to the amount of 500*l.* Some time after his entering their service he embarked in business as a grocer, and they allowed him to be a customer, and to keep an account with the bank, and they had dealings with him in such character, but these dealings in his individual capacity were to be but small, and, upon his death, a private account was found to be overdrawn to the amount of 15*l.* only. In his capacity of clerk, it was Osborne's duty to render up to Masterman & Co., the London respondents of the plaintiffs; and it was the abuse of this duty, and the conversion of it to his own advantage, that the action was brought against the defendant on the bond. On the 10th of November 1834, Osborne drew a bill dated North Bank, and as for W. & J. Sto-

veld, for 151*l.* 6*s.* 11*d.* at twenty-one days, on Masterman & Co. in favour of Messrs. Warner, which he paid to them on his own account, and which was duly honoured by the London house. This circumstance was not discovered by the plaintiffs previous to the death of Osborne. When this draft was drawn, it was the duty of Osborne to enter it first in the waste-book, then in the cross balance book, and subsequently in the ledger containing Messrs. Masterman's account, and also in the ledger of the particular customer; but Osborne, knowing that it was the custom of the bank to make up their balances on the 30th of June and the 31st of December, was said to have purposely omitted the entry till after the latter period, as, by so doing, he would be enabled to keep the account from the eye of the plaintiffs, who seldom examined the account more than on the balancing at the above half-yearly days. The draft in question was not entered in the before-mentioned books until early in the next year, after the balancing of the banking account, and then it was entered in the waste-book as an order to Messrs. Masterman & Co. to pay Messrs. Warner, on calling, 151*l.* 6*s.* 11*d.*; thus, as it was alleged, purposely making a false entry to prevent the existence of the draft being known. This was not discovered until after the death of Osborne, when one of the plaintiffs making up for government the account of bills used without stamps, it was found that the amount drawn by Messrs. Masterman's ledger did not correspond with the account furnished by Osborne to government. There were other instances of similar conduct imputed to Osborne whilst he was clerk to the plaintiffs, and in respect of which the action was brought. A verdict having been given for the defendant—

Talfourd, Serj. had obtained a rule nisi to set that verdict aside and for a new trial.

Spankie, Serj. and *W. H. Watson* shewed cause, contending, that the finding of the jury was supported by the books of Osborne, which established that the misconduct imputed was not within the conditions of the bond. The object of the bond was, to protect the plaintiffs from injurious consequences resulting from Osborne's not paying over money or accounting correctly in his character of clerk. It was to his transactions

in such character the breaches should be confined; they could not be applied to any other breaches committed by him in his capacity of customer, which was a new and totally different relation from that of master and servant, which was contemplated by the sureties. The dealings of Osborne must have been known to, and sanctioned by, the plaintiffs; this was clear from their mode of doing business and their weekly correspondence with the house of Masterman. The case was, in fact and substance, the ordinary one of a customer overdraw-ing his banker.

Talfourd, Serj. and Brass, in support of the rule, contended, that the assumption of the character of creditor could make no difference in the duties to be discharged as clerk, for which the defendant had become surety. Osborne was bound, as clerk, to enter all bills, no matter for what they were drawn, in a proper manner, and was not entitled, and it was clearly a breach of his duty, to draw bills so as to keep them out of the half-yearly account, to omit entering some and to enter others as orders to pay. Neither can it be said that the plaintiffs knew and sanctioned this mode of dealing by false entries; and the fact of the small amount which he had overdrawn his account at his death shews that they did not sanction his extensive dealings. Even assuming that they were acquainted with, or cognizant of, one improper act done by their servant, it did not thence follow that they were acquainted with and sanctioned all.

TINDAL, C.J. — The question for our consideration is, whether we should set aside a verdict found by the jury in favour of a defendant, in an action against him, as surety for the honesty and good conduct of a banker's clerk; and we are to decide whether the verdict is so clearly and unequivocally wrong, as to warrant us, in conformity with the practice of the courts of Westminster Hall, in sending the cause down for a second trial. I confess I do not see my way so clearly and distinctly upon the occasion as to come to such conclusion upon a matter, the decision of which was submitted to the jury, and upon which it was their peculiar province to decide; the subject at issue being a mer-

cantile transaction,—one in which that jury, composed of tradesmen, were particularly conversant. I cannot come to the conclusion, that they were so manifestly wrong, as to induce me to send this case to a new trial; but I am more readily inclined to an opposite opinion, when I look to the breaches assigned; and to that which appears to me to be the meaning of the condition of the bond. The first breach alleged is, that the said Osborne, whilst employed as a clerk, had and received from the said plaintiffs and divers other persons, for and on account of the said banking business, divers sums of money, amounting in the whole to, &c., yet the said Osborne hath not paid, &c. Now, the condition of the bond seemed to me, at the trial, as it does at present, to point at speculation on the part of the clerk, and its object was to prevent his receiving money and appropriating it to his own use; and, in my opinion, the drawing of bills of exchange by the clerk, as stated, though an improper act, was not, and cannot be said to be, within the breach provided against by the bond. As to the other allegation, that the administratrix did not, since the death of Osborne, pay, or cause to be paid, &c., the condition of the bond when considered, seems to point at the sums of money which Osborne might receive whilst he was acting as clerk before his death; but, in my opinion, it could not apply to the case of a bill of exchange drawn before his death and not due, nor the amount received whilst he was clerk. In addition to these reasons, we should remember, that the whole difficulty has arisen from the anomalous condition in which the party was placed, being at one and the same time a clerk and a customer: if this had not occurred, if the principal had not been thus situated, there is no doubt but that his acts performed in his life were of such a nature as to warrant an action against the sureties. As to his own account, the state of it was known, as it appeared by the evidence, to the plaintiffs; and I cannot take upon myself to say how this might have been felt by the jury, or what impression it might have made upon them. In fine, I do not see my way clearly; and I think we should not, under the circumstances, interfere with the province of the jury.

PARR, J.—I am of the same opinion. I do not impute the slightest fault to the jury for what they have done. The breaches assigned in the replication are not, I think, other than those against which the defendant, by the surety, meant to provide. One object of the bond was, I think, intended to prevent the commission of fraud by the clerk, and it may be said, at the counter, whilst receiving the various sums of money from the customers there: the object of the agreement was to prevent any peculation of the kind. The other object was, perhaps, more general; but I am not prepared to say, that the act, in consequence of which the banker could not be called upon to pay until after the death of the clerk, is within the breach; besides, the entire agreement is to be construed with some degree of strictness—the defendant is a surety, and his undertaking was, that the party should not conduct himself improperly in his capacity of clerk, and all the mischief here has arisen from the conduct of the plaintiff, in allowing the clerk to be a customer. The defendant entered into security against the misconduct of the party as clerk; he never contemplated to secure the plaintiff against his misconduct in his character of customer. It should be also borne in mind, that the individual in respect of whom this discussion has arisen, had, from his situation as clerk, better opportunities than he otherwise would have, for managing the books for his own purposes. In fine, the verdict is not so clearly erroneous as to warrant us in sending the case to a second trial. Besides, it is admitted, that the jury took all matters fairly into their consideration; and though they were not a special jury, or a jury of merchants, yet they were tradesmen, and fully conversant with the matters of this description. We should not, I think, interfere.

VASELEE, J.—I am of the same opinion. The mischief upon this occasion has not arisen from the conduct of Osborne, in his character of clerk, but in his character of customer. Now, he did not assume the character of customer at once; he did not become a customer until three years after he became a clerk; and if the defendant had been apprised of the fact, *non constat* but he would have withdrawn his security—*non constat* that he would have assented to

the assumption of such character, by the person for whose good conduct as clerk he was guarantee. The verdict does not, upon the whole, appear to me so clearly wrong as to justify us in sending it to a second trial.

VAUGHAN, J.—We should not be warranted in sending the cause to a second trial, if we did not see clearly, that the verdict already given was wrong. With regard to the breaches which have been assigned, the surety, I think, intended to provide against anything which the party might do in his character of clerk: it was not against anything which he might do in the character of customer, ingrafted upon that of clerk. The defendant, in my opinion, merely intended to be accountable for the honesty and integrity of Osborne as clerk. This was a matter for the consideration of the jury, and they had a better opportunity of deciding upon it than we can have. The rule should be discharged.

Rule discharged.

1836. { STANLEY S. TOWGOOD AND
May 24. { OTHERS, EXECUTRIX AND
EXECUTORS OF TOWGOOD.*

Landlord and Tenant—Covenant—Repairs.

In an action on a covenant to keep and leave demised premises in good and tenantable repair, the jury may consider the condition of the premises, i. e. whether they were new or old, at the time of the demise.

Covenant against the defendants, the executors of a lessee, for a breach of the following covenant in a lease for fourteen years of a messuage and premises: "That said, &c. (the lessee) shall and will, during the continuance of this demise, preserve and keep, and at the end or other sooner determination of the said term of fourteen years hereby granted, leave the said demised messuage and other buildings, and all the outhouses, offices, windows, doors, drains, sewers, pipes, and other water-

* This and the following case were decided in Trinity term last.

courses, gates, hedges, and fences, belonging to, in, or about the said demised premises, in good and tenantable order and repair; all losses and damages by fire or tempest in the meantime excepted."

At the trial, before Bolland, B., a verdict was found for the plaintiff for 14*l.* 10*s.*, being 8*l.* 10*s.* for the want of repairs in the messuage, tenements, &c., and 6*l.* for similar neglect in respect of a lean-to, built by the testator during his occupation.

Storks, Serj. moved for the reduction of the damages to the sum of 8*l.* 10*s.* if it should appear to the Court that the plaintiff was not entitled to anything in respect of the lean-to constructed by the testator. He also moved for a new trial, on the ground of the misdirection of the learned Judge in stating to the jury (upon the defendant's offering evidence to shew the state of the premises at the time of the demise, that they were old, &c.,) that the consideration of such question was quite immaterial, and that it was of no importance as to the point in issue, whether the premises were at the time of the demise new or old (1). The learned Serjeant added, that the premises appeared to be in a better state when surrendered, at the expiration of the lease, than they were at the time of the demise.

Kelly and Gunning shewed cause, and contended, that the fact of the premises being in a better state at the end of the term than at the commencement was immaterial, for even if pleaded, it would be no answer to the action, and when proved, could not affect the issue, which was, whether they were left in "good and tenantable repair." As to the lean-to, which was erected by the tenant himself, he was bound to keep and leave that at the end of the term in good repair—*Bac. Abr. 'Covenant,' (F).* In *Downe v. Cale* (2), it was held, that if a tenant covenant to erect three messuages

on the land, and to repair premises, and he erect five, he will be obliged to repair them. In *Harris v. Jones* (3), the rule laid down was, that the lessee, under a general covenant to repair, must leave the premises in substantial repair; and here the jury have found that they were not so left.

Storks and B. Andrews, in support of the rule, denied the application of *Harris v. Jones*, and they cited *Gutteridge v. Munyard* (4), where it was held, that where a very old house is demised, with the usual covenants to repair and yield up in repair, it is not meant that the house shall be restored in an improved state, or that the consequences of the elements shall be averted; but the tenant has the duty of keeping the house in the state in which it was at the time of the demise, by the timely expenditure of money and care. So also in *Fergusson v. ———* (5), it was held, that a landlord could not recover from a tenant from year to year a sum expended in putting a roof upon an old house. As to the lean-to, the action was not maintainable, for the covenant did not extend to buildings not upon the demised premises when the lease was granted. If, in the course of the term, the tenant erected buildings which he suffered to fall into decay, the landlord's remedy was for waste, and not upon the covenant.

TINDAL, C. J.—This is an action for a breach of covenant contained in a lease for fourteen years from Michaelmas, 1823, by which the tenant was bound to keep the demised premises in good and tenantable repair, and so to leave them. In answer to the action, the defendant pleaded, that he had observed and kept the covenants *modo et formâ*, repeating the terms of the covenant. When the case was submitted to the jury, it was a question for them whether the premises were in good and tenantable order and repair when the action was brought. The question, it should be recollected, in all cases is, whether the premises are in substantial repair. It does not refer to or comprehend those fanciful, trifling, immaterial breaches which occasion no actual damage, such as, for

(1) It was denied by the plaintiffs that these words were used in their positive sense by the learned Judge, and it was asserted that he used them only by way of illustrating his position that the premises should be left in good and tenantable repair.

(2) 2 Vent. 128; s. c. 3 Lev. 265, as *Dowse v. Earle*. In this case, as reported at great length in 2 Vent., Rokeby, J. doubted, and thought under the circumstances, that the covenant should be confined to the houses agreed to be built.

(3) 1 M. & Rob. 173.

(4) 7 Car. & Pay. 119; s. c. 1 M. & Rob. 334.

(5) 2 Esp. 590.

ample, the cracking of a pane of glass, such as, consistently with good sense, five men should be called together to decide. The jury have returned a verdict for the plaintiff for 14*l.*; and as to a part of this amount, it is objected that there was a misdirection, and that the residue was improperly given as damages in respect of lean-to, inasmuch as no alteration had taken place in that building, and no injury had been done to it since its original construction. The objection to the supposed verdict is founded upon the words used by the learned Judge in his summing up, viz. that the state of the premises at the time of the demise, whether they were new or old, was not matter for their consideration. Now, if that had been the direction of the Judge, the case, I think, ought not to have been submitted to another jury; in the first place, there is nothing in the report of the learned Judge leading to a conclusion that such words were used; and in the next place, the counsel do not agree upon the subject, and I cannot be thinking that some little misunderstanding has crept into the discussion, that the words in question were used as an instance or illustration of which the Judge was impressing, that the premises should be left in a state of repair. By using the words, he doubtless enlarged the proposition to a certain extent, but not to such an extent as to mislead the jury. I think this was the real state of things, when I observe the course which the case took, and the direct and cross-examination of the defendants' witnesses as to the state of the premises when the house was taken; and it should be also borne in mind, that some repairs were made to some want of complete repair by these very witnesses; thus the question resolves itself into whether the damages were too much or too little. The first of these witnesses, by stating, that the floor was out of order, that panes of glass were wanted; that there should be an underfilling of the walls; that the fence required some repair, which 2*l.* would be sufficient. When admissions are made by the defendants' witnesses, how are we to say that the jury should give no damages at all? It was also admitted that the lean-to was out

of repair. When I look at the case, it appears to me that the amount of the damages was for the decision of the jury, and that we should not interfere, especially when their assessment was only 14*l.* 10*s.* The matter was not left too broadly to the jury; it was submitted to their minds in the very words of the covenant, whether the premises were left in good and tenantable repair; and they found that they were not. It is not for us to enter into any disquisition as to the amount of the damages given by the jury, a question which they were more capable of clearly understanding than we are. The rule should be discharged.

PARK, J. was of the same opinion.

GASELEE, J., not having heard the entire discussion, gave no opinion.

VAUGHAN, J.—I agree; the report of the learned Judge is perfectly correct. The case cannot be taken out of it. The Court should not interfere or find fault with a verdict where the damages are only 14*l.* 10*s.*

Rule discharged.

1836. } LEUCKHART V. COOPER AND
June 13. } ANOTHER.

Lien—Warehouse-keeper—Custom.

A custom for all public warehouse-keepers in the city of London to have a general lien upon all goods from time to time housed or remaining in their warehouses, for and in the name of the merchants or other persons by whom such public warehouse-keepers are retained or employed, for all monies or any balance thereof, due from such merchants or other persons to such public warehouse-keepers, for or on account of advances or expenses which such public warehouse-keepers should have made or been put to, in or about the paying of duties or of customs, on goods consigned to them from abroad, or the payment of freight and other charges for the conveyance of such goods to the port of London, or the entering, landing, and warehousing of such goods, is bad in law; and, therefore, after verdict for the defendants, on a plea stating such a custom, judgment non obstante veredicto may be entered for the plaintiff.

Trover for certain bales of wool.

The defendants, in one of their pleas,

justified the holding of eleven bales, alleging that they carried on the trade of public warehouse-keepers in the city of London, and that there was, and from time whereof the memory of man runneth not to the contrary, hath been, and still is, a certain ancient and laudable usage and custom in the trade of public warehouse-keepers in the city of London, for all public warehouse-keepers to have and be entitled to a general lien upon all goods from time to time housed or remaining in the warehouses of such public warehouse-keepers, for and in the name of the merchants or other persons, by whom such public warehouse-keepers are retained and employed as aforesaid, for all monies or any balance thereof remaining due from such merchants or other persons to such warehouse-keepers, for or on account of any advances or expenses which such public warehouse-keepers have made or have been put to, in and about paying the duties and customs by law imposed and charged on goods consigned to such merchants and other persons from abroad, if required so to do by the said merchants or other persons, the freight and other charges for the conveyance of such goods to the port of London as aforesaid, and also for and on account of all and every the advances, charges, and claims which such public warehouse-keepers shall have made or have been put to, or to which they may have been entitled, for and in respect of the entering, landing, and warehousing such goods at and in the warehouses of such public warehouse-keepers as aforesaid; that while the defendants were such public warehouse-keepers as aforesaid, to wit, on the 1st of January 1833, and on divers times and occasions between that day and the 10th of October 1834, one E. Heilbron, merchant in the city of London, received divers, to wit, 200 bales of wool, shipped and consigned from abroad, and that the said E. Heilbron, on divers times and occasions during the time aforesaid, was possessed of divers, to wit, twelve bills of lading of the said wools, deliverable by the commission and consent of the plaintiff to order, whereby the said E. Heilbron was enabled to and did, on the times and occasions aforesaid, hold himself out as the true owner of the said

bales of wool, and afterwards and on the said several times and occasions aforesaid, delivered the said bills of lading to the defendants, and then retained and employed the defendants to enter at the Custom House, at and for the port of London, for the said E. Heilbron, the said bales of wool, in the said bills of lading mentioned and described (of which bales of wool, the said bales of wool in the introductory part of this plea referred to, were part and parcel), and afterwards to land the said wools, and house the same at and in the warehouses of the defendants, for and in the name of the said E. Heilbron, subject to his order, for certain reasonable reward to the defendants in that behalf, they, the defendants, paying the entries and customs by law charged and imposed on such goods; and the said E. Heilbron, on the said several occasions and times aforesaid, then requested the defendants to pay the duties, the freight, and other charges for the conveyance of the said wools to the port of London aforesaid: that, in pursuance of such retainer and employment, and believing the said E. Heilbron to be the owner of the said wools, they, the defendants, as such public warehouse-keepers, did, on the said several times and occasions, accordingly enter at the Custom House at and for the port of London, for and as the property of the said E. Heilbron, the said wools, and did pay the duties and customs by law charged and imposed on such wools, and also the freight, &c., and afterwards, to wit, at the said times, did land the said wools, and did house the same, for and in the name of the said E. Heilbron, at and in the warehouse of the said defendants, subject to the order of the said E. Heilbron. The plea then alleged, that the duties, customs, or freight, expenses, advances, &c., of the defendants, amounted to a large sum, viz. 2,000*l.*, and a great part thereof, to wit, the sum of 1,030*l.* 13*s.* 5*d.*, before the time of committing the grievance, was and still is due and owing from the said E. Heilbron to the defendants; that defendants, as such public warehouse-keepers, on divers times, did deliver the greater part of the said 200 bales of wool to the order of the said E. H.; and that the residue of the said wools, to wit, eleven bales thereof, being

the said eleven bales of wool in the introductory part of this plea referred to, and parcel of the said wools in the declaration mentioned, before and at the time of the committing of the said grievances were and still are lying, being, and remaining in the warehouse of the defendants: that the defendants, as such public warehouse-keepers as aforesaid, by virtue of and according to the said usage and custom of the trade of public warehouse-keepers in the city of London aforesaid, before and at the time of the committing of the grievances, retained and held the said last-mentioned bales of wool, parcel, &c., as and by way of a general lien for the said last-mentioned sum of 1,080*l.* 13*s.* 5*d.*, so due and owing from the said E. Heilbron, and still unpaid to the defendants as aforesaid, which was the said conversion of the said eleven bales of wool, parcel, &c., in the introductory part of the plea referred to, &c.

The plaintiff, in his replication, denied the existence of the alleged custom.

At the trial, before Tindal, C.J. a verdict passed for the defendants on this plea, and—

Wilde, Serj. had obtained a rule for entering judgment for the plaintiff *non obstante verdicto*.

Cresswell and R. V. Richards shewed cause.—The custom found by the jury is laudable and good. It is not incumbent on the defendants to shew the precise reason on which the custom was founded, and to which it owed its existence; for, according to *Litt. s. 80*, whatsoever is not against reason, may well be admitted and allowed; and in *Hix v. Gardiner* (1), in answer to the maxim, *Lex plus laudatur quando ratione probatur*, it was said by Coke, C.J. "If no reason can be given for the beginning of this or of any other custom, yet *non sequitur*, this custom to be for this cause unreasonable and against reason in the beginning of it, for that for some things no reason can be given, and as the rule is, *qui rationem in omnibus quaerit rationem destruit*." This custom would not have existed so long as it has, if it were not known to be at once reasonable and in favour of trade. It would have been put

an end to long since, if it was not felt to be attended with countervailing advantages. In *Wright v. Snell* (2), a carrier attempted to enforce a general lien for a balance due from a factor against the owner of goods; and in *Oppenheim v. Russell* (3), and *Richardson v. Goss* (4), the question arose between the wharfinger and purchaser of the goods, and not the bailor or his principal. In *Rushforth v. Hadfield* (5) it was decided, that the lien of a common carrier for his general balance, however it may arise in point of law from an implied agreement, is not to be favoured; but the reason is given in the second report of the same case in 7 *East*, 224, "because such lien is against the policy of the common law, and the custom of the realm, which only gives the carrier a lien on the particular goods, for the price of the carriage." This custom is not against the custom of the realm, and is said to prevail only in the port of London. The right of a party buying from a factor, who sells goods under a *del credere* commission, to set off any demand he has on the factor against the claim of the principal for the goods, is as injurious and inconvenient as the present, and yet it was established in *George v. Clagett* (6); and in *Haynes v. Foster* (7), the Court refused to set aside a verdict for the defendants, where it was left to the jury to say, whether the usage set up by the defendants for bill-brokers to deposit bills they had received to be discounted, as a security for money previously due from them, was established to their satisfaction, and whether the plaintiff had contracted with reference to that usage.—They also referred to section 2 of 6 Geo. 4. c. 94, enabling the person in possession of bills of lading, to be the owner so far as to make valid contracts.

Atcherley, Serj. and *W. H. Watson*, in support of the rule.—There is no resemblance between the trades and the rights of a wharfinger and of a warehouse-keeper, inasmuch as any person may be the proprietor of a warehouse, whereas a wharf

(2) 5 B. & Ald. 350.

(3) 3 B. & Pal. 42.

(4) Ibid. 119.

(5) 6 East, 519.

(6) 7 Term Rep. 359.

(7) 1 Cr. M. & R. 849; s. c. 3 Law J. Rep. (N.s.) Exch. 153.

(1) 3 Bulst. 295.

cannot be constructed without the intervention of the legislature—*Hale's Treatise on the Customs*, Pars Tertia, c. 23, *Har. Law Tracts*; and a wharfinger has not a general lien, in respect of harbourage and warehouse room, except by special agreement—*Holderness v. Collinson* (8), *Naylor v. Mangles* (9), and *Spears v. Hartley* (10), (where it was held, that a wharfinger had a general lien for his balance,) cannot assist the defendant, for in those cases the goods on which the lien was claimed were those of the debtor; but such is not the case here, the goods here being the property of the consignor. The statute 6 Geo. 4. c. 94. has been referred to, but the 3rd section enacts, "that no person shall acquire a security upon goods in the hands of an agent for an antecedent debt, beyond the amount of the agent's interest in the goods."

Cur. adv. vult.

TINDAL, C.J.—The jury having found in this case a verdict for the defendants, upon the issue raised on the second plea, the plaintiff has moved for judgment *non obstante veredicto*. The question therefore is, whether the custom stated in that plea is a custom that can be supported in law. The plea justified the retaining and holding of eleven bales of wool, parcel of the quantity claimed in the declaration, under an ancient custom from time immemorial used in the trade of public warehouse-keepers in the city of London, for all such warehouse-keepers to have and be entitled to a general lien upon all goods, from time to time housed or remaining in their warehouses, for and in the name of the merchants or other persons by whom such warehouse-keepers are retained or employed, for all monies or any balance thereof due from such merchants or other persons to such public warehouse-keepers, for or on account of advances or expenses which such public warehouse-keepers should have made or been put to, in or about the paying of duties or of customs on goods consigned to them from abroad, on the payment of freight and other charges for the conveyance of such goods to the

port of London, on the entering, landing, and warehousing of such goods. So that the general lien claimed is not confined to goods the property of the person who employed or retained the warehouse-keeper, but extends to all goods which are put by him in his own name into the hands of the warehouse-keeper, whether his property or not. The custom set up in the plea, if supportable, would make the goods of a foreign merchant, which have been consigned to a London factor for sale, and by him put into the warehouse of the warehouse-keeper for safe custody, liable to a private debt of the factor for expenses incurred in respect of other goods of third persons, which had been in his hands at former times, for charges contracted upon such goods during any antecedent period of time, and that to an unlimited extent. It appears to us, that such a custom is at once unreasonable and unjust, and therefore bad in law. It is a custom which is obviously prejudicial in a direct manner and in a very high degree to foreign trade, for no foreign merchant would be content to consign his goods to this country for sale, if they could be made liable, whilst warehoused, for the purpose of custody, to satisfy a debt already due from the factor to the warehouse-keeper, in respect of other goods. No authority whatever has been cited in support of this custom; and, as far as any analogy can be drawn from decided cases, it is against its validity. The case of *Oppenheim v. Russell* establishes this principle, that although a common carrier may have acquired, by usage or special agreement, a lien for a general balance of account between him and a consignee, this lien will not affect the right of a consignor to stop *in transitu*; that is, in effect, that this right of general lien shall not operate upon or against the rights of third persons; and the doctrine laid down in *Wright v. Snell* bears still more closely upon the point now under discussion, a general lien being held not sustainable by a carrier against the true owner of the goods for the general balance due from the factor to whom the goods were consigned for sale. That case in effect decides the present; for no sound distinction can be taken in this respect between a public warehouse-keeper and a public carrier,

(8) 1 Man. & Ryl. 55.

(9) 1 Esp. 109.

(10) 3 Esp. 81.

cept, indeed, that the latter stands in a position more favoured by the law in respect to lien than the former, the carrier being obliged by law to receive and carry the goods, whilst the warehouse-keeper's claim arises out of a voluntary contract. And the present case appears to us to differ from that of *George v. Clagett*, principally relied on by the defendants:—in that case, the owner put his goods into the hands of his factor to sell as his own; the factor sold them as his own, and the defendant had no knowledge that the factor was not the real owner of the goods. In such a case the set-off of the debt due from the factor to the purchaser, followed as a necessary consequence from the sale by him of his own goods; but in this case there was no sale by the factor. But the proposition contended for is, that the goods became, by the operation of the custom, pledged for the factor's debt, though the factor was not authorized by law so to pledge them directly. And though the factor may now, under some circumstances, pledge, the facts of the present case do not bring it within the operation of the statute Geo. 4. c. 94. It is unnecessary, as a further objection to this custom set up by the plea, to observe, that it is pleaded solely as to comprehend all goods put into the hands of a warehouse-keeper by a factor in his own name, whether or not the warehouse-keeper has knowledge or notice that they are not the property of the factor, but of the foreign merchants. But without relying on this objection, we think the custom unreasonable, and therefore bad, on the more general ground above stated; and, therefore, give our judgment in favour of the plaintiff, *non obstante veredicto*.

Judgment for the plaintiff accordingly.

24, 1836. }
31, 1837. } KNIGHT v. WOORE.

Trespass—Judgment—Distributive Plea—Costs—Witnesses.

Trespass for breaking and entering the plaintiff's close and pulling down a gate, the defendant justified under a right of way to a river with horses and carts for water goods. The jury found in favour of the defendant as to the right for water, and

against him as to the right for goods. Upon motion to enter the verdict for the plaintiff,—held, that the plea being in its nature distributive, and part being found for the defendant and part for the plaintiff, the verdict should be entered for the defendant on that part found for him, and for the plaintiff as to the residue.

Held, also, that the defendant was entitled to the general costs of the cause, and to the costs of all the witnesses upon the issue as to the right of way for water, although some of those witnesses also gave evidence as to the right of way for goods.

Trespass for breaking and entering the plaintiff's close, and removing a gate. The defendant justified under a custom for the inhabitants of Monmouth to pass through the *locus in quo* to and from the river Wye with horses, carts, &c. for water and goods. The jury found, that the defendant had a right of way to the river for water, but negatived his right as to goods; and they also found a verdict for the plaintiff, with 1*s.* damages, on a new assignment.

Ludlow, Serj. obtained a rule, calling on the defendant to shew cause why the verdict should not be entered generally for the plaintiff, inasmuch as the defendant had failed in making out the whole of his plea.

Maule and Whately shewed cause, and contended, that the case was within rule 7 of Reg. Gen. Hil. term, 4 Will. 4 (1), and that the verdict ought to be entered for the plaintiff on the right which the defendant had failed to make out, and for the defendant, on the right he had established. They cited *Phythian v. White* (2).

TINDAL, C. J.—This rule calls upon the defendant to shew cause why a verdict found for him on one part of the issue

(1) Which provides—"That, upon the trial, where there is more than one count, plea, avowry or cognizance upon the record, and the party pleading fails to establish a distinct subject-matter of complaint in respect of each count, or some distinct ground of answer or defence in respect of each plea, avowry, or cognizance, a verdict and judgment shall pass against him upon each count, plea, avowry, or cognizance which he shall have so failed to establish, and he shall be liable to the other party for all the costs," &c.

(2) 1 Mee. & Wels. 216; s. c. 5 Law J. Rep. (n.s.) Exch. 148.

should not be entered for the plaintiff. The question (which, it should be remembered, has not arisen upon a motion for a new trial, on the ground of the verdict being against evidence,) amounts in substance to this, whether the verdict found for the defendant should not be turned against him, and this when the jury have found part of the issue affirmatively against the plaintiff. To me it appears that the case is within the rule of Hil. term. 4 Will. 4. referred to on the discussion, in respect of pleas in actions of trespass; that is to say, where a plea (being distributive in its nature) is more extensive than is necessary, one part may be found for the plaintiff, the other for the defendant, and the verdict may be entered accordingly. Here, the part as to the right of way for goods is found for the plaintiff; that as to the right of way for water is not found for him, but for the defendant. The defendant, therefore, would, in my opinion, be asking too much if he sought to have the verdict entered for him, as the plaintiff is seeking too much by making a similar application. We should not interfere.

PARK, J.—If we were not to act in accordance with the opinion of my Lord Chief Justice, we should be violating the very form of the rule to which reference has been made. The matter here, which may be distributively taken, has been found partly for one, and partly for the other. The verdict should stand.

GASELEE, J.—I agree. Suppose the defendant had pleaded a right of way for horses and carts, and established only that for horses, should not the other matter, if it could be taken distributively, be found for the plaintiff?

VAUGHAN, J.—I am of the same opinion. This is capable of being taken distributively in its nature, and it should be so.

Rule discharged; verdict to be entered for the plaintiff on so much of the issue as related to a right of way for goods; for the defendant on so much as went to the right of way for carriage of water.

On the taxation of costs, the officer allowed the plaintiff the general costs of the cause, and the defendant the costs of that

part of the plea which claimed the right to fetch water, and of such of his witnesses were subpoenaed to prove that right only thereby disallowing the costs of the witnesses, whose evidence also applied to the right of way to fetch goods. In Michaelmas term—

Whately obtained a rule nisi to reverse the taxation.

R. V. Richards shewed cause, and contended, that the taxation was founded upon a just and correct principle, and was within the 74th General Rule. He relied on *Lardner v. Dick* (3), in which it was held that where several issues are found for the plaintiff, and some for the defendant, the latter is entitled to the costs of the issues found for him, but he is not entitled to the costs of his witnesses, unless their testimony was confined to the issues found for him, and he denied the applicability of *Frankum v. Lord Falmouth* (4), where it was held, that where in an action on a case the defendant succeeds on one of several issues, which goes to the foundation of the plaintiff's cause of action, he will be entitled to the general costs of the cause, though there is a verdict for the plaintiff on the plea of not guilty, without damages.

Whately, in support of the rule, contended, that the test by which the right to the general costs in the cause was to be tried, was, whether the party had succeeded substantially in the cause. It was clear that the defendants here have been substantially successful. The plea in which they claimed a right to pass, and upon which they removed the gate, and did wrong complained of, was found in their favour; and it was upon this the action mainly depended. As to the expenses of witnesses, *Eades v. Everatt* (5) is decisive for the defendants: there it was held that the expense of a witness called by the defendant whose evidence was substantially directed towards the issues found for the defendant, was properly allowed to the defendant, though he gave some evidence upon the other issues.—He also cited *Richards v. Cohen* (6).

(3) 2 C. & M. 589; s. c. 3 Law J. Rep. (N. Exch.) 140.

(4) 4 Dowl. P.C. 65.

(5) 3 Dowl. P.C. 687.

(6) 1 Dowl. P.C. 553.

TINDAL, C.J.—I think, as well from the pleadings as they appear on the record, as from the finding of the jury, that the defendant is substantially entitled to the verdict in this case, as the jury have, in fact, found in his favour. The action was in trespass for entering the plaintiff's close, and pulling down a gate. In his plea, the defendant claimed a right for all the inhabitants of Monmouth to pass and repass to the river Wye for goods and water. The replication to this plea severed itself into two issues, one as to the right for water, the other as to the right for goods. Now, if the defendant has succeeded upon either, the verdict must, I think, be said to be substantially found for him. The verdict must be found for him, if he was unjustly prevented from passing from the streets of Monmouth to the place in question—to carry water if he had that right—or to carry goods if he had that right. If either of those issues has been found for him, he must, I think, be said to have succeeded substantially; and, if he has introduced into his plea more than was sufficient to maintain that which has been found for him, he is sufficiently punished by the payment of costs entailed upon him for so doing. Having thus established his right, he is entitled to the general costs of the action in which it has been established; and, since he has succeeded, I do not see why he should not be allowed the costs of the witnesses, who, by their testimony, supported the issue found for him, because they also gave testimony as to the other issue found against him. In this case, the position of the parties is the reverse of that in which they were placed in *Richards v. Cohen*. The decision there was in favour of the plaintiff, and he was allowed the general costs of the cause, and of all his witnesses on the issue on which he had succeeded; and I think, upon the authority of that case, and the case of *Francum v. Lord Falmouth*, that the defendant here should be allowed the general costs, and the costs of all the witnesses who established the points upon which he was successful, although they spoke ineffectually for him upon others.

PARK, J.—I agree. At the same time, I cannot refrain from saying, that the officers are placed in a difficult situation when
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called upon to expound the rules relating to costs. They are, perhaps, too short, and do not go far enough into the subject; but, in this instance, the authority of *Richards v. Cohen* is strong in inducing me to think that the case should go back to be reviewed.

VAUGHAN, J.—I am of the same opinion. The whole of the case turns upon the question, whether the plaintiff or defendant has succeeded substantially. The plea asserted a right on the part of the defendant to pull down the gate. This has been found for him; and, therefore, I think that the substantial merits of the case have been found in his favour.

Rule absolute for the officer to review his taxation.

1836.	}	RANSON AND OTHERS V. DUNDAS AND ANOTHER.
June 11, 13.		
1837.		
Jan. 24.		

Parliament—Election Petition—Costs—Judgment.

A petition, complaining of an undue return of members to serve in parliament, prayed that the House of Commons would declare the election and return of the sitting members wholly null and void, and that the names of the said members should be erased from the return, and the two other candidates declared duly elected, and their names substituted in the said return. The petition complained, incidentally, of misconduct and partiality in the returning officers, but made no claim of redress against them for such misconduct:—Held, that the omission to serve these officers with notice to appear at the bar of the House, and interfere in the striking of the select committee appointed to decide upon the allegations contained in the petition, was not of such a nature as to vitiate the Speaker's certificate, by which the amount of costs, and the party liable to pay them, were certified to the Court, inasmuch as the returning officers were not parties, under the 36th section of 9 Geo. 4. c. 22, and consequently, if they had appeared, would not have had power to interfere in the striking of the committee.

Quære—whether the officers could make such objection after attending the committee

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thus struck without their interference, and defending themselves against the misconduct alleged in the petition?

Semble—such objection did not lie in the mouths of the sitting members, who were present, and assisting at the strike: the non-interference of the officers being also beneficial to them.

The recognizance entered into for the petitioners, differed in point of form from that required by the statute, but it agreed with the schedule annexed, as enacted by the statute, the schedule being conformable in substance to the act:—Held, that the recognizance was valid, and was not vitiated by its difference, in point of form, from that which the statute required.

The silence of the report of the committee, respecting charges advanced incidentally against the returning officers, does not invalidate the report, or render the proceedings void.

The Speaker's certificate being conclusive as to the amount of costs, the Court will not (all proceedings appearing in conformity with the act) inquire, whether costs, not strictly and properly occasioned by the opposition of the sitting members against the petition, are included in the taxation.

The Court will not allow the defendants to enter a suggestion on the roll, of the circumstances under which judgment has been allowed to be entered up for the plaintiffs, under the 68rd section of 9 Geo. 4. c. 22, for the purpose of enabling the defendants to take the opinion of a court of error.

When judgment is signed upon the Speaker's certificate under that statute, it must be limited to the sum specified in the certificate, and must not include the costs of the rule for entering it up.

At the election for the borough of Ipswich, in the year 1834, the defendants having been returned to serve in parliament for that borough, the plaintiffs, as electors, petitioned the House of Commons against the return. The petition, in substance, charged that many unqualified persons had been admitted to vote for the defendants, and divers persons duly registered and entitled to vote had been illegally and improperly excluded from voting for the other candidates, Rigby Wason and James Morrison, Esquires, by the return-

ing officers; that one of the returning officers had been guilty of great and undue partiality in favour of the defendants, and had improperly interfered with the freedom of election, and had illegally and improperly inserted certain votes upon the poll, &c., and rejected others, and that the defendants, by themselves and their agents, had been guilty of acts of treating and bribery; and that, by the means aforesaid, the defendants obtained a colourable majority, although the other candidates had a legal majority of votes. The petitioners prayed, that the election of the defendants might be declared null and void; that their names might be erased from the return, and those of Mr. Wason and Mr. Morrison substituted; and the petition concluded with the usual prayer, that the House would grant the petitioners such further relief, as to the House should seem meet.

This petition was ordered to be taken into consideration on the 26th of March, and the following entry was made on the journals:—"Date of order, the 25th of February—subject matter, Ipswich election, sitting members, do.—do. petitioners. Date of delivery, the 27th of February." The notice of this order was served on the sitting members and petitioners alone; and it was not until the 4th of March that the returning officers were served with the Speaker's summons to attend at the bar of the House, and bring with them the poll books and other documents on the 26th of March, and receive such orders as the House, or the committee, then to be chosen, should think proper to give.

On the 25th of February, the Speaker issued his precept to the proper officers, to examine into the sufficiency of the sureties named, or to be named, in the recognizance entered into, or to be entered into, by one or more of the persons subscribing the said petition, according to the statute 9 Geo. 4. c. 22, and to state to him their opinion of the sufficiency of the sureties. On the 7th of March, Ranson, the petitioner, entered into a recognizance in the sum of 1,000*l.*, the condition of which was as follows:—"The condition of this recognizance is, that if the said R. G. Ranson shall well and truly pay all costs and expenses, and fees, which shall be due and payable from the said R. to any witness

who shall be summoned to give evidence in his behalf, or to any clerk or officer of the House of Commons, upon the trial of the petition, signed by the said Ranson, complaining of an undue election or return for the borough of Ipswich; and if the said Ranson shall also well and truly pay the costs and expenses of the party who shall appear before the House in opposition to the said petition, in case the said Ranson shall fail to appear before the House at such time or times as shall be fixed by the House, for taking such petition into consideration, or in case the said R. shall withdraw his said petition by the permission of the House, or in case the select committee, appointed by the House to try the matter of the said petition, shall report to the House that the said petition appears to them to be frivolous and vexatious; then this recognizance to be void, otherwise to be of full force and effect." On the same day, the 7th of March, the sureties entered into a similar recognizance; and, on the 9th of March, official information was given to the Speaker that the sureties were sufficient.

The committee, to inquire into the matters contained in the petition, was appointed upon the 26th of March; evidence was heard, and after an adjournment, they came, on the 10th of June, to the following (among other) resolutions: "That R. A. Dundas and F. Kelly, Esqs., are not duly elected burgesses to serve in this present parliament for the borough of Ipswich: that the last election for burgesses to serve in this present parliament for the borough of Ipswich is a void election: that the petition of R. G. Ranson, &c., did not appear to the said committee to be frivolous or vexatious: that the opposition to the said petition, by the said R. A. Dundas and F. Kelly, Esqs., did appear to the said committee to be frivolous and vexatious: that R. A. Dundas and F. Kelly, Esqs., were, by their friends and agents, guilty of bribery and corruption at the late election for the borough of Ipswich."

On the 11th of August, the agents of the petitioners laid their bills of costs before the Speaker, and required that they should be referred for taxation, under the Geo. 4. c. 22. s. 60. The Speaker having complied with the requisition, upon the

1st of October the officers (the clerk assistant of the House and a Master in Chancery,) certified as follows: "We do hereby report to the Right Hon. the Speaker, &c., that the costs and expenses, allowed by us on taxation, amount to the sum of 4,694*l.* 15*s.* 7*d.*; and we further report, that R. A. Dundas and F. Kelly, Esqs., whose opposition to the petition of R. G. Ranson, &c., appeared to the select committee, appointed to try and determine the merits of the said petition, to be frivolous and vexatious, are liable to pay the same." Thereupon the Speaker signed a certificate of the amount of the costs, and of the liability of Messrs. Dundas and Kelly to pay them. In Michaelmas term, 1835—

Talfourd, Serj. obtained a rule, calling on the defendants to shew cause why the plaintiffs should not be at liberty to sign and enter up final judgment against the said defendants, for the sum of 4,694*l.* 15*s.* 7*d.*, the sum specified in the said certificate, pursuant to the statute 9 Geo. 4. c. 22. s. 63. This rule was obtained upon production of the certificate verified by affidavit, and upon affidavits stating a demand and non-payment of the costs, the issuing out of a writ of summons in an action of debt, and the service of a copy of a declaration upon the defendants, and the filing of the declaration on the 20th of November, and notice thereof to the defendants.

Affidavits were made in opposition to the rule by the returning officers, who stated that they had never received or knew of any notice of the day and hour appointed for taking the petition into consideration, or any order to attend the House, except the Speaker's warrant to appear at the bar of the house, as witnesses, with the poll books, &c.; but that, having understood that they were charged with illegal conduct at the election, they appeared before the committee, by counsel, on the 15th of April, when the charges against them proceeded, and the committee resolved that there was no ground for such charges. There was also an affidavit by the defendants' agent, Mr. Clipperton, which stated that the returning officers' opposition to the charge, and their defence, was made and conducted before the committee by their own counsel, acting on their particular and express behalves, and was so recognized

by the committee; and that a large portion of the bill of costs, amounting, as the deponent believed, to upwards of 3,000*l.*, was charged thereon, for and in respect of monies, costs, charges, and expenses purporting to have been incurred by the petitioners in respect of the allegations of improper conduct in the returning officer, and of personal bribery by the defendants, and that Messrs. Morrison and Wason had a legal majority of votes at the election: that, as to the first of these allegations, the committee had resolved "that no *animus* of an improper nature had been proved against the returning officers;" as to the second, had not made any further report, than that A. D. and F. K, esqs., by their friends and agents, were guilty of bribery and corruption; and that, as to the third allegation, the petitioners, after ten days' scrutiny of the votes, abandoned that part of the petition. The deponent also stated that he had protested before the examiners against the taxation of those parts of the bill relating to allegations which the committee had either expressly negatived or had not reported to have been established; and he also objected to certain other charges,—upon which objections, however, the Court refused to enter.

The Attorney General, Sir W. Follett, Wilde, Serj., and Humfrey, shewed cause.—It is conceded, that unless the defendants can impeach the proceedings, under the statute 9 Geo. 4. c. 22, this rule must be made absolute, inasmuch as the certificate of the Speaker, verified by affidavit, is sufficient *prima facie* to maintain the plaintiffs' application. The statute, however, creates a new tribunal for the trial and decision of disputed elections, to which tribunal it gives a limited and conditional authority; and before the Court can give effect to the certificate, it will be their duty to be satisfied that the limits of the jurisdiction have not been exceeded, and that the conditions have been complied with. If the authority was not exercised as the legislature directs, all the proceedings will be invalid, and there will be no remedy for the costs. This Court undoubtedly has no jurisdiction as to the amount of costs; but *Bruseres v. Halcomb* (1) is a

distinct and indisputable authority, that the certificate of the Speaker is not conclusive, but that the Court will inquire whether it was founded on proceedings legal by the act of parliament, and will not otherwise enforce it. So in *Strachey v. Turley* (2), the Court took notice that the Speaker's certificate was not conformable to the 28 Geo. 3. c. 52, although by that statute, section 23, it was declared, "that the Speaker's certificate of the amount of costs, with an examined copy of the entries in the journals of the resolutions of the select committee, should be deemed full and sufficient evidence in support of such action." And in a case, stated in a second action, 11 *East*, 194, on a new certificate, by the Speaker of a subsequent parliament, the Court inquired into the validity of that certificate, and held it to be good. The doctrine is also confirmed by *Gurney v. Gordon* (3), *Freeman v. Lambert* (4), *Magrane v. White* (5). First, it is objected, that under section 2 of 9 Geo. 4. c. 22, the returning officers, as parties affected by the petition, were entitled to receive notice of the day and hour appointed for taking it into consideration, and an order to attend the House by themselves, their counsel, or agent. Such notice and order would have given them the important privilege of striking the committee, and this omission is not cured by their subsequent attendance in the character of witnesses, or as parties to oppose and defend themselves against the charges, for the committee was improperly constituted by reason of their absence at the time when the list was reduced, and could not be made a legal tribunal by subsequent acquiescence and obedience to the Speaker's warrant. Sections 3, 18, 30, 32, 34, 57, and 58, shew the necessity of the attendance of the parties at the striking of the committee; and the 36th section, which confers certain privileges upon the returning officer, when he attends in consequence of the order, shews the necessity of the issuing of such order, and that a voluntary appearance on his part would not be attended with such result. Secondly, the recognizance entered into by Ranson is

(2) 7 *East*, 507.

(3) 9 *Bing.* 37; s. c. 1 *Law J. Rep.* (N.S.) C.P. 233.

(4) 4 *Mau. & Selw.* 234.

(5) 8 *B. & C.* 413; s. c. 6 *Law J. Rep.* K.B. 362.

(1) 3 *Ad. & El.* 381; s. c. 4 *Law J. Rep.* (N.S.) K.B. 228.

not sufficient within section 5 of 9 Geo. 4. c. 22 (6). This recognizance is entered into by Ranson alone, and he is only liable for the expenses of witnesses called on his behalf, whereas he should be bound to pay the expenses of all: the section requiring the party to be liable for the expenses of witnesses in behalf of the *person* or *persons*, &c. The petition here is subscribed by the three petitioners, and the recognizance ought to be for expenses due to any witness for any or either of them. This defect in the recognizance is most important, as witnesses may be summoned on the part of two, and not on the part of the three. Suppose Ranson, after entering into the recognizance, had become insane or had died, and the other two had gone on with the petition, as no doubt they could, and failed, could it be said that the witnesses, whom they chose to summon after the death of Ranson, were summoned in his behalf? Could, in such case, an action be maintained against the representatives of Ranson for the expenses of witnesses said to be summoned in his behalf? No doubt the witnesses would have an action against the two survivors, but they would not against the representatives of Ranson, and thus they would be deprived of that security which the legislature intended they should have. Neither does the recognizance give a remedy for costs incurred before the committee; it is confined to those incurred before the House; and yet, sections 10 and 12 allow voters to become parties to oppose or defend the return within fourteen days after the petition has been presented, and to be admitted as parties, in the room of the sitting member, to defend the petition, within thirty days of the insertion of the

(6) By which it is enacted, "That no proceedings shall be had upon any petition, unless the person or persons subscribing the same, or some one or more of them, shall, within fourteen days after the same shall have been presented to the House, &c. personally enter into a recognizance to the Lord the King, &c., in the sum of 1,000*l.*, with sufficient sureties in the sum of 500*l.* each, or for sufficient sureties in the sum of 250*l.* each, for payment of all costs, expenses, and fees, which shall become due to any witness summoned in behalf of the person or persons so subscribing such petition, or to any clerk or officer of the House on the trial of such petition, or to any party who shall appear before the House at such time or times as shall be fixed," &c.

notice in the *Gazette*. It may be admitted, that the recognizance is conformable to the schedule of the statute; but that is merely directory, and is not, as it should be, co-extensive with the enacting clause. So far from this being the case, the fact is, that if such recognizance is upheld, that which is peremptory in the statute, must be considered as superseded and annulled. This, however, is a conclusion to which the Court will not come; and *The King v. Loxdale* (7), *The King v. Jarvis* (8), *The King v. Dimpsey* (9), *The King v. Priest* (10), are decisive on the subject. A similar principle may be extracted from *Doe v. Brandling* (11), *Fleming v. Bayley* (12); and in *Morgan v. Brown and another* (13), where the defendants, Justices of the Peace, in answer to an action of trespass, relied upon a conviction under 9 Geo. 4. c. 31, which convicted the plaintiff and another of an assault, and ordered the two to forfeit and pay the sum of 4*s.*, it was held, that as the offence was several, the conviction ought to have specified what sum was to be paid by each; and that the imposing of a joint fine, made the conviction bad in substance as well as in form. The strictness required upon similar occasions is still further proved by what occurred upon the petition complaining of an undue return for Leicester. There the sureties, who entered into the recognizance, were given in upon the 23rd of March: seven clear days must elapse, by the 7th section of the statute, between the delivery of the names and the examination into the sufficiency: it was found that an error had been committed, and the name of a surety was Samuel, and not, as given in, Thomas. The mistake was communicated to the House upon the 25th of March; and upon debate, the order for receiving the petition was discharged. The report also is perfectly silent as to the returning officers, though the committee were bound to report as to them, by the 40th section, the latter part of which says, "that the committee shall, in like manner, report, with respect to every

(7) 1 Burr. 447.

(8) Ibid. 154.

(9) 2 Term Rep. 96.

(10) 6 Term Rep. 538.

(11) 1 Man. & Ryl. 605.

(12) 5 East, 313.

(13) 5 Law J. Rep. (N.S.) M.C. 77.

party who shall have appeared before them in opposition to such petition." In this respect, the case may be compared to one which is referred to a certain tribunal, by which many things are directed to be done, and if one alone is not done, the whole is a nullity. This stands on the same ground as a case submitted to an arbitrator or a Judge, in which many things, united and connected one with another, are to be adjudicated upon, and the decision will be a nullity if all matters are not taken into consideration and adjudged; and the connexion and mutual dependence of all matters now under discussion cannot be disputed or denied. The doctrine here laid down will be found to be fully established by *Winter v. Munton* (14), *Simmonds v. Swayne* (15), *Mitchell v. Stavely* (16), and *Birks v. Trippet* (17). This omission in the report may be attended with consequences most prejudicial to the defendants, inasmuch as the officers being clearly parties, there might have been a report in their favour, and the opposite party would be entitled to no costs at all; or the petition, so far as the officers were concerned, might have been declared frivolous and vexatious, and then the petitioners would be liable to costs: and thus in neither case would the costs be thrown upon the sitting members. It is finally objected, that costs are included in the certificate, which were incurred long after the report of the committee. For example, costs to the amount of 40*l.* were paid to Mr. Rose, the clerk of the recognizances, for taxing the costs of ninety-four witnesses, and 30*l.* were charged for the petitioner's agent, as late as the 6th or 7th of August, long after the report. Now, this is in direct opposition to the 58th section of the statute, which gives the full costs and expenses which such petitioners have incurred in prosecuting the petition; thus expressing the intention of the legislature that no other costs should be included—*Expressio unius exclusio alterius*. Here, therefore, is manifestly an excess of jurisdiction; and the defect founded upon such incident, cannot be cured by an apparent or tem-

porary submission to such tribunal—*Holt v. Meddowcroft* (18). Besides, there is nothing to shew that these witnesses were summoned; and it is for the costs of such alone, that provision is made by the enacting part of the statute. There is no provision made for the costs of witnesses who appear voluntarily; still less for the costs taxed, as in this case, before the clerk of the recognizances, who had no authority to tax, such authority being confined expressly to the officers appointed by the Speaker. Upon this subject, *Magrane v. White* will not assist the petitioners, the presumption there being that the witness was summoned, until the reverse was shewn. But such presumption is, like any other, capable of being rebutted, and this was done in the present case. The taxation of costs, in the effort to prove Messrs. Morrison and Wason duly elected, as having a greater number of lawful votes, the allowance of expenses for journeies, &c., are also open to the same objection. It is not disputed that there may be a mode of recovering many of the items objected to, but it cannot be done by this proceeding; and they should not, therefore, be included in the certificate.

Talfourd, Serj., Hill, and Austin, in support of the rule.—The plaintiffs have a right to these costs, as the opposition of the defendants has been reported frivolous and vexatious, and the objections urged are not sufficient to invalidate the Speaker's certificate. First, the absence of the returning officers at the striking of the committee, cannot be complained of by the defendants, as it gave them the positive advantage of striking one-half instead of one-third of the committee. But it is denied that the returning officers had any right to interfere in that proceeding. Such right was not given to the officers by the earlier statutes of 10 Geo. 3. c. 16. and 11 Geo. 3. c. 46. It was the 25 Geo. 3. c. 84. ss. 10, 11, and 12, which first provided for the case of the returning officers, and that only in two instances, which bear no resemblance to the present. The provision has been incorporated in some respects into the statute 9 Geo. 4. c. 22. ss. 2 and 36; but the cases there specified do not comprehend or include the

(18) 4 *Mau. & Selw.* 467.

(14) 2 B. Mo. 723.

(15) 1 Taunt. 549.

(16) 16 East, 58.

(17) 1 W. Saund. 32, n. 1.

present. The situation of the officers here, resembles that of the officer in the *Colchester case* (19), (1789,) who applied by his counsel to be admitted a party in the appointment of the select committee, and the House decided in the negative. A similar example may be found in the *Nottingham case* (20), where also, the returning officer, whose conduct was complained of, was not permitted to appear as a distinct party. With regard to the other objections, the same answer may be given to them all, viz. that the sections of the statute have been substantially complied with, and the clauses said to have been violated are merely directory, and a literal observance of them is not necessary upon occasions of this sort. When the petition is presented, signed by the party making complaint, it is the general practice to give the sitting members notice in writing to attend : and suppose notice were not given to the members, but, nevertheless, they attended, would, therefore, the whole proceeding be null and void? Again, if the party reside more than forty miles from London, he may, by the 8th section, enter into the recognizance before a Justice of the Peace; and if, having done so, it were found that he resided a little less than forty miles from London, and that consequently the recognizance should be entered into before the Speaker, would such trifling slip or blot make the entire proceedings wrong? In like manner, the 17th section requires the serjeant-at-arms to repair with the mace to the places adjacent, and require the attendance of the members: would the whole be a nullity, if the serjeant went to collect the members without taking the mace? On an application of this nature, would the Court receive an affidavit for the purpose of shewing that the select committee had been struck from a house consisting of 99 instead of 100 members, or that a member declared, by section 21, to be incompetent to serve on the committee, had voted? The 30th section requires the clerk, within one half hour, at farthest, from the time of the parties withdrawing from the house, to deliver in the names of the eleven members then remaining: would the Court allow an opposition to the pro-

ceedings, upon the ground that the clerk had not delivered in the names within the half hour, and decide that the delivery of the names within the half hour is a condition precedent, the non-compliance with which would render the proceedings a nullity? The allowance of such objections would amount to a subversion of the general principles of justice, by which every jurisdiction is bound; and it may be safely affirmed, that no election petition could bear so rigid a scrutiny. The affidavits of the returning officers may be admitted, without any injury or detriment to the claim of the petitioners, as their affidavits do not, in terms, negative the fact of their attending before the house, but leave this to be inferred from the circumstance of their not being summoned. They may have been present, nevertheless; and in the absence of such decisive negative, the Court should infer that they were actually present. But admitting the fact that no notice was given to the officers, what is the inference which should be drawn from the omission?—merely this, that there was no jurisdiction as to them, and that no charge was rightly advanced against them. Besides, no blame should be imputed to the petitioners; it was not their duty to serve the notice, it was the duty of the House of Commons; and thus the omission, if it was one, was not caused by the petitioners, that which is complained of being an act over which they had no controul. At all events, it was cured over and over again by the subsequent conduct of the officers, and their appearing for forty days before the committee. In such state of things, they should not be allowed to turn round upon the petitioners, and say that the entire proceeding was a nullity. This part of the case is reducible to this—the officers either did appear, or they did not: if they did, *cadit quæstio*; if they did not, they should have made their objection before, and not have kept it in the background until now. *Brunskill v. Giles* (21), and *Dovey v. Hobson* (22), where the Court awarded a *venire de novo*, will not assist the parties, for there the irregularity was noticed at the proper time, before verdict. For the time and mode

(19) 1 Peck. 504.

(20) Introduction to the same work, p. 46.

(21) 9 Bing. 13; s. c. 1 Law J. Rep. (n.s.) C.P. 143.

(22) 6 Taunt. 460.

in which objections of this kind should be advanced, reference may also be made to *Hill v. Yates* (23), *The King v. Hunt* (24), and *The London and Greenwich Railway Company v. the Sheriff of Surrey* (25). The civil law upon the subject is governed by the same principle, as appears from *Cujacius*, cap. 33, *Commentary on 18th Book*, and *Code de Procedure Civile*, *Potier*, 1029—1030. Even in cases where the accusation is of the most serious nature, and the penalty is, upon conviction, the loss of life, objections of this description must be taken in the first instance, and not kept as if in the pockets of the parties. *Rookwood's case* (26), *Cook's case* (27), *Watson's case* (28). *Bruyeres v. Halcomb*, and the other cases in which the circumstances have been inquired into, do not apply, as they either were decided under different statutes, or the certificate was defective on the face of it. Neither will *Morgan v. Brown* assist the defendants, as the objection there was, not to the variance from the form, but to the nature of the sentence, by which, contrary to the principle of criminal jurisdiction, one party was made answerable for the transgression of another. To the objection to the taxation of costs in respect of the former witnesses, &c. and of certain matters after the report, the answer is, that the officers have merely done that which was required of them by the statute. Neither can the recognizance be deemed null and void, as it follows the form prescribed in the schedule,—and the schedule is to be considered as the best and safest guide in the interpretation of the act. In fine, all the objections which have been advanced, fall to the ground; they go merely to that which is trivial and unimportant. The statute has been substantially complied with. There is no material defect upon which the Court can lay their finger; they will, therefore, be bound to treat the Speaker's certificate as binding and conclusive, and cannot consider it as waste paper, as required by the opposite party.

Cur. adv. vult.

(23) 12 East, 229.

(24) 4 B. & Ald. 430.

(25) 4 N. & M. 458; s. c. 4 Law J. Rep. (N.S.) K.B. 103.

(26) How. State Trials, 139.

(27) Ibid. 311.

(28) 2 Stark. N.P. Rep. 158.

TINDAL, C.J.—The question before us in this case arises upon an action of debt brought upon the 63rd section of the statute 9 Geo. 4. c. 22, to recover the costs and expenses occasioned by the trial of a petition before a select committee of the House of Commons, complaining of the undue election and return of members for the borough of Ipswich.

The plaintiffs under the section above referred to, obtained a rule (drawn up on reading the certificate signed by the Speaker, and proof of the demand of the costs, and refusal), which called on the defendants to shew cause why the plaintiffs should not be at liberty to sign and enter up final judgment against the defendants for the sums specified in such certificate.

On shewing cause against this rule, the defendants have urged various objections against the certificate, and have contended that, on the authority of the case of *Bruyeres v. Halcomb*, the certificate of the Speaker in the present case ought to be held by us as altogether void. In that case the Court of King's Bench held, that the committee, appointed for the trial of the petition, was appointed in a state of things which required that the committee should not have been appointed;—that it was a committee which had no authority over the petitioner;—and that the report of such a committee, which was the sole foundation upon which the Speaker's certificate rested, was a report which they had no power to make. In the judgment of the Court upon the facts before them, we entirely concur. A select committee appointed in the mode required by the statute, is the court which is to exercise the jurisdiction given by the statute; and if the appointment of the committee takes place under circumstances where the statute does not allow the appointment to be made, (which was the state of facts before the Court of King's Bench,) or in a manner contrary to, or inconsistent with the essential requisites prescribed by the statute, there is no court at all. The whole of the proceedings take place *coram non iudice*; the jurisdiction fails altogether; and with the jurisdiction, the whole of the superstructure built upon it by the statute falls to the ground also. *Debile fundamentum fallit opus*.

The question, therefore, in the present case will be, whether any of the objections urged in argument before us, are objections which essentially touch the constitution of the court or the legality of its proceedings; or whether, at most, they extend any farther than to the non-observance of certain directions to be found in the statute as to the course of its proceedings. For whilst in the one case, as well upon the necessary construction of the statute, as in conformity with the decision of the Court of King's Bench, we should be bound to hold the certificate absolutely void; in the other, notwithstanding a failure in the observance of matters, not essential, but directory only, we should be equally bound to uphold it, and to give it effect.

That the plaintiffs made out a *prima facie* case by their affidavits, setting forth the certificate of the Speaker, the demand of the costs, and the refusal to pay, was admitted in the course of the argument. But it is contended that the facts disclosed in the affidavits filed on the part of the defendants, form an answer to the application; and more particularly, that upon four distinct grounds of objection, the certificate of the Speaker must be held altogether void.

The first objection which has been urged before us, goes to the legality of the appointment of the select committee. It has been contended that the returning officers were parties within the meaning of the statute, and as such, entitled to notice in writing of the time of taking the petition into consideration, and to an order of the House to attend at the bar, and to be present at and assist in striking the committee; and that by reason of the omission of such notice and order, and of the returning officers not attending as parties in the present case, the constitution of the committee was defective from its very foundation. In the next place it has been objected, that the recognisance entered into for the petitioners was essentially defective, and that by reason of such defect, all the subsequent proceedings became void. In the third place, that the report of the committee is void, inasmuch as it contains no finding upon the charge made against the returning officers, nor upon the opposition to such charge, whether the same were respectively frivolous and vexatious, or the reverse.

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And lastly, that costs are included within the certificate which are unauthorized by the statute, and some even which have accrued at a time subsequent to the report itself.

Now as to the first objection, we are not prepared to say, that if, under the circumstances existing at the time, the House had no authority by the statute to constitute the Court, the appearance of the defendants before such Court, and their acquiescence in its subsequent proceedings, from the commencement of such proceedings down to their termination, could have the effect of setting up a jurisdiction which was in its original formation null and void; although at the same time we cannot but observe the inconvenient consequences which must follow, if an objection to the jurisdiction, known at the time to exist, and which in ordinary cases is always held to come too late if not made in the very first instance, should in this case be allowed to prevail, after the termination of the contest is known to be adverse to the parties who now stand on the objection: a consideration, which should at least induce us to pause, and to weigh scrupulously the grounds upon which the original objection is founded, and to require it to be made out clearly and distinctly that the proceedings are absolutely void, before we can be justified in refusing to give them their full effect. And this observation comes with greater force, when the objection is made on the part of the sitting members, not on the part of the returning officers—of the sitting members, who were at the bar of the House, and present at all the proceedings; who made no objection to the course pursued by the House, and indeed received a benefit, not an injury, by the mode adopted in striking the committee, inasmuch as they had a greater advantage in reducing the number of the committee, than they would have been entitled to, if the returning officers had been allowed to assist therein.

The whole strength of the first objection appears to us to depend on one single inquiry, viz., whether the returning officers upon the proper construction of the statute, are to be considered as a party having power to assist in striking the committee: if they were a party having such power,

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and by the course taken were not allowed to exercise it, then the committee must be held to have been improperly constituted : if they had no such power, the whole weight of the objection falls to the ground. For as to the mere want of notice from the Speaker, or of an order on the returning officers to attend at the bar of the House, if they had no power of interfering when there with the choice of the committee, such omission can be considered as an omission to comply with a matter directory only, and not essential to the legal constitution of the court.

The petition in this case, which was signed by the three plaintiffs, claiming on behalf of themselves and others a right to vote for members for the borough of Ipswich, prayed only "that the House would declare the election and return of the sitting members wholly null and void, and that they are not, nor ought to be deemed to be members to serve in parliament for the borough of Ipswich, and that the names of the said sitting members may be erased from the return, and the two other candidates declared duly elected, and their names substituted in the said return." The petition, in the course of its statements, complained incidentally of misconduct and partiality in the returning officers of the borough, but in its prayer is silent altogether as to any claim for redress against them on the ground of misconduct. It is, therefore, in fact, a petition complaining of the undue election and return of members in parliament, and of nothing else. That it was so treated by the House of Commons itself, is evident from the form of the order of the House for taking the petition into consideration ; such order distinctly mentioning the sitting members and petitioners only as the subjects of the petition ; and again, the service of such notice and of the order of the House being made upon them alone.

First, therefore, looking at the form of the petition in question, we think the returning officers were not called upon as original parties to the petition to appear before the House ; and that even if they are held to be included within the petition, as parties petitioned against, yet upon the proper construction of the act (upon which the real question before us turns), they

had no power whatever to interfere in striking the committee. In order to arrive at a just conclusion upon this point, on which the whole strength of the first objection rests, let us consider, first, how the case stood as to returning officers before the present act ; and next, what alteration, with respect to them, has been effected by the statute now under consideration.

The original act, 10 Geo. 3. c. 16, commonly called the Grenville Act, the first which established the tribunal for the trial of controverted elections returns, provides for the case of two parties only, the petitioners and the sitting members. This is obvious from a simple reference to the act itself. The statute 11 Geo. 3. c. 42. s. 6. provides for the case of two parties before the House, where they petition on distinct interests, or complain on different grounds : but as to returning officers, both these acts are altogether silent. It is the 25 Geo. 3. c. 84. which for the first time mentions returning officers, and provides in sections 10, 11, and 12, for two cases, viz. the case of no return made by the returning officer in proper time, and of a return made not of members but of special facts only ; in both which cases, and in no other, the statute appears to put the returning officers in the place of the party petitioned against in the former acts, as to the notice to be served upon them, the order of the House for attending at the appointment of the committee, and the power of striking the committee ; the 12th section expressly providing, that if there shall be more petitions than one presented, complaining of such return, or omission of such return, upon distinct interests or upon different grounds, the House shall determine from the nature of the case, whether the returning officer shall, together with the petitioners, be entitled to strike off from the list of members drawn by lot, or whether the list shall be reduced by the parties severally presenting the said petitions only.

Under the acts, therefore, above referred to, if they had still remained in force, it would seem that the returning officers would not have been entitled to strike off from the list of members drawn by lot, upon a petition against them for partiality or misconduct ; or more properly, that the case of partiality or misconduct did not fall

within the scope of the 25 Geo. 3, and would not have been necessarily tried before a select committee of the House appointed under that act; but that the House would have disposed of such a petition against the returning officers, of their own authority, and according to the customs, course of proceeding, and privileges of the House.

The question therefore is, whether the 9 Geo. 4. c. 22. has made any difference in this respect, and given any right to the returning officers which they had not before, of striking the committee in the case of a petition charging them with partiality or misconduct. The 2nd section, and the 36th, are the only clauses which seem to apply to the case of returning officers. The 2nd section, so far as it relates to returning officers, appears in its commencement to be confined to three cases of complaint:—where no return is made in due time; or no return according to the requisition of the writ; or there is complaint of the special matters contained in such return: it is altogether silent as to misconduct: but as the enacting part of that section directs, that “where no return has been made, or the special matter of the return, or the *conduct of the returning officer* is complained of,” notice in writing of the time appointed for taking the petition into consideration, shall be forthwith given by the Speaker to the returning officer or officers, accompanied with an order to the *parties* to attend the House at the time appointed by themselves, their counsel, or agent, it may be too narrow a construction to hold the clause to be limited to the precise instances mentioned in the beginning of it, or to exclude from its operation any petition against the returning officers for misconduct, in the wider sense of that word. But whatever may be the scope and intention of the 2nd section, and whether it includes within it a petition against the returning officers for partiality or misconduct, or is confined to the cases before adverted to, it is the 36th section, and that alone, which carries out the intention of the statute, and shews the power given to the returning officers in respect of striking the committee.

Now, before we come to the consideration of that section, it is to be observed,

that the statute has provided for all the cases of petitions in which the sitting members are parties before the House, in three distinct sections, the 30th, the 33rd, and the 34th.

The first of these sections provides for reducing the numbers of the committee in the case where there are before the House, the petitioners, the sitting members, or any party who has been admitted to defend the return, or right of election: the second provides for the case where there are more than *two* parties before the House on distinct interests, or complaining or complained of upon distinct grounds; still, however, “parties whose right to be elected or returned may be affected by the determination of any such committee:” and the last provides for the case where no parties appear before the House to oppose the petition. All which sections do by their frame manifestly apply to the cases where the sitting members or those who appear to defend the return are the parties; and have no application whatever to cases where the returning officers are parties before the House, upon any ground of complaint against them.

The cases of sitting members and parties whose rights to the return and election are in question, having been thus provided for, the statute proceeds in the 36th section to make provision for the case of petitions against returning officers. This section is so worded as to make it in some degree doubtful whether it provides for the case where there is *one* petition only against the returning officers. It begins by referring to the case where there is one such petition only, and also to the case where there are more than one; but is silent altogether as to the course of proceeding where there is only one, whilst it gives clear and precise directions “where there shall be more petitions than one presented on distinct interests or complaining on different grounds.” It is unnecessary to say, that if such clause does not comprise the case of a single petition against the returning officers, the case now under consideration is altogether unaffected by it. But assuming the case of a single petition against the returning officers to be necessarily within the intention of the clause, and that by analogy with the other provisions of the act, the same

mode of striking the committee shall take place as where there is one petition only, in the case of sitting members, we think it clear the clause cannot apply to any case where the petition is not a petition against the returning officers alone, but is also, as in the present case, a petition against the sitting members who appear at the bar, and are made parties to defend their return before the House; first, because the case of the petition where the sitting members are parties, is already clearly and expressly provided for; and there can be no reason to infer any intention that their rights in striking the committee, which have already been defined by the act, should be altered or affected by any complaint against the returning officers; next, because the provision in this section is one which would exclude the sitting members altogether from assisting in striking the committee. The section provides expressly "that the House shall determine whether the officer shall, together with such petitioners, be entitled to strike off the list in the manner hereinbefore directed, or whether such list shall be reduced by the parties *severally presenting such petitions only*." A provision which would exclude the sitting members altogether from assisting in striking the committee; and which, therefore, is necessarily incompatible with the case of a petition in which they are included as parties.

Again, if this section could be held to relate to the case of a petition against the sitting members, and the returning officers jointly, and it should be held that both had the power of striking; in what order or in what proportion are they to strike off the members? We cannot suppose that a clause, intended to comprehend such a case, would have been altogether silent upon the only point necessary to give it any operation.

Now, this is the only clause in the act which gives the returning officers a power to interfere in striking the committee; if the case is not brought within this clause, it cannot be held to come within the act. And without relying upon the objections to which we have before adverted, that it is not a petition against the returning officers at all, for such ground of complaint as the statute had in view; or that it is not a case

in which there are more petitions than one on distinct interests or different grounds of complaint; we hold it to be the necessary construction of the clause that it does not comprehend the case, where the sitting members are called upon to appear, do actually appear at the bar of the House, and are the parties opposing the petition. And it cannot but suggest itself as an observation, that in such a case there is no necessity to hold the returning officers within the clause; for where the petition is against the sitting members, and complaint is incidentally made of the misconduct of the returning officers, there is no reason, upon general principles, why the committee struck by the petitioners and the sitting members should not be supposed, *a priori*, an adequate tribunal to sit in judgment with the strictest impartiality upon the conduct of the returning officers, if the House think proper to depute their authority, as to the returning officers, to such committee.

It appears, therefore, to us, that in the present instance, the Court was composed of the very same identical persons as those who would have constituted it, had the returning officers received notice from the Speaker of the time of taking the petition into consideration, and had they attended at the bar of the House in pursuance of the order to that effect: for in such case, they would have had no authority to alter a single name.

The second and following objections will, we think, require less consideration.

It is objected, in the second place, that the recognizance entered into for the petitioners is not the recognizance required, or even sanctioned by the act: and that as the language of the 5th section is in *the negative*—"that no proceedings shall be had upon any such petition, *unless* the person or persons subscribing the same, or some one or more of them," shall enter into the recognizance directed in and by that section; the entering into the proper recognizance forms a condition precedent to the validity of all the subsequent proceedings; and that the condition of the present recognizance, not providing for all the events, nor agreeing with all the requisites contained in that section, the recognizance itself is altogether void, and the case stands precisely in the same position as if there had been no re-

cognizance at all. But we are of opinion, upon the best consideration we can bring to the question, that the recognizance entered into upon the present occasion, although subject to some exception in point of form, is not open to any objection which affects it in substance or legal operation. The recognizance, it is to be observed, follows the form given in the schedule: and though such form, if it varies from the requisites of the act in any important or essential particular, cannot be taken to overrule the enactments of the statute itself, yet it is obvious that if the schedule can be made consistent with the act, upon any sound and legal principles of construction, it is our duty so to construe the schedule. The fifth section expressly directs the recognizance to be entered into "according to the form hereunto annexed;" so far, therefore, as the *intention* of the legislature was concerned, there can be no doubt but that they intended that the form given in the schedule should embody in it the different requisites expressed in the act itself, and that they thought it sufficient for that purpose; otherwise the form would only operate as a false light to mislead instead of affording assistance to those who are endeavouring to follow the directions of the act. The question, therefore, is, whether the discrepancies which have been pointed out between the 5th section and the form in the schedule are real and essential, or formal only; for in the one case, the recognizance which has been given must be held to be void—in the other, good.

Now, the objections which have been urged against the validity of the recognizance are in effect two. First, that whereas the petition is subscribed by three persons, yet the recognizance is not only entered into by one only of the petitioners, but is altogether silent about the other two: so that (as it is argued) it makes Ranson liable only for the costs of the witnesses summoned to give evidence *in his behalf*; whereas it is said, witnesses might be summoned, and the trial carried on, by the other petitioners, in case Ranson died, or refused, or became incapable to go on with the trial before the committee. The objection is not merely, that the recognizance is given by one only of the three petition-

ers; for to such objection it would be a sufficient answer, which was given at the bar, that by the 5th section it is expressly provided that the recognizance shall be entered into "by the person or persons signing the petition, *some one or more of them*;" so that it was the manifest intention of the legislature, that the responsibility of one only of the petitioners should be held sufficient. But the strength of the objection consists in this, that there is not any mention in the recognizance, of the acts of the other petitioners. As an answer, however, to this objection, it is to be remembered that the three petition upon one and the same interests, that is, as electors of the borough; so that there was one petition only; not several, upon distinct interests, or different grounds of complaint. When, therefore, the condition of the recognizance is so framed that Ranson shall pay "all costs, expenses, and fees which shall be due and payable *from him* to any witness who shall be summoned to give evidence *in his behalf*," it necessarily means, summoned to give evidence *on the behalf of that interest* which he represents; that is, generally *in support of the petition*. Again, the condition is not, as it has been argued, confined in its terms to witnesses *summoned by him*: under the terms used in the condition they may be summoned indiscriminately by any of the three petitioners: for witnesses so summoned would equally be "summoned to give evidence in his behalf." And after all, comparing the words actually used in the recognizance with the words employed in the 5th section—viz. that the recognizance shall be entered into by some one or more of the petitioners, "for the payment of all costs, &c. which shall become due to any witness, summoned in behalf of the person or persons so subscribing such petition," we think the meaning of both substantially the same—namely, that each provides a security for the costs and expenses of all witnesses summoned in the course of the investigation in support of the petition.

The second objection urged against the recognizance, is this; that it provides only for the payment of the "costs and expenses of the party who shall appear before the *House* in opposition to the petition;" whereas the 5th section directs security to

be given for the payment of the costs and expenses "to any party who shall appear before the House, or any committee of the House, in opposition to such petition." And it is argued, that new parties may and often do come in, and are allowed to appear before the committee, after the petition is pending before them, who were not originally before the House; and that in this very case the returning officers appeared before the committee; the charges against them were entertained by the committee; and the returning officers were allowed to defend themselves, and did defend themselves against such charges.

The question therefore that arises is, what is the meaning of the expression used in the 5th section, "a party who appears before the House, or any committee of the House"? It is manifest by referring to the various parts of the statute, that the statute itself makes provision only for parties to be admitted parties by the House: it nowhere makes any provision for parties to be admitted by the committee to appear before them. The 10th and the 12th sections establish that point; in which provision is made for allowing parties not originally petitioned against to appear; in the one case, where the application is made within fourteen days after the petition has been presented; in the other, where a similar application is made within thirty days after the notice in the *Gazette* therein referred to. But in both those cases the application is directed to be made to the House, not to the committee, and power is given to the House, not to the committee, to admit them. When, therefore, parties are said to appear before the committee, in opposition to appearing before the House, it is not in pursuance of any power given, or any provision made, by this act, but under the power which committees have, by long and invariable usage, been known to possess; viz. that when sitting on the trial of elections, they have taken cognizance of incidental charges against the returning officers, and have allowed them a hearing and a defence, more as a matter of indulgence than a matter of strict right. For unless the returning officers are made parties to the investigation by the House itself, under the powers given by the act, the House are not bound by

the finding of the committee; but the right to call upon the returning officers, and to investigate any charge against them, and punish them for misconduct when established by proof, still remains with the House itself. The first observation therefore is, that the recognizance, in its present shape, provides for all the costs when the party appears before the only tribunal at which his appearance is directed by the statute itself, that is, before the House.

But it is said, the 5th section comprises within its meaning, not only the costs and expenses of the parties appearing before the House, under the provisions of the act, but of parties afterwards appearing before the committee under the usage and practice of election committees. Now it is manifest, that the objection which has been made in this case must apply to every election petition presented to the House; for it never can be known, at the time when the recognizance is entered into, whether there will or will not be parties appearing before the committee. It is not a question therefore (as represented in the course of the argument) of varying the form in order to make it suit the particular case: the form must be altered in every instance by adding to the recognizance "the appearance of the parties before the committee." Whilst, therefore, the 5th section directs that the party *shall* enter into the recognizance according to the form annexed, we must, if we yield to the objection, adopt the conclusion, that the party shall not, in any case, enter into the recognizance in that form; but that the recognizance must in every case be held void, unless it is first altered in the manner contended for. But we think so harsh and unreasonable a conclusion ought not to be resorted to, where the section and the form given in the schedule can, by any fair intendment, be reconciled together; and we are of opinion that such is the case; and that, construing the 5th section and the form in the schedule together, the words used in the form, viz. "the party who shall appear before the House in opposition to the said petition," must be taken to comprise those parties who should appear generally in opposition to the petition, either at the bar of the House at an earlier period, or, in a more advanced stage

of the proceeding, before the committee appointed to inquire and report its decision to the House; and that it is by no means improbable, that the words relating to the appearance before the committee, have been introduced into section 5, for no other purpose than that of removing any doubt whether costs and expenses before the committee were intended to be included within the terms of the form of the recognizance.

One argument used in support of the objection now under consideration was, that the form of the recognizance given by the schedule is subject to the same consequences as the form of a conviction or a declaration given for the recovery of a penalty; in which latter case, if the form is defective in stating a legal ground for the conviction or the demand, the whole proceedings fall to the ground. But in that case the conviction or declaration forms the basis or ground-work upon which the whole of the subsequent proceedings rest; which if void, the whole must fall together: but here, the proceedings in the suit before us are perfectly regular; the objection arises upon the form of a recognizance which is wholly collateral to the proceedings in the suit, and does not appear, nor does it form any part whatever of the proceedings in the action before us. And it is impossible here not to advert to the marked difference between this case and the case referred to, wherein Mr. Halcomb was the petitioner. There the petitioner did all he could to withdraw himself from the trial. He did not, after the committee was struck by the officer of the House, appear before the House, or before the committee. Nothing, therefore, was done by him which could be construed into a waiver of their regularity of the proceedings, or an admission of the jurisdiction of the Court. Here, on the contrary, the sitting members, with full knowledge of the form in which the recognizance was given, instead of treating it as a nullity, and insisting that the course should be pursued which is marked out by the 5th section, where no recognizance is given, raise no objection to its form, but attend the committee throughout, and contest the petition down to the final close of the trial.

Without, however, resting in any manner

upon the effect of such a waiver, we think the objections made to the recognizance are substantially answered by the construction of the statute itself.

The third objection is made against the report of the committee, which, it is contended, is altogether void, inasmuch as it decides nothing with respect to the charge, or the opposition to the charge, made against the returning officers, being frivolous or vexatious. And upon this head it is insisted, that the fortieth section marks out the line of duty of the committee, by requiring them to make such report; and that they having failed in reporting on one point submitted to their judgment, the whole of the report is void, and with it all the subsequent proceedings are also avoided. That clause directs, that every such committee, at the same time that they inform the House of their final determination on the merits of the petition which they were sworn to try, shall also report to the House whether such petition did or did not appear to them to be frivolous or vexatious (this is complied with in the present case); and in like manner report with respect to every *party* who shall have appeared before them in opposition to such petition, whether the opposition of such *party* did or did not appear to them to be frivolous or vexatious; this also has been complied with, so far as relates to sitting members: but the contention is, that as no report is made as to the opposition of the returning officers, whether frivolous and vexatious, or the reverse, therefore the whole of the report upon which alone the certificate for costs depends, is void. Now admitting, after the decision of the Court of King's Bench, in the case of *Truman v. Lambert*, that the returning officers in this case upon a petition shaped in its prayer as is the present, might have been considered a party appearing before the committee in opposition to the petition, and therefore entitled to recover their costs as such party, if the committee had reported in their favour, still we see no provision in this act which can be construed to make the report altogether void as against the sitting members, because it is silent as to the petition against the returning officers, or the opposition made thereto.

This question turns upon the 40th, 57th,

and 58th sections. The 40th section directs that the committee, at the time they inform the House as to their final determination on the matters of the petition, shall also report to the House, whether the petition did or did not appear to them to be frivolous or vexatious; and in like manner, report with respect to every party, who shall have appeared before them in opposition to such petition, whether such opposition appeared to them to be frivolous or vexatious. The 57th and 58th sections shew the consequences which follow from such report; viz. that in one case the parties who appeared before the committee in opposition to the petition shall be entitled to their costs; in the other case, the petitioners. Now, the report in this case is, that the opposition to the petition by the sitting members appears to the committee to be frivolous and vexatious; and the consequence immediately follows under the 58th section, that the petitioners are entitled to their costs, to be taxed in the manner pointed out. There are no words in the 40th section which make the report of the committee as to the opposition of all the parties who have appeared before them, a condition precedent to the validity of the report as to those who are adjudicated upon in the report. The returning officers may have cause to complain that they have no remedy for their costs, by a report made in their favour; but it can make no difference to parties against whom the report is actually made, that it is silent as to others against whom the committee might have reported. The measure of costs payable by any party reported against must be precisely the same, if properly estimated, whether the report extends to others or not. We see no ground, therefore, for holding that the want of the adjudication for or against the returning officers, supposing it to have become necessary under the circumstances before the committee, can upon any clause in this statute be held to avoid the whole report.

The last ground of objection relates to the mode in which the taxation of costs was conducted. It is alleged that it included costs not strictly and properly occasioned by the opposition of the sitting members against the petition, such as costs occa-

sioned by the charge against the returning officers, and other charges not authorized by the statute. The costs to which the sitting members were liable under the report of the committee, were undoubtedly confined by the act to those only which were strictly and properly occasioned by their own opposition, and the taxation, ought certainly to be confined to those alone. The course pursued appears to have been this:—The committee reported the opposition to be frivolous and vexatious; in consequence of which, a request was made to the Speaker to refer the bill of costs of the petitioners; the Speaker thereupon directed the two examiners appointed by him to tax the costs and expenses mentioned in the requisition; and the examiners afterwards report that the costs and expenses allowed by them on taxation amount to a certain sum, and that the sitting members, whose opposition to the petition appeared to the committee to be frivolous and vexatious, are liable to pay the same.

Looking, therefore, only at the course of proceeding which took place, it appears to be strictly in conformity with the directions of the act; and there is nothing in the course of proceeding which can lead to the inference that the examining officers in taxing the costs, or the Speaker in granting this certificate, did anything beyond their strict duty, by allowing any other costs than those occasioned by the opposition to the petition by the sitting members; and the only question is, whether, in this stage of the proceedings, this Court has any power to try the propriety of this allowance, or the principle upon which it was conducted, after the certificate thereon has been granted by the Speaker. And we are decidedly of opinion that we have no such authority; but that the terms of the 60th section, "that the certificate signed by the Speaker shall be conclusive evidence of the amount of such demands in all cases, and for all purposes whatsoever," are at once so clear and so precise, that we should be taking upon us a jurisdiction not granted or intended by the statute, if we interfered in any manner on the subject. It is obvious that any such interference would be altogether useless; for if upon the discussion before us it ap-

peared to us that any mistake was made, we have no means of rectifying it by sending the matter back to the examiners, or to any other officer; and the consequence would therefore be, that if the smallest mistake in the amount were discovered as to a single item (as indeed was avowed in the course of the argument), the petitioners must lose the whole of their costs: a conclusion at once so unjust and unreasonable, that if there were any doubt upon the words of the act, it would go strongly to shew that we could not have the power contended for. We therefore think the certificate must be treated as conclusive evidence before us as to the amount for which the verdict is to be entered up.

Upon consideration, therefore, of the several objections which have been argued before us, we think them answered by a reference to the act itself, and that the judgment must be entered for the plaintiffs as prayed.

Rule absolute.

The Attorney General, as soon as the judgment was pronounced, moved to enter a suggestion of the circumstances under which the judgment had been given for the plaintiffs, in order that the opinion of a court of error might be obtained. The ground of the application was, that, as the judgment was not at common law, but under the provisions of a statute, the facts to warrant the judgment ought to be suggested on the record. He instanced the cases of a suggestion entered under 43 Geo. 3. c. 46. s. 3, to give costs to the defendant, under the London Court of Conscience Act, where a party is sued out of its jurisdiction—on the Welsh Judicature Act, under 14 Geo. 2. c. 17, where judgment as in case of a nonsuit is moved to be entered up; and where commissioners of taxes obtain treble costs on a suggestion that they are sued as commissioners—and he distinguished the case of *Mellish v. Richardson* (29), as the proceedings there were at common law.

TINDAL, C. J.—Nothing could give me personally greater satisfaction than assenting to this application, but I do not see

how it can be granted. This is a statutory proceeding: we are merely ministers; it is our duty to see whether the machinery is right, and whether the Speaker's certificate is such as may enable us to give it effect.

His Lordship then suggested that Mr. Attorney General should renew the application on the ensuing Monday, when the opposite party might shew cause in the first instance. Accordingly—

June 13.—Mr. Attorney General repeated the application.

TINDAL, C. J.—The Court would feel most happy in having the facts upon which they have pronounced their opinion placed upon the record for the purpose of submitting them to a higher tribunal, but I do not see how that can be done according to, or consistently with the course chalked out for us by the act of parliament, the 63rd section of which gives a certain form of declaration in these words:—"In case of the non-payment thereof, (the costs,) to recover the same by action of debt in any of His Majesty's courts of record at Westminster, in which action it shall be sufficient for the plaintiff or plaintiffs to declare that the defendant or defendants is or are indebted to him or them in the sum to which the costs and expenses, ascertained in manner aforesaid, shall amount," &c. It then goes on to say, that "the certificate of such amount, so signed as aforesaid by the Speaker, shall have the force and effect of a warrant to confess judgment, and the Court in which such action shall be commenced, shall, upon motion, and upon production of such certificate, enter up judgment in favour of the plaintiff or plaintiffs named in such certificate for the sum specified therein to be due from the defendant or defendants in such action, in like manner as if the defendant or defendants had signed a warrant to confess judgment in the said action to that amount." Hence, therefore, it appears, that the certificate of the Speaker is subject to the same consequences as though it were a warrant to confess a judgment: and the affidavits made on the opposite side are, in my opinion, in the nature of an application to the Court to set aside the judgment, and they may be

(29) 6 Bligh, N.S. 70.

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considered as made for the purpose of shewing that the Court had no jurisdiction. This being so, the Court are to deal with the one, as they are in the habit of dealing with the other; and, consequently, they are to inquire into the grounds on which the Speaker's certificate was obtained. Having done this, the Court have done all. It would, therefore, be useless to enter a suggestion upon the roll, and, under the present circumstances, such a course might not alone be idle and inoperative for the purpose for which it is proposed, but might tend to injure the rights and interests of third persons, who are not now before us.

PARK, J.—The feeling of the Court is in accordance with that expressed by my Lord Chief Justice. This is a novel attempt; one like it has never been heard of before; and it would not be wise or prudent for the Court to allow an act to be done, which would be inoperative.

GASELEE, J.—I do not feel competent to give an opinion generally upon the subject-matter of this discussion, as I was not present during the entire investigation; but, since I have been in court, I have heard nothing to induce me to think that we should interpose our authority for the purpose of allowing other proceedings to be adopted in reference to the judgment which has been delivered. The grounds of opposition, as I understand them, are similar to those which are made to a warrant of attorney, and the affidavits resemble an application made to the Court for the purpose of disputing the facts. We should not interpose.

VAUGHAN, J.—I agree that proceedings should not be adopted, which would prove altogether inoperative.

Rule refused.

The defendants, on the same day, sued out a writ of error, returnable on the first day of Michaelmas term, the allowance of which was served on the 9th of July, and the transcript was carried over to the Exchequer Chamber on the 2nd of November.

On a taxation of costs on the 7th of July, it was objected by the defendants, that no costs could be allowed, but the Prothonotary allowed the plaintiffs the costs of the cause, of the rule to enter up judgment, and

the costs of the plaintiffs' appearance in the first instance to oppose the motion for leave to enter a suggestion on the roll; and judgment was entered up by the plaintiffs for the debt (4,694*l.* 15*s.* 7*d.*), and also for 295*l.* for their damages sustained as well on occasion of the detention of the said debt, as for their costs and charges by them about their suit in that behalf expended. In Michaelmas term—

Wilde, Serj. obtained a rule to shew cause why the judgment should not be set aside for irregularity; or why it should not be amended by striking out so much as related to the award of costs; or why the Prothonotary should not review his taxation of costs in the cause, and the judgment be reduced in regard to the costs to such amount as shall be allowed on such review; and, in the meantime, and until the Court shall otherwise order, why all proceedings upon the said judgment, and upon the writ of error brought thereon, should not be stayed. The application was made on the ground, that section 62 of 9 Geo. 4. c. 22. authorized the plaintiffs to enter up judgment for the amount specified in the Speaker's certificate; that certificate was to have the effect of a warrant of attorney, and a warrant of attorney to enter up judgment for a certain sum would not authorize a judgment for that sum and costs. The rule was not drawn up with costs, and the allowance of the costs of the plaintiffs' appearance to oppose the rule was contrary to the known practice not to give costs on shewing cause in the first instance. *Weldron v. Norris* (30) was cited.

Talfourd, Serj., Hill, and Austen, shewed cause, and argued, in substance, that, admitting that the plaintiffs were not entitled to the costs of their appearance to shew cause in the first instance against the rule for entering a suggestion, they were still entitled to the costs of the other proceedings. The law upon the subject generally is laid down in *Tyte v. Glode* (31), that where by any act since the Statute of Gloucester, an action is given to the party grieved, he is entitled to costs if he succeeds, though he had no remedy before the act: and, in *Jackson v. the Inhabitants of Colesworth* (32),

(30) 2 W. Bl. 769.

(31) 7 Term Rep. 267.

(32) 1 Term Rep. 71.

it is laid down by Willes, J., that where ever damages are given, costs should be given also. To the same effect is *Witham v. Hill and others* (33), where, no mention having been made of costs in the statute 27 Eliz. c. 13, which gave damages, the doubt was, whether the plaintiff should have his costs taxed *de incremento*, and it was determined he should. Now, is there not a complete analogy between these and the present case? What are the costs given by the statute 9 Geo. 4. c. 22, and which are, by the 61st section, to be taxed as between attorney and client? How are they to be considered but as in the light of damages—of a certain penalty, imposed upon the other party for conduct deemed frivolous and vexatious, and adopted merely for the purpose of producing expense? Again, are not the plaintiffs entitled to their costs upon the ordinary principle upon which costs are given for the detention of a debt? and should not the conduct of the defendants here be considered as equivalent to such? This reasoning is still further confirmed by what was said by Lord Tenterden in delivering the judgment of the Court in *The College of Physicians v. Harrison* (34). He there expresses himself in the following manner:—"Our opinion, that the plaintiffs would be entitled to costs if they succeeded, is founded mainly upon this: that where a right is vested in a particular person or corporation, the withholding of that right, and thereby compelling the party to sue for it, is an injury for which damages may be recovered; and if damages may be recovered, then costs will follow." Besides, costs may be severed altogether, in the consideration of the Court, from the damages; and proceedings may be adopted with regard to the former alone, as in *Thomas v. the Archbishop of Canterbury* (35), where an injunction was granted, on the condition, that the party seeking it should give judgment in the action, which was to stand as a security for the costs at law, and in equity, but not for the debt. But, independently of any general principle bearing on the subject, the act of parliament, under which the plaintiffs claim, gives them the

right of costs. The section points out and specifies imperatively the course to be pursued—namely, by a certificate from the Speaker, which is to have the force and effect of a warrant of attorney. That this is so, cannot be denied; it cannot for a moment be contended, that the 23rd section of 28 Geo. 3, which gave the party the power of recovering his costs by action of debt, is not repealed by the 13th section of 53 Geo. 3. c. 71, which is analogous to the 63rd section of 9 Geo. 4. c. 22. The plaintiff, therefore, takes, as he was obliged to do, the warrant of attorney for better or worse. He has no remedy beyond it; but, in all such cases, the costs of such are allowed, being, as they are described, sixty-five or eighty shillings. They also referred to 6 Geo. 4. c. 23, for establishing the taxation of private bills in the House of Commons, and 7 & 8 Geo. 4. c. 64, for a similar purpose in the House of Lords, and urged, that the same construction should be put upon them all, as framed in *pari materia*.

Wilde, Serj., Sir W. W. Follett, and Richards, in support of the rule, contended, that it was by no means clear that the intention of the statute 9 Geo. 4. c. 22. was to give the party the costs of his application for entering up judgment upon the certificate. The construction therefore to be put upon a statute ambiguous in this respect should be strict, not liberal. The words of this statute, upon the point referred to, could not be said to be more explicit than those in 8 & 9 Will. 3. c. 11. s. 3, which gives the plaintiff costs in certain cases in actions for treble value of tithes; and yet the Judges would not decide that particular question in *Bale v. Hodgetts* (36). So far, in truth, from the statute being clear and satisfactory with regard to that which is contended for, the negative of the proposition may be safely maintained. It may be safely alleged, that the power of taxation exercised by the officer, and claimed by the plaintiffs, does not exist in the statute. The authority given was to enter up judgment for a certain specific sum mentioned in the Speaker's certificate: this authority had been exceeded, and a considerable sum had been added. "What right had the parties to act thus? None whatever. The

(36) 1 Bing. 182; s. c. 1 Law J. Rep. C.P. 34.

(33) 2 Wils. 91.

(34) 9 B. & C. 524; s. c. 7 Law J. Rep. K.B. 249.

(35) 1 Cox, 399.

practice observed in entering up judgment upon an ordinary warrant of attorney, is also adverse to the claim, as costs of such are never given, unless they are provided for in the warrant. Thus, in *Delane v. Mott* (37), where the plaintiff brought an action upon an annuity deed, and afterwards took a warrant of attorney for the sum due, with the proviso, that, if within a certain time, the annuity was not paid, he should be at liberty to take out execution for the sum specified, together with all costs incurred for or by reason of the non-payment of the annuity—it was held, that he was not at liberty under this clause to take out execution for the costs of the action. It has been also said, that the plaintiff had no mode of proceeding, except that which he has adopted, inasmuch as his course is specifically pointed out by the statute: this, however, is not so, for *Sharp v. Price* (38) is an authority to shew, that an act of parliament giving a summary remedy against defaulters, though in terms apparently prescribing such remedy, is cumulative, and does not take away the person's right of action at law. Besides, the words *shall* and *may*, in the section, are not imperative. The distinction as to the meaning and interpretation to be put upon these words is laid down in *The King v. the Commissioners of Flockwood Inclosure* (39), where Holroyd, J. said, "*May* is to be taken for *must*, when it is for the public good;" and, per Lord Ellenborough, "*Shall* and *may*, when they are for the public good, may be held imperative:" but not so here.

Cur. adv. vult.

Jan. 24.—TINDAL, C. J.—The rule, in this case, calls upon the plaintiffs to shew cause why the judgment entered up by them should not be set aside for irregularity; or why it should not be amended by striking out so much thereof as relates to the award of costs; or why the Prothonotary should not review his taxation of the costs of the cause, and the judgment be reduced, in regard to the costs, to such amount as should be allowed on such review. And upon shewing cause before us, the argument on both sides has been prin-

cipally confined to the question,—in fact, the real question between the parties,—whether the plaintiffs who have signed their judgment in an action of debt, under the 63rd section of the 9 Geo. 4. c. 22, are entitled to sign judgment for costs in such action, or are limited simply to the amount of the sum mentioned in the Speaker's certificate.

The 63rd section of the last-mentioned statute, is borrowed from the 13th section of the 53 Geo. 3. c. 71, with which it agrees in substance, before which last-mentioned statute, the remedy for costs and expenses certified by the Speaker, was governed by the 23rd section of the 28 Geo. 3. c. 52, and directed to be by action of debt in any of His Majesty's courts of record at Westminster, in which action it was provided, that it should be sufficient for the plaintiff to declare that the defendant was indebted to him, (in the sum to which the costs and expenses ascertained in manner aforesaid, should amount,) by virtue of that act; and it was provided, that the certificate of the Speaker, under his signature, of the amount of such costs and expenses, together with an examined copy of the entries in the journals of the House, of the resolution of the select committee, should be deemed full and sufficient evidence in support of such action of debt. And an express provision follows, that no wager of law or more than one imparlance shall be allowed, "and that the party in whose favour judgment shall be given in any such action shall recover his costs."

It is obvious, therefore, that a trial of the action of debt by a jury, was contemplated by the legislature, for provision is made to take away the trial by wager of law; and although a form of declaration is given by the statute, so as to relieve the plaintiff from all difficulty in that particular, yet under the general issue of *nil debet*, or by means of special pleading, very great impediments might have been thrown in the way of the plaintiffs' recovering, and points raised as to the regularity or legality of the proceedings in parliament, either by the production of evidence before the jury, or by means of bills of exceptions, or by pleading to the declaration. It is further obvious, that the legislature thought it necessary to provide for costs by a special enactment, and that the enactment is so

(37) 2 Chit. Rep. 423.

(38) 6 Price, 131.

(39) 2 Chit. Rep. 251.

framed as not only to give costs to the plaintiff, but to the defendant also, in case the plaintiff failed in recovering his debt.

The statutes, therefore, of the 53 Geo. 3. and 9 Geo. 4, introduced an entirely new remedy, and conferred a new and very great benefit on the plaintiff. For after these statutes, the defendant's plea was taken from him; he could neither have any trial of the fact before a jury, nor raise any point of law upon the record; the certificate, of the amount of costs and expenses by the Speaker, is directed to have the force and effect of a warrant to confess judgment; and the Court is directed upon motion, and on the production of such certificate, to enter up judgment in favour of the plaintiff named in such certificate, for the sum specified therein to be due from the defendant, "in like manner as if the defendant had signed a warrant to confess judgment in the said action to that amount."

If the question, therefore, had rested merely on this comparison between the new and the former provisions, the inference would appear to us to be strong, that, under the latter, there was no intention in the legislature to allow costs to the plaintiff upon his judgment. The costs, in all cases, under the new provision would be small, when compared with those upon a trial before a jury: in all ordinary cases, very trifling indeed. And when it is observed, that by the first statute, the costs were expressly given to the party who succeeded in obtaining the judgment, which might be either the plaintiff or the defendant; and that by the present statute, the judgment, if entered up, can only be entered up for one party—viz. the plaintiff; and that the statute omits any mention whatever of costs; we think it a reasonable inference, that, under the new mode of recovering the amount, it was intended, that the plaintiff should forego his claim to costs, as the price for the greater facility and certainty of obtaining his demand. And we think, even if such inference is not to be drawn, the silence of the new statute as to costs, makes that subject a *casus omissus*, and that we have no authority to supply it.

But on another and perfectly distinct ground, we think we have no power to give judgment for costs. This is a statutory

power given to the Court to enter up a judgment; and the terms of such power must be strictly followed. The certificate by the Speaker is declared to have "the force and effect of a warrant to confess judgment;" and the Court is directed to enter up judgment in favour of the plaintiff "for the sum specified therein to be due from the defendant." This gives an authority expressly to enter up judgment for the very sum mentioned as the amount of the debt, and no more. But the clause directs the judgment to be entered up, "in like manner as if the defendant had signed a warrant to confess judgment in the said action to that amount." Now, the statute cannot be more safely construed than by considering what would be the course of proceeding if the defendant had actually signed a formal warrant of attorney to confess judgment in the action, to the amount of the sum mentioned in the Speaker's certificate, and the plaintiff had entered up his judgment under such warrant of attorney. In that case, it is the well known course of practice of the Court, that the warrant of attorney being silent as to costs, the judgment would have been entered up for the sum specified as the debt, and for no more.

It has been urged in the course of argument, that it would be unjust that the plaintiff should suffer by a vexatious and expensive opposition to his entering up judgment. But in answer to this, it should be recollected, that there is nothing in the statute which deprives the Court of its inherent authority, to fix the defendant with the payment of costs on a vexatious opposition to a rule for entering up the judgment; such costs, however, not forming part of the judgment itself, but being one of the terms on which the rule is made absolute.

We think, therefore, that so much of the rule which has been obtained must be made absolute, as relates to the amending of the judgment, by striking out the award of costs; and the residue of the rule must be discharged.

The Court directed the judgment to be amended by the plaintiffs, by reducing it by the sum mentioned in the rule, the defendants to have seven days time to amend the writ of error if necessary, and to assign errors after the plaintiffs shall have amended the judgment.

1837. } THE BANK OF ENGLAND v. AN-
January. } DERSON AND OTHERS.

Banker—Bill of Exchange—Evidence.

An acceptance by a co-partnership, consisting of more than six persons, carrying on the trade or business of bankers, within the distance of sixty-five miles from London, in the course of such trade or business, of a bill of exchange at a date less than six months, is illegal under the 3 & 4 Will. 4. c. 98.

Documents from the Bodleian Library and Rolls Chapel, are not admissible as evidence, for the purpose of proving the existence of certain insulated facts.

His Honour the Master of the Rolls sent for the opinion of this Court, the following

CASE.

The London and Westminster Bank is a co-partnership consisting of more than six persons, united in covenants, carrying on in London all such parts of the business of banking as are usually carried on by London private bankers. Mr. George Alfred Muskett is a proprietor of shares in the said London and Westminster Bank, and became such by a purchase of shares from a former shareholder. Mr. George Alfred Muskett carries on business as a banker at St. Albans, which is a town within sixty-five miles of London, in the county of Hertford, on his own sole account, and is registered at the Stamp Office as the sole person interested in such bank, under the style and firm of the Bank of St. Albans. The said George Alfred Muskett keeps a banking account with the London and Westminster Bank, and the London and Westminster Bank act as the London agents of the said George Alfred Muskett, and receive and collect for him his London monies, and place the same, when received, to his credit; and hold the same at his disposal, as London bankers usually do for their customers. The bank of St. Albans has not any connexion whatever with the London and Westminster Bank, except that the London and Westminster Bank act as the London agents of the St. Albans Bank. On the 21st of February 1835, one W. J. Robertson applied at the office of the said bank of St. Albans, for a bill of exchange on London, for 25*l.*, and paid Henry Ed-

wards, the clerk of the said George Alfred Muskett, the sum of 25*l.* for the same; and, thereupon, the said George Alfred Muskett, by the said Henry Edwards, his clerk, drew upon the said London and Westminster Bank, a bill of exchange, and delivered the same to the said W. J. Robertson. The following is a copy of the said bill:—

"No. 383. Bank of St. Albans post bill, 21st of February 1835. To the London and Westminster Bank, Throgmorton Street. Twenty-one days after date, pay to the order of W. J. Robertson, esq., the sum of 25*l.*, and place the same to account.

"For the bank of St. Albans,

"25*l.* "Henry Edwards."

"Ent^d. H. E."

The said sum of 25*l.* was received by the said George Alfred Muskett, on his own sole account, and for his own use and advantage.

The London and Westminster Bank did not pay, or compound for the stamp duty on such bill, but the stamp duty on such bill was paid, or compounded for, by the said George Alfred Muskett.

The said bill was, on the 23rd of February 1835, presented to the said London and Westminster Bank, for acceptance, and the same was accepted by order of the directors thereof, as follows:—

"Accepted,

"At 38, Throgmorton Street, per procuration of the trustees of the London and Westminster Bank,

"J. W. Gilbert,

"Manager."

At the date of the presentment of the said bill, for acceptance, the said London and Westminster Bank had, as such London bankers of the said George Alfred Muskett, as aforesaid, monies in their hands, belonging to the said George Alfred Muskett, to an amount exceeding 25*l.*, and the said bill was accepted for and on account of the said London and Westminster Bank.

The question for the opinion of the Court was, whether the said acceptance, by the said London and Westminster Bank, of the said bill, was lawful; having regard to the provisions of the act 3 & 4 Will. 4. c. 96, and other acts passed, and now in force, respecting the Bank of England.

Maule, for the plaintiffs, entered into an historical disquisition upon the Bank Acts, 5 W. & M. c. 20. ss. 19, 20, (passed in 1694, by which the Bank of England was established,) 7 & 8 Will. 3. c. 31, 8 & 9 Will. 3. c. 20, 3 & 4 Ann. c. 9, 6 Ann. c. 22, 15 Geo. 2. c. 13, 39 & 40 Geo. 3. and 7 Geo. 4. c. 46, and contended that the clear and manifest conclusion to be deduced from these statutes was, that the Bank of England should possess a monopoly as a bank of circulation and of issue. All these statutes speak in unequivocal terms of the exclusive privilege of the Bank of England. That privilege was relaxed and modified, and was surrendered by the Bank of England, by the 7 Geo. 4. c. 46(1); but to a certain extent only, things being left in the same state within a radius of sixty-five miles from London. The judgments in *Broughton v. the Manchester Water-works* (2), are clear authorities upon this subject; and in that case, *Fowler v. Wigan* (3) was distinguished, as there it did not appear on the face of the instrument, that the security was made by more than six persons; an observation which applies more forcibly in the present

case. It may, therefore, be affirmed that for the period of 100 years since the 6 Anne, no company trading as a bank of issue have accepted bills payable at a date of less than six months; and it can easily be made to appear that the restriction as to time imposed by that act, has been continued by all the subsequent statutes. The answer of the defendants is, that the mode of acceptance they have adopted, is rendered lawful by 3 & 4 Will. 4. c. 96. ss. 2 & 3(4), which sections, however, must be read in conjunction with the 15th section of 39 & 40 Geo. 3 (5). Upon the wording of these sections, it will be contended in the first place, that the statute 3 & 4 Will. 4, when speaking of bills and notes, means bills and notes obligatory under seal, and not bills of exchange and notes in the sense ordinarily attached to them. It will be also objected, that admitting bills of exchange and notes in the ordinary sense, to be meant, still the party here is not within the statute, as he is prohibited from *borrowing*, owing, or taking up any sum or sums of money on these bills or notes, payable on demand, or at any less

(1) Which, after reciting 39 & 40 Geo. 3, and the intention and consent of the company, enacts, that "it shall be lawful for any bodies politic or corporate, erected for the purposes of banking, or for any number of persons united in covenants or copartnership, although such persons so united or carrying on business together, shall consist of more than six in number, to carry on the trade or business of bankers in England, in like manner as copartnerships of bankers, consisting of not more than six persons in number, may lawfully do, and for such bodies politic or corporate, or such persons so united, as aforesaid, to make or issue their bills or notes, at any place or places in England, exceeding the distance of sixty-five miles from London, payable on demand or otherwise, at some place or places specified upon such bills or notes, exceeding the distance of sixty-five miles from London, and not elsewhere, and to borrow, owe, or take up any sum or sums of money on their bills or notes, so made and issued as aforesaid, provided they have not a house of business or establishment as bankers, in London, or at any place or places not exceeding the distance of sixty-five miles from London, and that every member of any such corporation or copartnership shall be liable to or responsible for the due payment of all bills and notes which shall be issued, and for all sums of money which shall be borrowed, owed, or taken up by the corporation or copartnership, of which such person shall be a member."

(2) 3 B. & Ald. 1.

(3) 1 Stark. N.P. 459.

(4) Section 1. enacts, "That during the continuance of the said privilege, no body politic or corporate, and no society or company, or persons united or to be united in covenants or partnerships, exceeding six persons, shall make or issue in London, or within sixty-five miles thereof, any bill of exchange or promissory note, or engagement for the payment of money on demand, or upon which any person holding the same, may obtain payment on demand."

Section 2. enacts, "That the intention of the act is, that the Governor and Company of the Bank of England should, during the period stated in the act, (subject, nevertheless, to such redemption as is described in this act,) continue to hold and enjoy all the exclusive privileges of banking, given by the said recited act of 39 & 40 Geo. 3, as regulated by the said recited act of 7 Geo. 4, or any prior or subsequent act or acts of parliament, but no other or further exclusive privilege of banking."

(5) Which enacted and declared, "That it was the true intent and meaning of the same act, that no other bank should be erected, established, or allowed by parliament, and that it should not be lawful for any body politic or corporate whatever, erected, or to be erected, or for any other persons united or to be united in covenants or partnerships, exceeding the number of six persons, in that part of Great Britain called England, to borrow, owe, or take up any sum or sums of money on their bills or notes, payable on demand, or at any less time than six months from the borrowing thereof, during the continuance of such said privilege to the Governor and Company."

time than six months from the borrowing thereof; and it will be argued, that as the defendant merely accepted the bill, and was not the drawer or indorser, he cannot be said to *owe, borrow, or take up* money within the statute; in other words, that he must, for the purpose of being brought within the act of parliament, say in express terms, "lend me the money." Now, with regard to the first objection, that the bills intended by the statute were those under seal, it must, no doubt, be admitted, that the word *bill* is very old in the law, and one of varied and ambiguous signification; there is, for example, an English bill, a bill of lading, a bill of divorce, &c.: but even if the word used is of doubtful signification, its meaning will be understood by the context, and will be explained by the application of the rule *noscitur à sociis*. Now the legislature in the various statutes which refer to and comprehend bills under seal, as placed in contradistinction to bills of exchange, express their meaning in words, and leave nothing doubtful or ambiguous in the case. They have done so in 5 & 6 W. & M. s. 26, 29, 6 Ann. c. 20, 8 & 9 Will. 3. c. 20. s. 30; and in the same statute, ss. 21, 23; and when bills under seal are not intended, bills of exchange and notes are spoken of. So also the 2nd, 3rd, and 19th sections of the 7 Geo. 4. treat the words bill, and bills of exchange, as synonymous. This exposition is evidently intended by the statutes. It has been supported by all decisions; it is founded upon good sense, and will, on that account, be recognized and sanctioned by the Court. It may, perhaps, be also said for the defendants, that the bill in question is not *their* bill, as it is required to be by the words of the statute; but such proposition is not tenable, and is directly opposed to the opinions of Abbott, C.J. and Bayley, J. in *Broughton v. the Manchester Waterworks Company*.

The objection that the facts here do not constitute a borrowing or taking up of money, within the words of the statute, is met by *Perring v. Dunston* (6), and *Slark v. the Highgate Archway Company* (7). In the latter case, the defendants, who were sued as the makers of a promissory note

for 2,000*l.*, at two months' date, tendered evidence to shew that the note was drawn and issued merely for the accommodation of the payee, and not for the purpose of completing their works, for which only the company were authorized, by the acts of parliament, to raise the sum mentioned; and a new trial was granted, on the ground of the rejection of such evidence. This decision must have proceeded upon the principle, that if the note was not drawn for the purposes specified by the company's act, it was within the statute 6 Ann. c. 22, and the other statutes framed for the protection of the Bank of England. And the same principle was acted upon in *Ex parte Randleson* (8). If the act constituting a borrowing were limited and restricted, as is contended for, the statute would be nugatory. But the mode in which the word is to be construed, may be collected from the sense in which the correlative term *loan* or *lending* is used in other statutes. Now in 12 Ann. c. 16, (avoiding securities tainted with usury,) the word *loan* only is used, yet if more than 5*l.* per cent. discount had been taken upon this bill, that would have been usurious, and if so, there would have been a loan; and if a loan, a borrowing. It follows, therefore, that it is a loan upon the one side, and a borrowing upon the other, when a party becomes liable upon a bill of exchange. The transaction here is, in fact and strictness, a borrowing upon the part of the defendants. The Westminster Bank transacts business in the metropolis: Mr. Musckett, the drawer of the bill, residing at St. Albans, has an account with them for more than 25*l.*: they owe him more than 25*l.*, inasmuch as a greater sum was deposited with them: this money the bankers had a right to use and employ as they pleased, and though called a deposit, it was, in fact, a loan, and decided to be so in *Sims v. Bond* (9). When, therefore, the party draws upon the bankers for the deposit or loan, and they accept the bill, they "*owe*," in the words of the statute upon the bill; they are debtors on the bill for that portion of the deposit for which they accept, and which they may retain until the bill becomes due, and they need not return it in specie.

(6) Ry. & Mo. 426.

(7) 5 Taunt. 792.

(8) Mont. & M'Ar. 86.

(9) 5 B. & Ad. 389.

The Attorney General (Sir J. Campbell,) contrâ.—By deciding that this acceptance is illegal, the Court will determine, that if any partnership concern, whether of a banking nature, or otherwise, accept a bill in discharge of a debt due by them to the drawer, they, by such acceptance, will violate the privileges of the Bank of England,—contravene an act of parliament,—render themselves liable to a prosecution for their conduct; and the acceptance will be void in the hands of the drawer or payee. The defendants here may be considered merely as the agents of Muskett, or the collectors of his money, and it cannot be disputed that he is entitled to order them to dispose of that money, either by cheque or order; and it is contended, that it is immaterial whether the order is given in that form, or in the form of a bill of exchange. The transaction, in fact, was only incidental to the carrying on of the business of a bank of deposit; and the law allows a bank of deposit, as well within sixty-five miles of London, as without such limit. The Westminster Bank do not circulate money or negotiate their paper, but receive money strictly as a bank of deposit. The private bankers of London accept bills for their customers, as bankers of deposit, and the country bankers for whom the Westminster Bank are the agents, will be put to great inconvenience and difficulties, and unable to struggle with any competition, if they are not allowed to take the monies collected by those agents, out of their hands in the usual manner. This right of the customers is clearly not prohibited by the common law; and it cannot be affected by the Bank Acts, unless the language is clear and unequivocal. Those acts must be construed strictly, as they impose a burthen and inconvenience on the subject, restrain a common law right, are in restraint of trade, and expose the defendants to pains and penalties; and if an indictment could not be sustained against the defendants for borrowing, owing, or taking up a sum of money," upon the facts stated in the special case, they are not within the acts of parliament. The onus of shewing that the acceptance is contrary to the 3 & 4 Will. 4. c. 22, is on the Bank of England, and they can rely upon the 3rd section only, for the act only applies to such companies as

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"make or issue bills," and not to the acceptance thereof. Under section 3, it is incumbent upon the Bank to shew that the defendants have "borrowed, owed, or taken up" a sum of money on their bills or notes, and the true signification of these words is to be collected from the statute of 6 Ann. c. 22. s. 9, and the intermediate Bank Acts, in all of which they have been introduced (10). Now, upon considering the sense of the words in the first and subsequent statutes, it will appear that they were clearly intended to apply, not to bills of exchange, as at present known and understood, but to bills under seal, which were then in use, as a part of the circulating medium. He here referred to 5 W. & M. c. 20, 8 & 9 W. 3, 6 Ann., 7 Ann., 3 Geo. 1. c. 8, 15 Geo. 2, 4 Geo. 3, 21 Geo. 3, 29 & 30 Geo. 3, *Anderson's History of Commerce*, vol. 2, 606—631, vol. 3, 28, 29. He also referred to *Jacobs' Law Dictionary*, 'Bill,' and cited *Capp v. Lancaster* (11). In further illustration of his argument, and for the purpose of shewing more clearly the construction put upon the 6 Ann., and that which should consequently be put upon the 3 & 4 Will. 4, he offered to produce certain documents (bills under seal) from the Bodleian Library.

Maule objected to the reading of these documents, as bringing before the Court a matter of fact not stated in the special case, upon which there might be some dispute.

The Attorney General submitted, that the documents might be received in evidence upon the same principle that *Camden's Britannia*, as was laid down in *Stainer v. the Burgesses of Droitwich* (12), was admissible; the case here not being as to a particular right or custom, but one which affected the kingdom in general, and thus being within the qualification in the authority referred to. These documents, considered as contemporaneous history, would afford material assistance in the exposition of old statutes.

(10) The Attorney General here entered into an historical detail, as to the origin and causes of the insertion of these words into the early Bank Acts, viz. a jealousy entertained by the Bank of England of the Million, and the Mining Banks, and its inability to cope with them in the market, without protection.

(11) Cro. Elis. 548.

(12) 1 Salk. 287.

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[TINDAL, C.J.—The question is, how are we to certify to the Master of the Rolls, if we are to receive as evidence that which is in the nature of contemporaneous history? Might not the opposite party dispute the authority? might not they refer to one hundred authorities, for the purpose of qualifying or denying that which has been received as evidence? The difficulty is, if you are allowed to prove incidentally these insulated facts, why may not they go tomorrow to the Bank, and rummage for old bills of exchange; and in such case, what should we do? We are, however, ready to receive the evidence tendered, if it is not objected to.]

Maule having persevered in his objection, the evidence was not received.

The *Attorney General* then offered as evidence, certain rules and regulations of the Mining Company from the Bodleian Library, dated 1706, and a deed of partnership of the Million Bank, from the Rolls Chapel, dated 1698. Of the genuineness of the documents there could be no doubt. The production would assist the Court much in the construction to be put upon old acts of parliament. If upon certain occasions they were obliged to give weight to history, why not give equal weight to the materials of which it was composed?

[TINDAL, C.J.—We reject that which is now offered to our consideration as evidence, upon the single ground of inconvenience. This, it should be recollected, is not general history, it is merely a single insulated fact; and it would be most inconvenient, if we were to receive this as evidence, for we should consequently be bound to receive from the other side, similar evidence of such facts as they, in their judgment, might choose to submit. Upon this ground alone, we refuse the application. The argument should be confined to the statement of facts as they arise on the case.]

The difference between bills of exchange and bills under seal, also appears from the fact that the forgery of the former was not a felony until the reign of George II., but by 11 Geo. 4. c. 9, the altering, forging, or counterfeiting bank bills or bank notes, was declared to be a felony. But admitting that ordinary bills of exchange are within the statute, the

transaction in this case is not within the meaning of the word "borrowing." The statute 21 & 22 Geo. 3, establishing the Bank of Ireland, is in the same terms as 6 Anne, and imposes a penalty of "treble the sum borrowed or taken up upon such bills or notes," one moiety thereof to be paid to the informer, and the other to the use of his Majesty. Now, if a *qui tam* action were brought against a party under the Irish Act, the borrowing, the foundation of the action, should be proved; and how could this be done? Not by the production of the bill or note, for the sum borrowed may be totally different from that for which such bill or note was given. The same proof would, of course, be required on an indictment on the statute of Anne, and the same difficulty would occur. If the construction of the word "borrowing" depends upon the meaning of the word loan, in the usual sense of that expression, it cannot apply to a sum of money in the hands of a banker, that can be drawn out by a cheque at a moment's notice.

Thirdly, within the statute there is no borrowing by the defendants on "their bill." Amongst merchants and lawyers, the bill is that of the drawer, by whom it is issued, and not of the acceptor. The bill exists before it comes into the hands of the acceptor, and in cases of a parol acceptance of an inland bill before 1 & 2 Geo. 4. c. 78. s. 2, and of foreign bills at the present time, where the party may never see the bill, or of an acceptance for honour, it is impossible to say that it is the bill of the acceptor, or is issued by him; and the schedule to the 7 Geo. 4. c. 47. would have been unnecessary if he had been deemed the issuer of the bill. Another difficulty also is as to the date from which the acceptance is to run. Suppose a bill drawn at six months, but accepted three days after, or at twelve months, and presented to the drawee, and accepted by him within six months, or three days only before it became payable, would this be a violation of the statute? and would the proof of the acceptance having been made at such a time, and that the holder knew it, defeat his security? The usage of the East India Company, with respect to a similar statute, 9 & 10 Will. 3. c. 44. s. 75, as appears from *Mur-*

ray v. the East India Company (13), also supports the defendants' construction of the statute. The cases on this subject are contradictory, and the more recent decisions are in favour of the defendants. In *Broughton v. the Manchester Waterworks Company*, the view taken of the Bank Acts was not profound or elaborate; and, in the course of the judgment, words are referred to which are not to be found in those acts; and in *Harvey v. Kay* (14), where it was observed that the case shewed, that the Bank Acts applied to all companies for whatever purposes established. Bayley, J. said, "In *Mayor v. Hammond* (15), all the Judges were of opinion, that those acts did not prevent more than six persons from paying their debts by their acceptance, but merely more than six persons carrying on a banking concern." *Stark v. the Highgate Archway Company* is not a positive decision, and the marginal note is prefaced by a *quære* and a *semble*; and both cases are overruled by *Perring v. Dunston*. In *Ex parte Randleston* the instruments were promissory notes, and the party did "owe," within the words of the statute.

Maule, in reply, urged, that if the principles contended for by the Attorney General were admitted, the most injurious consequences would result, not, alone to the credit of the Bank of England, but to that of the nation, for the support of which the privileges of the Bank were given. If this acceptance was lawful, the Westminster Bank might accept any number of bills at what date they pleased, or might issue promissory notes, and the same course could be taken by other companies. This is clearly contrary to the prohibition in the Bank Acts, which in substance is, that the credit of more than six persons shall not be pledged upon any instrument, either legally or practically negotiable at a less date than six months. The defen-

dants cannot be called the agents of the drawer in the sense relied on; nor is the distinction between a bank of issue and of deposit recognized, or anywhere noticed by the legislature; but by the statutes a monopoly is given to the Bank of England, even as a bank of deposit, with respect to negotiable securities at a date less than six months. As to the cases, *Broughton v. the Manchester Waterworks Company* is not overruled by *Perring v. Dunston*, which was a *Nisi Prius* case, in which a verdict was taken by consent. The inaccuracy of expression in Lord Tenterden's judgment must be assumed to be that of the reporters, and not of the Bench. It is impossible to maintain that the bills referred to in the statute are confined to those under seal; for when the various statutes refer to bills under seal, they state such intention; and *The King v. Bigg* (16) shews that there were bank bills not under seal. In further support of the proposition, reference may be made to *Jacob, Com. Dig.* 'Merchant,' F, 1, 2, and *Matyne*. Even Anderson, who was referred to upon the discussion, admits that sealed bills had gone out of general use, and were fallen into desuetude. No conclusion can be deduced in favour of the defendant from the usage as to India bonds; they were securities for money of a fluctuating value, and were paid as such until the arrival of the goods. The statute 22 & 23 Geo. 3. c. 16. (the Irish Bank Act) is an authority that the words of the statute of Anne must be extended to bills of exchange not under seal, for otherwise, as bills under seal were clearly not contemplated by the later statute, the same words in these two statutes must have a different construction. The question, as to a bill of exchange drawn at more than six months, but accepted within that period, is answered by the intention of the legislature, which was to prevent these bills from being in the place of a circulating medium—from being considered and used as paper money. It was never intended to prohibit the issuing of bills which had a long time to run. To the argument, that this is not the bill of the defendants, it is answered, that it is the bill of the party.

(13) 5 B. & Ald. 204.

(14) 9 B. & C. 356; s. c. 7 Law J. Rep. K.B. 167.

(15) This was a special verdict in C.B., argued before the twelve Judges. It is not reported. The Attorney General also referred to the short-hand writer's notes in *Dickenson v. Valpy*, for the purpose of shewing that the Court here held the same doctrine. The fact is not mentioned in the report in 10 B. & C. 128; s. c. 8 Law J. Rep. K.B. 51.

(16) 3 P. Wms. 419.

who is liable upon it; and the objection, that the date of the acceptance does not appear, is met by the observations of Holroyd, J. in *Broughton v. the Manchester Waterworks Company*. The learned Judge says, "Here the defendants are made a corporation by a public act of parliament, and every person is bound to take notice of that act; and when, therefore, a holder of a bill, though a *bona fide* indorsee, takes the defendants' acceptance, he must know that they are a body corporate; and he therefore receives it, knowing it to be the acceptance of a corporation prohibited from owing money on such a bill; he is not, therefore, an innocent indorsee, because he takes a bill which he knows to be prohibited by statute, and that distinguishes the case from that of *Wigan v. Fowler*."

The Attorney General, at the conclusion of the argument, prayed the Court, that in consequence of the importance of the subject, and the magnitude of the interests at stake, the Court would deviate from the usual practice, and send to the Master of the Rolls, not alone their certificate, but the reasons on which it was founded. Their Lordships agreed with the Attorney General, as to the importance of the question to be decided, and said they would, in all probability, consent to that which he asked.

Cur. adv. vult.

TINDAL, C.J.—The case which has been sent to us by the Master of the Rolls, involves in its determination results of such general importance, that we have thought it right, not merely to certify our opinion to his Honour in the ordinary way, but to state publicly the grounds and reasons on which such opinion has been formed.

The question is, whether a copartnership, consisting of more than six persons, and carrying on the trade or business of bankers within the distance of sixty-five miles from London, can, by law, in the course of such trade or business as bankers, accept a bill of exchange, payable at less than six months from the time of the giving of such acceptance? And we are of opinion, regard being had to the various statutes which relate to the Bank of

England, that such an acceptance is not a lawful acceptance. In thus stating the question, we purposely insert, as one of its terms, that the acceptance is given in the course of the defendants' trade or business of bankers: first, because such appears to us to be the necessary character of the transaction described in the case; and, secondly, because we are unwilling to embarrass the general question with the consideration of one of much less importance, viz. whether an acceptance given by more than six persons in partnership, but not as bankers, or by more than six persons in partnership as bankers, but given in payment of their private debt, as for goods sold, or salaries of clerks, or rent, or the like, would or would not fall within the restriction: to which we shall afterwards more particularly advert, and which we consider, under the several statutes, to be still in force.

The question above stated depends for its answer upon the construction to be put upon the statute 3 & 4 Will. 4. c. 98, the statute which is at present in force and operation; and the particular clause of the statute which bears upon it is section 3, by which it is enacted, "that any body politic or corporate, or society, or company, or partnership, although consisting of more than six persons, may carry on the trade or business of banking in London, or within sixty-five miles thereof: provided that such body politic or corporate, or society, or company, or partnership, do not borrow, owe, or take up in England any sum or sums of money on their bills or notes, payable on demand, or at any less time than six months from the borrowing thereof." These prohibiting words are found originally in the 9th section of the statute 6 Ann. c. 22, by which statute, any direct restriction was for the first time imposed upon the rights of the public in favour of the Bank of England. And in order to determine the proper construction which is to be put on the words employed by the legislature in the statute of his present Majesty, it will be advisable to ascertain, in the first place, the intention of the legislature, when the same restriction was originally imposed: and afterwards to consider, whether any of the subsequent statutes passed from time to time for the

renewal or confirmation of the privileges of the Bank of England, either throw any light upon the original intention of the legislature, as to the extent of the restriction, or have by their own operation enlarged such extent.

The Bank of England was first established by the 5 & 6 Will. & Mary, c. 20, which, by section 19, gave power to their Majesties, by letters patent, to incorporate the subscribers and contributors to the sum of money therein mentioned, by the name of the Governor and Company of the Bank of England. By two subsequent sections, the 26th and 27th, the corporation is prohibited from buying or selling any goods, wares, or merchandises, but not from dealing in bills of exchange, or in buying or selling bullion, gold, or silver, or goods deposited with them. This statute, however, does not confer any exclusive privilege whatever on the Bank beyond that given by the 28th section, namely, that of making their bills obligatory and of credit, under seal of the corporation, transferable, *toties quoties*, by indorsement, under the hand of the holder; and allowing the assignee to sue upon the same in his own name: but the statute itself altogether silent as to the intention of the legislature, whether the bank thereby empowered to be created should be a bank of circulation and issue, or merely a bank of deposit. Under the powers of this statute, the Governor and Company of the Bank of England were shortly afterwards made a body corporate by royal charter; and by the statute 8 & 9 Will. 3. c. 20, which is the next in succession relating to the Bank, the stock of the company is allowed to be augmented and increased; and the first direct privilege is conferred upon the company, by enacting, in section 28, that during the continuance of the corporation, "no other bank, or any other corporation, society, fellowship, company, or constitution, in the nature of a bank, shall be erected or established, permitted, suffered, countenanced, or allowed by act of parliament within this kingdom;" which words are explained by the late statute, 15 Geo. 2. c. 13. s. 5, to intend, that no other bank shall be erected, established, or allowed by parliament." From this time no extension whatever of the pri-

villeges of the Bank took place until the passing of the statute 6 Ann. c. 22, above referred to; when, in an act of parliament, the title of which embraces a variety of subjects of legislation having no relation to each other, and states, amongst the rest, that of "An act for securing the credit of the Bank of England," the prohibition above referred to, upon the proper construction of which the present inquiry mainly turns, is first created by the legislature. In the interval, however, between the incorporation of the Bank of England and the statute of Anne, that is, between the years 1694 and 1707, it is certain, that the Bank had begun, and continued, to act as a bank of circulation and issue, and probably to a very considerable extent. This appears evident, as well from the language of the recital in the 36th section of the statute 8 & 9 Will. 3. c. 20. above referred to, as from the enacting words of that section. The 36th section recites, "that divers frauds and cheats had been put upon the Governor and Company of the Bank of England, by the altering, forging, and counterfeiting of the bank bills and bank notes of the said governor and company, and by the rasing and altering indorsements thereupon, to the great decay of credit;" after which the clause then proceeds, "that for redressing the same for the future, it is enacted, that the forging and counterfeiting the common seal of the corporation of the governor and company, or of any sealed bank bill made or given out in the name of the said governor and company for the payment of any sum of money, or of any bank note of any sort whatsoever, signed for the said Governor and Company of the Bank of England, or the altering or rasing any indorsement on any bank bill or note of any sort, shall be, and is hereby adjudged to be, felony without benefit of clergy." This clause affords an inference which seems undeniable, namely, that in 1697, when that statute was passed, the Bank of England was in the habit of issuing bank bills sealed, and bank notes signed, so largely, that the protection of such bills and notes from forgery was essential to the preservation and security of the public credit.

In this state of things the statute of Anne was passed. The clause in question begins

by reciting the enactments of the before-mentioned statute, 8 & 9 Will. 3. c. 20, by which it was provided, that during the continuance of the corporation of the Governor and Company of the Bank of England, no other bank, or any other corporation, society, fellowship, company, or constitution, in the nature of a bank, shall be erected or established, permitted, suffered, countenanced, or allowed by act of parliament, within the kingdom. Nevertheless, that since the passing of the said act, some corporations, by colour of the charters to them granted, and other great numbers of persons, by pretence of deeds or covenants united together, have presumed to borrow great sums of money, and therewith, *contrary to the intent of the said act, do deal as a bank, to the apparent danger of the established credit of the kingdom*; and after this recital, the statute proceeds to provide the remedy in the terms following: viz. "that it shall not be lawful for any body politic or corporate whatsoever, erected, or to be erected, other than the said Governor and Company of the Bank of England, or for other persons whatsoever, united or to be united in covenants or partnership, exceeding the number of six persons, in that part of Great Britain called England, to borrow, owe, or take up any sum or sums of money on their bills or notes, payable at demand, or at any less time than six months from the borrowing thereof."

The great grievance, therefore, to which the statute of Anne intended to apply a remedy, was that of other corporations and large numbers of persons, united in partnership, contrary to the intent of the statute of William 3, "presuming to deal as a bank;" that is, as a bank of circulation and issue; for, merely dealing as a bank of deposit, could scarcely "affect the credit of the Bank of England," the securing of which credit is the object mentioned in the title of the act: still less could it operate "to the danger of the established credit of the kingdom," which is the effect of such dealing, as described in the recital to the same section.

Such then being the grievance felt and described in the statute, the remedy which the legislature would, *a priori*, be expected to apply, is some remedy co-extensive with the mischief itself; some enactment which,

if it did not in terms prevent persons united in a copartnership of more than a given number from "dealing as a bank of circulation" altogether, would at least impose such restraints and regulations upon the mode of dealing as a bank, as would prevent them from coming into competition with the dealing of the Bank of England, by laying a sufficient check upon the issue of negotiable bills or notes, having the security of a large body of copartners, and made payable on demand, or at a very short time after the issue. Whatever was the extent of the restriction, thus originally imposed by the statute of Anne, it is found to be repeated in all the subsequent statutes, passed from time to time for the renewal or confirmation of the privileges of the Bank of England; if not in words precisely the same to the very letter, yet in words bearing precisely the same meaning; and it is, for the last time, inserted in the statute before alluded to, the 8 & 4 Will. 4. c. 98, as the proviso or condition, upon the observance of which, "any society or partnership, although consisting of more than six persons, might carry on the trade or business of banking in London, or within sixty-five miles thereof;" and the question immediately before us is, whether this restriction is framed in such terms as to comprise, within its limits and extent, the transaction stated in the case.

Upon the part of the defendants, it is contended, that the facts stated in the case do not bring the transaction within the restriction of the statutes. And, as the three principal objections which have been urged are grounded upon the language used in the statute of Anne, we will consider them in their order.

In the first place, it is objected, that the statute of Anne, using the term "bills" simply, and without any addition, must be construed to intend "bills sealed or obligatory," or, as they are commonly termed, single bills; and that, by reference to the two former acts, passed in the preceding reign, for the establishment of the Bank of England, bills of exchange cannot be held to be included within the word bills, without any addition. In the second place, it is objected, that no case can fall within the meaning of the restriction, unless where the transaction is such as to import "a

borrowing" on the part of the copartnership; which, as it is argued, cannot be said to exist on the present occasion. And, thirdly, it is objected, that even if the defendants can be held to have "borrowed" by accepting the bill, yet that they have not borrowed "on *their* bill," which is required by the statute.

With respect to each of these objections, it may be advisable, in order to discover the views of the legislature, to consider, first, the statute of Anne, taken by itself, and next, some of the subsequent acts passed *in pari materid*, in order to discover whether they throw any light upon the language originally employed in the first statute, or make any legislative alteration therein by subsequent enactment.

And, with respect to the first objection, we think there must be considerable doubt as to the soundness of the construction contended for by the defendants, where it is observed, that the statute of Anne is not speaking, in the clause under consideration, of bills or notes of the Governor and Company of the Bank of England, but of bills or notes of any other bodies politic or corporate, and of persons united in copartnership to a greater number than six. It is therefore no necessary inference, that by "bills" the statute meant such bills only as the Bank of England were in the habit of issuing; but all other bills might equally be included. But again, the restriction relates to bills of persons in copartnership; but, as such persons can have no common seal, it would seem, to say the least of it, very improbable, that the statute could have intended bills sealed with the several seals of a copartnership, consisting of persons exceeding the number of six to an indefinite extent; sealed bills, by an indefinite number of private partners, never having been heard of in the course of trade—certainly never as a medium of circulation; the very necessity of proof of so many separate sealings (the law of England not allowing any one partner to seal for others under an implied authority) rendering the recovery on such instruments almost impracticable. Again, neither the bills sealed by other bodies corporate, or by copartners, were negotiable instruments, not being transferable by indorsement under the hand of the holder, the power

given for transferring such sealed bills by indorsement being limited by the statute to the case of sealed bills of the Bank of England. To construe the restriction, therefore, as limited to sealed bills of copartners, would be to legislate against a danger which could not by possibility exist. Again, the manifest object of the restriction was, to prevent the circulation of negotiable paper, of whatever description it might be, which might come into competition with the circulating paper of the Bank of England. To prohibit, therefore, the issue of such bills only as corresponded in precise form with those adopted by the Bank, and to permit the issue of bills of any other form, would have fallen short altogether of the object professed by the restriction; it would have conferred no advantage whatever on the Bank, nor any security to public credit. We therefore think, looking at the statute of Anne alone, the sounder construction is, that in using the general expression, "bills or notes," it was the object of the legislature to comprise within the restriction all negotiable instruments which could fall, in common understanding at that time, within either of those denominations. And again, when it is further considered, that within three years before the passing of the statute of Anne, promissory notes and inland bills of exchange had been put by the legislature upon the same footing, we think the expression of bills and notes may, with more propriety of construction, be held to comprise bills of exchange, than be confined to bills under seal.

But, in order to arrive at the meaning of the prohibition in the present statute, (3 & 4 Will. 4.) which is borrowed from the statute 6 Anne, the acts passed by the legislature, *in pari materid*, between the two, may be referred to with great advantage. The question is, whether the expression, "bills or notes," found in both those acts, is confined to bills sealed, and promissory notes. The affirmative of that proposition is contended for by the defendants, on the ground of the language employed by the legislature in the two earliest Bank Acts; do the subsequent acts bear out, or impugn, that construction? The statute which appears to us to throw the greatest light on the question, is the 15 Geo. 2.

c. 13. The 5th section of that act, which recites, that it is passed "to prevent doubts that may arise concerning the privilege or power given by former acts to the Governor and Company, of exclusive banking, and also in regard to the erecting any other bank or banks by parliament, or restraining other persons from banking, during the continuance of the said privilege," and it then proceeds to declare, that it is the true intent and meaning of this act, "that no other bank shall be erected, established, or allowed by parliament; and that it shall not be lawful for any body politic," &c., to borrow, owe, or take up any sum or sums of money on "their bills or notes," payable, &c. as stated in the statute of Anne. Now, in the 12th section of the very same statute, the word "bill" requires manifestly the construction, of a bill not under the seal of the company, but an ordinary bill of exchange. It is an enactment, that "if any officer or servant of the company, intrusted with any note, bill, dividend warrant, bond, deed, or any security, money, or other effects belonging to the said company, shall embezzle any such note, bill, dividend warrant, bond, deed," &c., such person shall be guilty of felony. It appears to us, that the words, "note" and "bill," when occurring without any addition in the 12th section, must be held to mean, not bills sealed only, but bills of exchange; and if so, the same expression, "bills or notes," occurring in the 5th section, which is expressly stated to have been passed to prevent any doubts as to the privileges given by former acts, must receive the same construction.

The statute next in order of time, to which reference may be made, for the purpose before adverted to, is that of 7 Geo. 4. c. 46. By that statute, it is recited that the Bank of England had consented to relinquish so much of their exclusive privilege of banking, as prohibits more than six persons in England acting in copartnership from borrowing, owing, &c. at a greater distance than sixty-five miles from London, upon certain conditions therein specified. One of those conditions is stated, in section 3, to be this, that such co-partnerships do not borrow, owe, or take up in London, or within sixty-five miles thereof, any sum of money on any

bill or promissory note of any such co-partnership, payable on demand, or at any less time than six months from the borrowing thereof, "nor make or issue any bill or bills of exchange or promissory note of such co-partnership, contrary to the provisions of the recited act of the 39 & 40 Geo. 3." These last words plainly shew that bills of exchange are within some of the provisions of 39 & 40 Geo. 3. But upon reference to that statute, no words are found to comprehend them, except the expression so often adverted to, "bills or notes." The very same section further provides, that it shall not extend to prevent such co-partnership, (that is, a co-partnership carrying on their business as bankers beyond sixty-five miles from London,) by any agent, from discounting in London, "any bill of exchange not drawn by or upon such co-partnership, or by or upon any person in their behalf." Now, the manifest object of the introduction of this negative was to let it appear clearly to the world, that the circulation in London of bills of exchange at short dates, upon the credit of such country co-partnerships, either as drawers or acceptors, was excluded from the benefit of the proviso. And the anxiety upon this subject is further manifested by the provision contained in the second section, that such country co-partnerships shall not draw upon any person resident in London, any bill of exchange which shall be payable on demand, or for less than 50*l*. With such an object in view, it can scarcely be conceived to be within the intention of the legislature, that a bill of exchange at twenty-one days for 25*l*. (as is the present case, or as it might be at three days, for 5*l*., for the argument is precisely the same,) might be accepted by a banking co-partnership in London, and circulated in London, upon their credit, without any violation of the prohibition in the same statute, to owe money on such bill.

Lastly, to take into consideration the recent statute, 3 & 4 Will. 4, the 3rd section of that statute, after reciting the intention of the act to be, that the Governor and Company of the Bank of England should, during the period stated in that act, (subject, nevertheless, to such redemption as was described therein,) continue to

hold and enjoy all the exclusive privileges of banking given by the said recited act of the 39 & 40 Geo. 3, as regulated by the said recited act of the 7 Geo. 4, or any prior or subsequent act or acts of parliament, but no other or further exclusive privilege of banking: and that doubts had arisen as to the construction of the said acts, and as to the extent of such exclusive privilege; and it was expedient that the same should be removed; it was therefore declared and enacted, that any body politic or corporate, or society, or company or partnership, although consisting of more than six persons, might carry on the trade or business of banking in London, or within sixty-five miles thereof, "provided that such body politic, &c. do not borrow, owe, or take up in England, any sum or sums of money on their bills or notes, payable on demand, or at any less time than six months from the borrowing thereof."

Here is a modern act of parliament, in which the expression of "bills or notes" is found to occur. Suppose that statute had stood alone; could any one, at this time of day, hesitate in construing it to intend "bills of exchange and promissory notes"? And when we find the expression in the section which recites, that doubts had arisen as to the construction of the former acts, and as to the extent of the exclusive privilege, we think it amounts to a legislative declaration, that the words in the former statutes are to be construed in the sense which the same words import, at the time when the new statute speaks.

But the second objection grounded upon the words of the original statute, and upon which the principal reliance appears to have been placed in the course of the argument, is, that the transaction stated in the case, cannot be held to be "a borrowing;" that the acceptance by a banker of a bill drawn upon him by his customer at a distant day, for the payment of his, the customer's, money, placed in the banker's hands, is no loan to the banker, and, consequently, no borrowing by him, but merely a mode of payment to the customer of what is his own. But it appears to us, in the first place, that the acceptance of the bill under the circumstances stated in the case, is to be considered as a borrowing in point of

law. By taking the acceptance, the customer consents that his money shall remain in his banker's hands until the bill becomes due; he has no power or right, after receiving the acceptance, to change his mind, cancel the acceptance, and compel the banker to pay his money on demand. The drawing and accepting the bill forms a contract between the drawer and acceptor, which can only be rescinded by the mutual consent of both: for what would be the condition of the banker who may have lent the money of his customer on the faith of the forbearance given, if the law were otherwise? The relative position, therefore, of the customer and the banker, seems undistinguishable as to its legal consequences, in any material respect, from that of lender and borrower.

But "borrow" is not the only word employed by the statute. The words used are, "provided they do not borrow, owe, or take up." Now, we consider these latter words as put in apposition with the word "borrow," for the purpose of expounding the meaning in which the legislature intended to employ the first term. For if "owe, or take up," had been used in a sense essentially different from "borrow," the frame of the proviso must be held to be incomplete. There is, upon that supposition, no length of time expressed in the statute, from the "owing or taking up," short of which time the bill or note cannot legally be drawn; for the proviso prohibits such bills or notes only as are payable on demand, or at a less time than six months, "from the borrowing thereof." The meaning of the term "borrow" must, therefore, be taken to have been considered by the legislature as substantially the same as that of the terms "owe or take up," with which it is put in juxtaposition; and that the transaction amounts to an "owing" of money by the banker to his customer, can admit of no doubt.

Whenever the drawee of a bill of exchange accepts it, he becomes a debtor to the holder of the bill to the amount of the sum specified in the bill, and the holder gives credit to the acceptor to that amount until the maturity of the bill. The relation of debtor and creditor thus created by acceptance of the bill, appears to be considered by the legislature as equivalent to an actual borrowing of the money owed on

the one hand, and credited on the other. That such was the opinion of the Court of King's Bench, appears from the case of *Broughton v. the Manchester Waterworks Company*, which was much referred to in the course of the argument; in giving judgment in which case, each of the learned Judges states in effect, "that the acceptance made the company debtors, and to owe upon their bills."

It was objected, in the third place, that even if there was a borrowing by the defendants, yet they have not borrowed "on their bills;" and that the statute prohibits only a borrowing "on their bills or notes." But we are of opinion, that if the bankers are to be held borrowers, and the acceptance of the bill drawn upon them is the security they give for the debt, they do, in common parlance, borrow on their bills when they borrow on their acceptances. The acceptor is as much a party to the bill as the drawer; indeed, he is the person primarily liable on the bill as soon as he becomes a party to it, by giving his acceptance. But after all, the expression both in the statute of Anne, and the subsequent acts, of "their bills or notes," may only have been used to distinguish them from the bills or notes of the Bank of England. And if the interpretation of the statute could be otherwise held, what an easy mode would be opened for evading the prohibition of the statute.

It was insisted upon, in the course of the argument, that the holding of the acceptance stated in the case to be illegal, would invalidate the security of all transactions on bills of exchange, where the acceptors consisted of a partnership of more than six persons; for that no man could tell, by looking at the bill, at what period the time of borrowing took place, or whether the bill had six months to run from such time or not. The first answer to this objection is, that the difficulty does not occur in the present, or in any case, where the bill is drawn at less than six months from its date; for in such case, every person must know that the bill had been accepted within six months from the borrowing. Secondly, that although, if a bill should be drawn at a longer period than six months, and accepted within six months next before the time of its maturity, the transaction would

be a violation of the provisions of the statute, and all persons who were privy to it would be prevented from enforcing the acceptance, still such violation of the prohibition of the statute would not affect a *bond fide* holder without notice. If bills of exchange, so accepted, cannot lawfully be issued, the danger of their being employed as circulating paper cannot be great; but, on the other hand, if bills at very short dates may be lawfully accepted, it is obvious that a paper circulation might be created by such bills, almost equivalent to a circulation of promissory notes payable on demand.

Notwithstanding, therefore, the objections which have been urged on the part of the defendants, to this construction of the clauses above adverted to, we are of opinion, that the acceptance stated in the case falls within the prohibition contained in the statute of Will. 4: and we feel no doubt that it falls within the mischief which the statute of Anne, and all the subsequent acts, intended to provide against—viz. the permitting any other body corporate, or any partnership, consisting of a large number of persons, to enter into competition with the Bank of England by the issue of notes or bills either payable on demand or at short periods from their issue.

This construction of the prohibitory clause, gives a real benefit and protection to the Bank of England; and that something real and substantial was intended to be given by the legislature, on the one hand, and was, on the other hand, thought and believed by the Bank of England to be given to them, is evident, from the constant repetition, in all subsequent acts, in the same words, of the identical provision contained in the statute of Anne; for if not a real privilege, why was it continued to be inserted?

The construction contended for by the defendants, that it must be confined to bills under the seals of the co-partners, gives in reality no benefit or protection at all, at the present period, if it ever could have given any.

But it is not only to be considered that such was the sense in which Parliament and the Bank of England, who may be considered as the contracting parties, understood the provision, but such also has been

the general understanding of all, at the time the first act passed, and from thence to the statute of Will. 4. For no instance can be pointed out, until the present, in which a banking co-partnership, consisting of more than six in number, have been found, in the course of their dealing as bankers, to accept bills of exchange payable at a less interval than six months from their acceptance. And if no other argument was brought forward, we attribute great weight to the maxim of law, *contemporanea expositio fortissima est in lege*.

Upon the whole, therefore, we shall certify to the Master of the Rolls the opinion of the Judges who heard the argument to the effect above stated.

The following certificate was afterwards sent:—

“We have heard this case argued by counsel; and are of opinion, that the acceptance by the London and Westminster Bank, of the bill mentioned in the case, was not lawful, regard being had to the provisions of the act 3 & 4 Will. 4. c. 98. and the other acts passed and now in force respecting the Bank of England.

“N. C. TINDAL.

“S. GASELER.

“J. VAUGHAN.

“J. B. BOSANQUET.”

1837. }
January. } JAMES V. SALTER.

Limitations—Distress—Annuity.

A distress for the arrears of an annuity, created by will, must be made within twenty years next after the right of the party distraining first accrued, according to the 2nd section of the 3 & 4 Will. 4. c. 27, that section not being qualified or controuled by the 3rd section; and the cases specified in the latter section being put merely as instances of doubt and difficulty, not excluding cases not mentioned in such enumeration from the operation of the 2nd section.

Though the defendant, in his replication to the plea in bar to the avowry, abridges the amount of the arrears, for which he has distrained and avowed, from 29 years to 19½ years, such abridgment will not avail him, as it has no bearing on the fact, appearing from the record, that no distress was made

for 29 years after the right to distrain first accrued.

Replevin for goods, &c. For the declaration and pleas in bar, vide 2 Bing. N.C. 505, and 5 Law J. Rep. (N.S.) C.P. 112. The only difference was, that, upon the present occasion, a plea, that the distress was not made within six years after the arrears became due, was put upon the record, for the purpose of bringing the case within the 42nd section of the statute 3 & 4 Will. 4. c. 27. The rule for a new trial being, on that occasion, made absolute, the present question arose upon a special verdict, found on the second and fifth issues. The second issue was, whether the distress, so far as related to 585*l.*, part of the money in the avowry and the cognizance mentioned, was made within 20 years next after the time at which the right to make a distress for the said sum of 585*l.* and every part thereof, being arrears of the said annuity, yearly rent, or sum of 30*l.*, first accrued to the defendant John Salter; and the last issue was, on the question whether the distress in the avowry and cognizance mentioned was made at any time within six years next after the arrears, in respect of the said annuity, yearly rent, or sum of 30*l.*, first became due.

The special verdict set out the will of J. Salter, the father of the defendant, in which he charged his freehold property with the annuity for which the distress was made—and the death of the father, in 1804, without altering or revoking the will. It further stated, that on the 17th of March defendant and his bailiff took the goods and chattels referred to, for and in the name of a distress for 870*l.*, for 29 years' arrears of the said annuity, or yearly rent, or sum of 30*l.*, ending at Christmas 1834; and the defendant Salter never received any part of the said annuity.

Crowder, for the plaintiff.—The avowant contends that he had a right to distrain, as this case is not within the 3 & 4 Will. 4. c. 27; which proposition is, in some measure, supported by the opinion intimated by the Court upon a former occasion. But the title of the act, and an examination of the 1st, 2nd, and 3rd sections, will shew that this construction of the act is erroneous. The first section enacts, “that the word

rent shall extend to all heriots, and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land, except," &c. It is enacted by the 2nd section, "that after, &c. no person shall make an entry or distress, or bring an action to recover any land or rent but within 20 years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims, nor within 20 years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same." Now, this section, in positive terms, includes the present case. Its expressions are sufficiently wide; and, if it stood alone, could there be a doubt of this annuity being barred? But the argument is, that the 3rd section is to give the proper construction and interpretation to the 2nd; and, as that gives certain instances with regard to the time when the right to make an entry or distress shall be deemed to have first accrued, and these instances do not apply, it is out of the statute. The instance in the 3rd clause, which, it is said, should comprehend this case, is "when the person claiming such land or rent shall claim in respect of an estate or interest in possession, granted, appointed, or otherwise assured by any instrument, then such right shall be deemed to have first accrued at the time at which the person claiming, &c. became entitled to such possession or receipt by virtue of such instrument:" and it is contended, that this cannot include the present case, inasmuch as it is enacted in the clause, "that the instrument by which the estate or interest, &c. is granted is to be *other than a will*." But it is submitted, that such could not be the intention of the legislature. The words are to be construed according to the nature of the instrument by which the interest is assured; and this being a future interest, when the will was executed, and not coming into possession until the death of the testator, the case is within the words of the clause, "and when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest,

and no person shall have obtained the possession or receipt of the profits of such land, &c., then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession." Besides, will not the Court take into their consideration the possibility of a will being kept back for years? Upon this part of the case is incumbent upon the defendant to show, by positive, not inferential determination, that the 2nd section is regulated and qualified by the 3rd. An additional argument in support of the construction contended for, may be established by referring to the 40th section, which enacts, "that no legatee shall be sued for but within 20 years next after a present right to receive the same shall have accrued." As the present is a case of an annuity, granted by will, and by the legislature, it is probable, intended that the same period of time should be a limit for bringing actions for the recovery of that which is derived from the same source, and assured by the same instrument. With regard to the plea which has been put upon the record, to bring the case within the 42nd section of the statute, it is sufficient to observe, that if the case were within the 2nd section, such plea must be unavailing, as, under such circumstances, the annuity would be barred altogether. At all events, the defendant cannot recover more than six years of arrears, the time limitation being in this case six years, regulated by the 42nd section of 3 & 4 Will. 4. c. 27, and not extended, as in *Paget v. Foley* (1), to 20 years, under the 3rd section of 3 & 4 Will. 4. c. 42, which, according to the authority above cited, operates as a repeal, *pro tanto*, of the 42nd section of 3 & 4 Will. 4. c. 27.

Butt, contra, urged, that the real question was, whether that which was raised on the second issue was pleadable in respect to the estate or the rent; and it was necessary to consider whether the admission of the plea brought the case within the 42nd section, as it was clearly the intention of the legislature, that rent should not be recoverable for a longer period than six years, in cases to which that section could be said to apply. An argument, in favour of

(1) 2 Bing. N.C. 679; s. c. 5 Law J. Rep. (C.P. 258.

plaintiff, has been attempted to be raised, from a supposed analogy between the 2nd and 40th sections; but if the case is not within the 2nd, it is perfectly clear that it is not within the 40th, as this section does not refer to annuities or rent-charges, but to sums of money in gross, secured by mortgage or otherwise, charged upon or payable out of land, &c. Rent, it must be admitted, does include annuities, and the sum sought to be recovered here is not a principal sum in the sense referred to in the 40th section. It is the amount of the annuity accruing from year to year. It has been said, that if the 2nd section stood alone, there would be no doubt upon the subject: but the 2nd section is to be taken in conjunction with, and qualified or extended by, the 3rd, which explains its signification and meaning; and the general intention of the legislature is to be collected from the provision of that 3rd section, comprised in the words "other than a will;" and thereby excluding a will. In fine, the cases as to the time when the right first accrued, adverted to in the 2nd section, are specified in the 3rd; and, as the present is not found amongst them, but, on the contrary, is excepted, it follows that the matter is altogether out of the statute, and the judgment of the Court should be for the defendant.

TINDAL, C.J. observed, that the main question for the consideration of the Court was, whether the matter contained in the second plea in bar brought the case within the 2nd section of the statute; if it did, the plaintiff was entitled to judgment.

Cur. adv. vult.

TINDAL, C.J.—The question which has been argued before us, arises upon a special verdict found on the second and last issues, raised between the parties to this action: the second issue being upon the question, "whether the distress, so far as relates to 585*l.*, part of the money in the avowry and cognizance mentioned, was made within twenty years next after the time at which the right to make a distress for the said sum of 585*l.*, and every part thereof, being arrears of the said annuity, yearly rent, or sum of 30*l.*, first accrued to the defendant John Salter;" and the last issue being on the question, "whether

the distress in the avowry and cognizance mentioned, was made at any time within six years next after the arrears in respect of the said annuity, yearly rent, or sum of 30*l.*, first became due." Of these two issues, the first appears to us to be the principal, and, indeed, the only important one; for if the plaintiff is entitled to judgment in his favour on that issue, the right and title of the defendant Salter to the annuity is altogether barred, and he cannot, in any view of the case, be allowed to recover the arrears for the last six years, to which the pleadings on which the last issue is raised, can be held to apply.

The facts which are found by the special verdict, on the two issues, are few and simple. That John Salter, the father of the defendant of that name, by his will duly made and published, devised the property therein mentioned, to trustees, to the intent that they should, out of the rents and profits, pay to John Salter the defendant, during the term of his natural life, an annuity or clear yearly rent of 30*l.* by four quarterly payments, to commence on the first quarterly day of payment after his decease; with a power of distress if the annuity should be in arrear for twenty days next after any quarterly day of payment. That the testator died in 1804, without having revoked or altered his will; and that, on the 17th of March 1835, the defendants distrained for 370*l.*, for twenty-nine years' arrears of the annuity, ending at Christmas, 1834.

On this state of facts, it appears that the right to make a distress for the annuity first accrued to John Salter, the son, on the expiration of the twenty days next after the first quarterly day of payment subsequent to the testator's death, that is, at the very latest, some time in April 1805. It also appears, that so far as there is any allegation on the record, or any finding by the jury, there was no payment or receipt of the annuity by the defendant Salter, before the distress was put in in March 1835; for it was then put in by the defendant for the whole of the arrears since the death of the testator. And although the defendant has, by his own voluntary act, in his replication to the plea in bar, abridged the amount of the arrears for which he had distrained and avowed, that is, from twenty-

nine years to nineteen years and a half, still this act of the defendant has no bearing on the fact, appearing from the record, that no distress was made for twenty-nine years after the right to distrain first accrued.

Now, upon reference to the statute 3 & 4 Will. 4. c. 27, it appears to have provided two distinct periods of limitation, within which, all distresses for arrears of annuities must be made, the two periods being prescribed in respect of claims and objects in their own nature perfectly distinct. The second section contemplates and provides for the case where the right or title to the annuity itself is disputed, and directs "that no person shall make a distress for any rent, but within twenty years next after the time at which the right to make such distress, shall have first accrued to the person making the same." The 42nd section contemplates and provides for the case, where the title to the annuity is not disputed, but the distress is made for the arrears due; and for that purpose directs, "that no arrears of rent shall be recovered by any distress, but within six years next after the same respectively shall have become due." The second issue arises upon a plea in bar, framed upon the 2nd section; the last issue arises upon a plea in bar intended to be framed, though not accurately or aptly framed, on the 42nd section.

Now, with respect to the second issue, it is manifest, that the facts found in the special verdict, will bring the case precisely within the provision of the 2nd section of the act, unless that section is to be governed and controuled, not simply explained and construed, by the 3rd; that is, unless the 3rd section does, in terms, exclude from the operation of the 2nd, the claim of any person whose right to a rent is derived under a will, by reason of the words "other than by will," which are found in the 3rd section. And when this case was originally before the Court upon a motion for a new trial, after the rule had been made absolute, upon a ground perfectly distinct from that which is now before us, an opinion was expressed by the Judges then in court, that the present case was excluded from the operation of the 2nd section, by reason of its not being comprehended within the 3rd; which 3rd

section appeared to us, upon a mere hasty view, to contain an enumeration of instances to which only the 2nd section could be held to be applicable. For myself, however, I am ready to admit, and I am authorized at the same time, to say the same for my three Brethren who were then in court, that the further argument which we have heard on this point, when brought directly before us for judgment upon the record, and the further opportunity for consideration which has been afforded us, has induced us to alter the opinion we then formed, and that we think, (in which my Brother Vaughan entirely concurs with us,) that this case is governed by the 2nd section of the statute, which, under the facts found in the special verdict, affords a bar to all claim and title to the annuity.

That the case must have been governed by the 2nd section, if that section had stood alone, cannot be doubted; and, upon a more close examination of the 3rd section, the object and intent of it seems to us, to be no more than this—to explain and give a construction to the enactment contained in the second clause, as to "the time at which the right to make a distress for any rent shall be deemed to have first accrued," in those cases only in which doubt or difficulty might occur: leaving every case which plainly falls within the general words of the 2nd section, but is not included amongst the instances given by the 3rd, to be governed by the operation of the 2nd. Many reasons concur to shew that such must be the just construction of the act. In the first place, if it had been intended that the 3rd section should limit the application of the 2nd to those cases, and those only, which are enumerated in the 3rd, it might justly have been expected that words would have been employed to express clearly and distinctly such an intention: but in this section there are no words that can be said directly to exclude all instances except those enumerated in the 3rd section. Again, if the words, "granted by any instrument other than by will," were to be held to prevent the application of the statutory limitation of twenty years to claims of land or rent granted by will, it would be at direct variance with other parts of the statute, for the instance in the 3rd section, immediately

following that now under consideration, which provides for cases of claims, in respect of estates in reversion or remainder, "or other future estates or interests," is large enough to comprehend, and would comprehend, all executory devises; and, again, section 40 expressly provides for the case of any legacy. And, indeed, the words, "by any instrument other than by will," carry the matter no further than if the 3rd section had proceeded, by attempting to enumerate every species of instrument by which an estate in land or rent could have been granted, and had omitted to mention a will; in which case the only inference that could be drawn from such omission would have been, that the case not being enumerated in the 3rd section, fell back upon the general provision contained in the 2nd. Indeed, unless this is held to be the true construction, the case, which is likely to occur perhaps with the most frequency, viz. the devise of an estate in possession in land, or of an estate in possession in a rent-charge first created by the will, would be altogether unprovided for by the statute; for the third class of instances, enumerated in section 3, describes the grant to be, "by a person being in respect of the same estate or interest in the possession of the receipt of the rents or profits of the land, or in the receipt of the rent," a description which cannot apply to the case of a devise either of a particular estate in land, or of a newly-created rent: for the devisor, who has by his will carved an estate in land out of the estate whereof he was seised, can never be said to have been possessed in respect of the same estate or interest as that claimed by the devisee; still less can the devisor, who creates a new rent-charge by his will, be said to have been in the receipt of the rent. The case therefore under discussion, not falling within the 3rd section, but falling within the clear and unambiguous terms of the 2nd, we hold to be governed thereby; and that the claim and title of the defendant, Salter, to the annuity, is barred by the lapse of twenty years since his right to distrain first accrued, and that the verdict upon the second issue must be entered for the plaintiff.

As to the last issue, founded upon the

limitation of six years, given by the 42nd section, it becomes of little importance whether the verdict thereon be entered for the plaintiff or the defendant, any further than as the costs dependent on that issue are affected by such finding; for, there being but one avowry, and the plaintiff being entitled to judgment on the issue raised on one of his pleas in bar, the avowant's claim of a return of the cattle, &c. is completely barred, whatever may become of the other pleas in bar.

Now, taking the last issue as if it stood alone, which appears to be the correct mode of considering the question, and apply thereto the finding in the special verdict, we think it appears that the distress was made within six years next after the arrears of the annuity became due. For upon the last issue there is no objection made to the avowant's right or title to the annuity itself, but simply to the amount of arrears claimed beyond those of the last six years, and the distress was evidently made within time for the last six years.

We therefore think the verdict on the last issue must be entered for the defendant; but that, upon the whole record, the judgment must be for the plaintiff.

Judgment for the plaintiff.

1837. } STANHOPE v. FIRMIN AND
Jan. 11. } EVORY.

Attorney—Authority.

If an attorney appear and defend a cause for a party without his knowledge or authority, and an execution be levied upon him for the costs, the Court, upon its being certified by the Prothonotary to whom the matter has been referred, that the attorney is insolvent, will order the sum levied to be returned by the plaintiff.

In this case, an application was made, upon the part of the defendant Evory, to have a sum of money, which had been levied on his goods for costs, returned by the plaintiff, upon the ground, that the attorney Wright had appeared and defended the action without his, Evory's, authority or knowledge.

The COURT desired that the matter should be referred to the Prothonotary, for the purpose of ascertaining the circumstances of Wright,—vide 3 Bing. N.C. 301, and 6 Law J. Rep. (N.S.) C.P. 12;—and it appearing, upon the report of the officer, that the attorney was in a state of extreme indigence and poverty,—

The rule was, upon the motion of *The-siger*, made—

Absolute.

1837. } In the matter of BEESLY'S
Jan. 12. } BAIL.

Bail—Bill of Exchange.

The drawer of a bill is competent to become bail for the acceptor, in an action against him for non-payment of the bill.

Upon the justification of bail in this case by affidavit, it was objected by—

Andrews, Serj., that one of them was incompetent, he being the drawer of the bill, against the acceptor of which the action was brought. He referred to *Barnesdale v. Stretton* (1), and *Anonymous* (2).

W. H. Watson, contra, submitted, that there could be no objection to the bail, as he was not the party originally liable, as was the case in 1 Dowl. P.C.

[*BOSANQUET*, J. referred to *Arch. Prac.* 3rd edit. 168, and to *Harris v. Manley* (3), where the Court, (*absente* Lord Alvanley, C.J.,) held, that the indorser may be bail for the drawer of a bill in an action against him upon the same bill.]

The COURT were of opinion, that the circumstance of the party being the drawer of the bill, was not a valid objection to his being bail for the acceptor, in an action against him on that bill. The case of *Barnesdale v. Stretton*, which alone occasioned any doubt, was, upon inspection, found not to apply; it was there held, that a person liable on outstanding dishonoured bills, not renewed, or the right of proceed-

ing against him not suspended, cannot justify as bail (4).

Bail justified accordingly.

1831. } WOODROFFE v. WOOTTON AND
Jan. 31. } ANOTHER.

Set-off—Jurisdiction.

An application to set off a portion of a debt, secured by a judgment in this court, against the costs incurred by the dismissal of petitions presented by the plaintiff against the defendants in the Court of Bankruptcy, must be made to the latter court.

The plaintiff having presented two petitions respecting the defendants, in the Court of Bankruptcy, which had been dismissed with costs,—

Hoggins, on the part of the plaintiff, had obtained a rule, calling upon the defendants to shew cause why a portion of a debt of 780*l.*, due from the defendants to the plaintiff, and secured by a judgment of this Court, should not be set off against the costs of the unsuccessful petitions in the Court of Bankruptcy.

Barstow shewed cause, submitting, that the application should have been made to the Court in which the costs had been incurred. The granting of such an application would amount to an injunction restraining the defendants from availing themselves of the authority of the Court in which they had succeeded.

Hoggins, contra, relied on the case of *Webber v. Nichols* (1), where it was held, that the costs in a suit in equity might be set off against the costs of an action in this court.

Per Curiam.—The application should not be made here. How can we stay the proceedings of another Court?

Rule discharged, without costs.

(4) See the reasons stated in the judgment of Bayley, J., in that case.

(1) 4 Bing. 17; s. c. 5 Law J. Rep. C.P. 19.

(1) 2 Chit. Rep. 79.

(2) 1 Dowl. P.C. 183.

(3) 2 Bos. & Pul. 526.

1837. { PONTET, SURVIVING EXECUTOR
 Jan. 18. { OF GALLARD, v. THE BASINGSTOKE CANAL COMPANY
 (1).

Covenant—Company—Navigation.

A canal company were authorized by statute to raise money by an instrument under their common seal, upon the security of the undertaking, rates, duties, &c., by way of mortgage, so as that all who advanced money should be creditors in equal degree, and no preference be given to any, in respect to the priority of advancing their money or the dates of their securities. It was provided in the deed-poll, given in pursuance of the statute, by which money advanced by the plaintiff to the company was secured, that the interest should be paid half-yearly. The assets of the company not being sufficient to discharge all their debts:—Held, that an action of covenant against the company for arrears of interest was not maintainable; the plaintiff's remedy being against the undertaking, rates, duties, &c., under the statute.

The declaration alleged, that the defendants, the company of proprietors of the Basingstoke Canal Navigation, on the 26th of September 1793, according to the statute in such case made and provided, made their deed-poll, sealed with their common seal, and now shewn to the Court here, the date whereof was, &c., and thereby made known to all to whom these presents should come, that in pursuance and by virtue of an act of parliament made and passed in the 33 Geo. 3, entitled, 'An Act for effectually carrying into execution an Act of Parliament of the 18th year of his present Majesty, for making a navigable canal from the town of Basingstoke, in the county of Southampton,' &c., and also of an order made at a general assembly or meeting of the said company of proprietors, held on the 15th of April 1793, and in consideration of the sum of 100*l.* to them advanced, and paid by J. Gallard, the receipt whereof was thereby acknowledged, the said company of proprietors had granted and assigned, and by that

present instrument or writing, under their common seal, did grant and assign, unto the said J. Gallard, his executors, administrators, &c., all the said navigation and undertaking, and the rates or duties granted, and made payable by the said act of the 18th of the reign of his Majesty, and all their property, estate, right and interest therein, to hold the same unto the said Gallard, his executors, administrators, &c., until the said sum of 100*l.*, together with interest for the same, at the rate of 5*l.* per cent. per annum, to commence from the 24th of June then last past, and to be paid half-yearly, that is to say, on the 25th of December and the 24th of June in every year, should be fully paid and satisfied. After two other counts, upon similar deeds, the plaintiff alleged, that after the making of the said deeds, the defendants did not keep their covenant in the same, in this, to wit, that the interest on the said sum was not paid according to the said deeds, and that, on the contrary thereof, afterwards, to wit, on the 25th of December 1834, a large sum of money, to wit, the sum of 95*l.*, became and was due and in arrear for interest upon each of the said sums, for a large space of time, to wit, the space of nineteen years, before then elapsed, contrary to the force and effect of the said several deeds, and the covenant in each contained, to the damage, &c.

Plea—To the first count, that the deed-poll, therein mentioned, was made and executed by them, the defendants, for the purpose of securing to the said Gallard, therein named, the repayment of a certain sum of money, to wit, 100*l.*, borrowed by them of him for the purpose specified in and by the said act, made and passed in the 33 Geo. 3, and interest thereon; that the said deed-poll was made and executed by the defendants, pursuant to the provisions in that act contained, by reason whereof J. Gallard became and was, and the plaintiff, as surviving executor as aforesaid, still is entitled to all the privileges and benefits of a claim or lien on the navigation and undertaking, rates and duties mentioned in the said act of 18 Geo. 3; that the defendants had, in like manner, borrowed from divers other persons divers large sums of money, amounting in the whole to a large sum of money, to wit, the

(1) Vide 2 Bing. N.C. 370, and 5 Law J. Rep. (N.S.) C.P. 153, where a rule was made absolute, for the inspection by the plaintiff of the books of the company.

sum of 54,270*l.*, and had executed mortgages or assignments for securing the repayment of the same with interest, for the purposes of and pursuant to the said act of 33 Geo. 3. And the defendants averred, that the said last-mentioned sum of money still remained due and unpaid; and that the said last-mentioned persons, their executors, administrators, &c., before and at the time of the commencement of the suit, were and still are entitled to a lien on the said navigation and undertaking, rates and duties, together with the plaintiff as executor as aforesaid; that the whole assets and property of the defendants were insufficient to pay and satisfy the said sum of money and interest in the deed poll, in the first count mentioned, and the said other sums of money so borrowed by the defendants, as in this plea mentioned, and interest thereon; and that, if this plaintiff should succeed in obtaining a judgment in this suit against the defendants, he would thereby obtain a priority over the said other creditors of the defendants, contrary to the form of the statute in such case made and provided (2). Verification.

Similar pleas to the other counts.

Demurrer and joinder.

Erle appeared in support of the demurrer, but the Court called on—

Barstow to support the declaration.—Admitting that the plaintiff is precluded;

(2) 33 Geo. 3. c. 8. 1. enacts, "That it shall be lawful for the proprietors, &c., from time to time, by virtue of an order made at any general assembly, &c., to borrow and take up, at legal or less interest, any sum or sums of money upon the credit of the said undertaking, and the rates and duties granted and made payable by the said act, and, by writing under their common seal, to mortgage and assign over the said undertaking, and the said rates or duties, to the person who shall advance or lend the monies, and his trustee as a security for the money so to be borrowed, together with interest for the same." 3rd section, "That all persons to whom any such mortgage, or assignments, or grants of annuity as aforesaid, shall be made, or who shall be entitled to the money thereby secured, shall be creditors on the said rates or duties, in equal degree one with another, and no preference shall be given to any such creditors, in respect to the priority of advancing their money or the dates of their securities; and the interest of the money to be borrowed, and of the annuities to be granted as aforesaid, shall, from time to time, be paid half-yearly to the persons entitled thereto, in preference to any interest or dividends due or payable by the said company of proprietors, by virtue of the said recited act."

by his own agreement, from maintaining an action against the corporation for the principal, as the security of the navigation, duties, rates, &c. has been given to the creditors for that sum, still he is entitled to recover the interest. For the payment of interest the parties have entered into a covenant, and, upon breach, they are liable in the usual manner. The words of the bond are, that the interest shall be paid half-yearly; and if they do not operate in the manner now assumed, they would be insensible; no meaning whatever could be attached to them; and this, it is evident, was not the intention of the parties. It may be said, that these words do not constitute an express covenant, but there are no particular words necessary to constitute a covenant. In *Com. Dig.* 'Covenant,' A, 2, it is said, "any words in a deed, which shew an agreement to do a thing, make a covenant: as, if it be agreed by articles between A. and B, that stock shall be in the hands of B. until a jointure be made, B. *solvendo proinde* the interest to A; covenant lies against B. for the interest."

TINDAL, C.J.—It is admitted, by the pleadings, that the security given for the money advanced, when the agreement was first made, was upon the undertaking itself. This is abundantly clear from the statement in the declaration, that the said company, &c. did grant and assign unto the said Gallard, his executors, administrators, &c., all the said navigation and undertaking, and the rates and duties granted, &c., until the said sum, together with interest for the same, &c., shall be fully repaid and satisfied. This being so, the executor may avail himself of this mode of procuring payment, that is, he may have recourse to the undertaking, rates, &c., just as he should, if, the interest being paid, he sought to recover the principal. The agreement and contract between the parties are satisfied, by giving this security on the thing itself, not on the corporation security. The one party here gave to the other security on the work on which he speculated. He did not give, as is contended for, personal security, which, in my opinion, it was the object of the statute to prevent. Judgment should be for the defendants.

VABGHAN, J.—I agree. The 3rd section of the statute shews it was not the intention of the legislature that the corporation should be liable to an action. If such were brought, would not a court of equity interpose immediately for the purpose of preventing that priority, which should not, according to the intention of the legislature, be allowed to exist?

Judgment for the defendants.

1837. }
Jan. 18. } LORYMER v. VIZEU.

Pleading—Accord and Satisfaction.

*To a declaration on a charter-party, with a count for the hire of the ship, and on an account stated, alleging as breaches, that the defendant did not load a cargo according to agreement; that he did not pay 200*l.* for the hire of the ship for a certain time; that he did not pay 200*l.* on the account stated;—a plea, that the defendant paid, before action brought, 476*l.* 14*s.* 7*d.*, parcel of the several sums in the declaration mentioned, in full satisfaction and discharge of all the damages by the plaintiff sustained and occasioned by the non-performance of the said promises, and that the plaintiff accepted and received the same in full satisfaction, was held to be bad.*

Assumpsit on a charter-party, with a count on an account stated. The breaches alleged were, the not loading of a cargo at St. Michael's; the non-payment of 200*l.* for four months' freight; the non-payment of a like sum found to be due on an account stated, to the damage, &c.

Plea—as to the sum of 476*l.* 14*s.* 7*d.* parcel of the several sums of money in the declaration mentioned, plaintiff ought not, &c., because, before the commencement of the suit, to wit, on the day and year first aforesaid, the defendant paid to the plaintiff divers monies, amounting in the whole to the said sum of 476*l.* 14*s.* 7*d.* in full satisfaction and discharge of all the damages by the plaintiff sustained on occasion of the non-performance of the said promises, as to the sum of 476*l.* 14*s.* 7*d.* parcel of the several sums of money in the declaration mentioned, and the plaintiff then accepted and received the said sum of 476*l.* 14*s.* 7*d.*

in full satisfaction and discharge of such damages.

Demurrer, assigning for causes, that it did not sufficiently appear in or by the plea, in respect of what counts or parts of the declaration the same was pleaded; or whether the sum of money therein alleged to have been paid, was paid in satisfaction and discharge of all the several causes of action in the declaration mentioned, or of some of those causes only, or, if of some only, in respect of which of those causes of action; by reason whereof the plaintiff was prevented from replying to the plea with any certainty; also, that the plea was defective, in not sufficiently shewing when the sum of money then mentioned was paid; also, that the plea was irrelevant, and an insufficient answer to any of the causes of action in the declaration mentioned, inasmuch as the payment therein mentioned was alleged to have been made before the defendant had committed any breach of any of the promises, as in the declaration mentioned, the words, "the day and year first aforesaid," referring to the time of the making of the charter-party in the first count mentioned; that the plea was pleaded to the damages only, and not in bar of any part of the action; and that it was in other respects informal and insufficient, &c.

Joinder.

Erle, in support of the demurrer, contended, that the question was, whether the plea could be extended to and give an answer to the entire declaration; and it clearly could not, as no reference was made to damages for not taking in a cargo; neither did it shew, with any certainty or precision, to what portions of the demand the payments should be applied. *Mee v. Tomlinson* (1) was decisive of the question. There the plea was held to be bad, for not shewing to how much of the sum in the first count, and to how much of the sum in the second, it was pleaded.

Whately, (who refused to amend,) contra. —The decision in *Mee v. Tomlinson* is not entitled to the weight contended for; as Parke, B., in *Marshall v. Whiteside* (2),

(1) 4 Ad. & El. 262; s. c. 5 Law J. Rep. (N.S.) K.B. 41.

(2) 2 M. & W. 191; s. c. 5 Law J. Rep. (N.S.) Exch. 133.

states the dissatisfaction of Patteson, J. at the judgment in that respect. There is, besides, *Jourdain v. Johnson* (3), where Lord Abinger said, it would be extremely inconvenient to defendants to be more restricted in that respect, than they were under the old practice of paying money into court on the common rule, in place of which this plea is framed; and as it was the constant practice to pay one sum into court generally, on all the counts, he considered it no sufficient reason why this should not be equally done under the new rule. The case is clearly analogous to that in which money is paid into court; and the principle on which both classes are decided, should be unvaried and the same.

TINDAL, C.J.—This plea is intended to be one in accord and satisfaction; and C. B. Comyns, in his *Digest*, 'Accord,' B. 1, lays it down, "that an accord, which makes a good plea, must be in full satisfaction of the thing demanded." This evidently is not the case here; and as the defendant has refused to amend, there must be judgment for the plaintiff.

The other Judges concurring—

Judgment accordingly.

1836. }
June 3. } YOUNG v. MURPHY.*

Breach of Promise of Marriage—Pleading.

In an action against the defendant for breach of promise of marriage, the defendant pleaded first, that after the making of the promise, he was informed, and believed, that the plaintiff was an immodest, lewd, and unchaste person; that she had committed acts of fornication with one H. P., and that she was pregnant by the above-named person, and had been delivered of a bastard child; secondly, that after the promise, she had committed fornication with some person or persons to the defendant unknown, and was pregnant, and delivered of a bastard; wherefore he refused, &c., as he lawfully might:—

(3) 2 Cr. M. & R. 564; s. c. 5 Law J. Rep. (N.S.) Exch. 42.

* This case was decided in Trinity term last.

Held, upon special demurrer, that such pleas were not bad, on the ground of putting matters in issue, and of uncertainty.

The plaintiff declared against the defendant for breach of promise of marriage and alleged that he had intermarried with another woman, who was named.

Pleas—First, non-assumpsit.—Second, that after the making of the supposed promise and undertaking in the declaration mentioned, and before the defendant's term marriage with E. S, in the declaration mentioned, to wit, on the 31st of May 1836, he discovered and received information that the plaintiff was an immodest, lewd, unchaste, and immoral person, and, being sole and unmarried, had had carnal intercourse with, and was carnally known by, had committed fornication with one H. P. of which the defendant had no notice, knowledge, or suspicion at the time of making the supposed promise and undertaking in the declaration mentioned; and he further said, that the information he so received, and had, was true, and that the plaintiff was an immodest, lewd, unchaste, and immoral person, and, being sole and unmarried, had, after the making of the said supposed promise and undertaking in the declaration mentioned, and before his intermarriage with E. S, had carnal intercourse with, and had been carnally known by, had committed fornication with H. P. wherefore the defendant refused to amend, as he lawfully might for the cause aforesaid. Verification.—Thirdly, that after the making of the said supposed promise and undertaking in the declaration mentioned, before his intermarriage with the said E. S, he received information, and had information, that the plaintiff, being sole and unmarried, had committed fornication with some person or persons to him, the defendant unknown, and was pregnant and with child of a child likely to be born, and which was afterwards born a bastard, but of which he had no notice, knowledge, or suspicion at the time of making the supposed promise and undertaking in the declaration mentioned; and the defendant, in fact, said, that the plaintiff, being sole and unmarried, after the making of the supposed promise and undertaking in

declaration mentioned, and before the inter-marriage of the defendant with the said E. S., had committed fornication with some person or persons to the defendant unknown, and had become and was pregnant and with child of a child likely to be born, and which was subsequently born a bastard, wherefore, he, the defendant, did refuse to marry the plaintiff, and did marry the said E. S., as he lawfully might, for the cause aforesaid. Verification.

Demurrer, assigning for causes—That although every plea ought to contain but one answer to the declaration, and not to contain several distinct matters of defence, yet the defendant had endeavoured by his said second plea, to include two answers to the declaration in the same plea, and to include therein two distinct matters of defence to the cause of action mentioned in the declaration, inasmuch as in one part of the said second plea he had alleged that the plaintiff was an immodest, lewd, unchaste, and immoral person, and in another part of the same plea, that she, being sole and unmarried, had had carnal intercourse with, and had been carnally known by and committed fornication with the said H. P.; and also, for that the said plaintiff could not traverse or confess and avoid either of these distinct answers, and matters of defence, without admitting the other of them; nor could she take or offer any certain issue upon the said matters of defence; and also, for that the said plea tended to prolixity in pleading, and could not be answered by a single replication; also, for that the said allegation contained in the second plea, by which it was alleged that the plaintiff was an immodest, lewd, unchaste, and immoral person, was bad, as not sufficiently certain, not giving or conveying to the plaintiff any sufficient or certain information or knowledge as to the manner in which the defendant intended to impeach her modesty, chastity, or morality, or upon what immodest, lewd, unchaste, or immoral conduct of the plaintiff, the defendant intended to rely in support of that allegation, nor would the plaintiff, from such allegation, be in any way prepared to answer the said charge; and also for that the said second plea did not sufficiently state or allege that the plaintiff was an immodest, lewd, unchaste, or immoral person, because she had carnal in-

tercourse with and had been carnally known by, and committed fornication with the said H. P., as mentioned in the plea, or for any other separate and distinct causes or cause, and the plaintiff was, by the said second plea, left in uncertainty as to what particular charge of immodesty, lewdness, unchastity, and immorality, the defendant meant to bring against her by the allegation first above mentioned, and that the second plea was, in other respects, double, uncertain, informal, and tended to prolixity in pleading, and to several issues, and was against the rules of pleading, and also for that the defendant had not stated or alleged in his said second plea, at what time or times the plaintiff committed fornication with the said H. P., as in the second plea mentioned, although that allegation was a material one, and ought to have been stated with sufficient certainty of time; that although every plea ought to contain but one answer to the declaration, and ought to contain only one matter of defence, yet the defendant had endeavoured, by his third plea, to include two answers and matters of defence to the declaration in the said third plea, inasmuch as he had alleged in the said plea, that the plaintiff had committed fornication with some person or persons to the defendant unknown, and then had gone on to allege in the same plea, that the plaintiff had become and was pregnant and with child of a child likely to be born, and which was subsequently born a bastard, while a plea containing either of the above allegations would be a sufficient answer to the declaration; also, for that it was not alleged by whom the said plaintiff had become and was pregnant with the said child, or that the person or persons by whom she was so pregnant, were unknown to the defendant, or that the said pregnancy was the result of the fornication so alleged to have been committed, as in the third plea; also, for that the defendant had not alleged in or by the said third plea, with sufficient certainty, whether he intended to rely on the plaintiff's having committed fornication with one person only, or with more than one, but had stated in the alternative, that she had committed fornication with some person or persons unknown to him; and also, for that the defendant had not stated in his said third plea, with sufficient cer-

tainty, at what time such fornication was committed, or that the time when it was committed was unknown to him, although the committing of such fornication was a material fact, and ought to have been alleged with sufficient certainty as to time.

Joinder.

Peacock, for the demurrer, objected to the duplicity of the second and third pleas, in consequence of which, the plaintiff could not use the general replication, as it would not be a sufficient answer to the various matters which these pleas contained. Such replication would put in issue the fact of the pregnancy; but it would leave untouched the fact of who the father of the illegitimate child was. For aught that appeared, by such mode of pleading, the defendant himself might have stood in such relation, and be entitled to such character; and in such case, according to the opinion intimated by Lord Tenterden in *Irving v. Greenwood* (1), the defendant would be liable. In the case referred to, it was admitted, that after the promise the plaintiff had a child, but it was contended that the defendant was the father; and the Lord Chief Justice told the jury, that if they thought the defendant was not the father, he was entitled to their verdict. Hence it was to be inferred, that in his Lordship's opinion, if the defendant was the father, he was bound to carry his promise into effect.

[*Park, J.* and *Vaughan, J.*, protested at once against the doctrine and the conclusion attempted to be deduced.]

This mode of pleading was also fraught with this inconvenience and mischief to the plaintiff, that she could not know how to shape her evidence so as to meet the allegations of the defendant. The pleading was also liable to the objection of generality, which, in an action of this nature, could not be allowed. The defendant affected to rely upon various acts of immorality, which he did not specify, whereas he should point out the single act on which he meant to rely, and to that act he should be confined. Suppose he had published in a newspaper the alleged reason of his not marrying the plaintiff, and an action were brought against him for so doing, would he be allowed to plead as he has?

He certainly would not. In *J. Anson v. Stuart* (2), where, in an action for a libel, the plea was equally general, Ashurst, J. said, "This plea is bad, on account of its generality. When the defendant took upon himself to justify generally the charge of swindling, he must be prepared with the facts which constitute the charge, in order to maintain his plea. Then he ought to state those facts specifically, to give the plaintiff an opportunity of denying them, for the plaintiff cannot come to the trial, prepared to justify his whole life;" and *per Buller, J.*, "This is contrary to every rule of pleading; for wherever one person charges another with fraud, he must know the particular instances on which his charge is founded, and therefore ought to disclose them." The doctrine thus laid down is not confined to cases of libel; it is equally applicable to the present. The defendant here must be supposed to know the particular acts of unchastity which he has imputed to the plaintiff, and he should state them. A similar doctrine has been adopted and acted upon in *Holmes v. Catesby* (3), and *Jones v. Stevens* (4).

TINDAL, C.J.—There is no analogy between the supposed case and the present. In the case put, the party would be obviously a wrong-doer; and in all the cases cited, which were cases of libel, the defendant was a wrong-doer. Whether or not he is so here is *sub judice*.

Upon the suggestion of the Court, the plaintiff agreed to withdraw the demurrer, and join issue on the pleas.

Taddy, Serj. was to have supported the pleas.

1836. } WILLIAMS AND ANOTHER v.
Nov. 25.* } SHARWOOD AND OTHERS.

Nolle Prosequi—Costs—Bill of Particulars.

*The plaintiffs declared in assumpsit for 3,000*l.* goods sold, with counts for money lent, and on an account stated; and the bill*

(2) 1 Term Rep. 748.

(3) 1 Taunt. 543.

(4) 11 Price, 235.

* This case was decided in Michaelmas term.

(1) 1 Car. & Pay. 350.

of particulars limited the demand to a certain amount, giving credit generally for a certain sum, and the defendants pleaded non assumpsit, a set-off, and payment of money into court. To these pleas, the plaintiffs entered a *nolle prosequi*, and took the money out of court, leaving still an excess of amount claimed in their particulars, over the sum taken out:—Held, that the defendants were entitled under the 33rd section of 3 & 4 Will. 4. c. 42, on the judgment of *nol. pros.*, to the costs of the pleas above referred to, (except that of the payment of the money into court,) and of many other pleas which, by an arrangement between the parties, were not put upon the record, but which were delivered with a Judge's order to the plaintiffs, and were to operate as a particular of what the defendants might give in evidence.

The plaintiffs declared in assumpsit for 3,000*l.*, goods sold, &c., with counts for money lent, and on an account stated. The defendants pleaded twenty-nine pleas, which were in substance as follows:—first, as to all the monies in the declaration except 1,059*l.* 10*s.* 7*d.* non assumpsit;—second, as to 50*l.*, parcel of the monies in the first plea mentioned, except, &c. the delivery by defendants to plaintiffs of a bill of exchange for 50*l.*, and payment to the plaintiffs by the acceptor of the bill for 50*l.* before action. Then followed seventeen pleas similar to the second, stating the payments of different sums by the acceptors of different bills; and seven pleas, varying only from the last seventeen, in stating the payments to have been made after action by different acceptors. Then, a plea of payment as to 860*l.* 16*s.* 1*d.*; a plea of set-off to the whole declaration, except the money paid into court; and, lastly, the plea of payment into court of 1,059*l.* 10*s.* 7*d.*

	£.	s.	d.
The plaintiffs' particular was for..	1,920	6	8
Giving credit generally	483	10	8
Thus reducing their demand to ..	1,436	16	0
Sum paid into court	1,059	10	7
Excess of claim	377	5	5

Upon the summons to plead several matters being attended before a Judge, he allowed all the pleas; but, as they were very long, his Lordship suggested an ar-

range ment, assented to by the parties, that an order should be drawn up, striking out all the pleas from the second to the twenty-sixth inclusive, and that the defendants should be placed in the same position in all respects as if the pleas had been pleaded; the pleas struck out being delivered with the order, and operating as a particular of what the defendant might give in evidence: the pleas not struck out, viz. the first, twenty-seventh, twenty-eighth, and twenty-ninth, were delivered as pleas in the action. As to the non assumpsit, the payment, and the set-off, the plaintiffs entered a *nolle prosequi*, and they took the money, 1,059*l.* 10*s.* 7*d.*, out of court. The defendants signed judgment under section 33 of the statute 3 & 4 Will. 4. c. 42, for the costs in respect of the *nolle prosequi*. Upon the taxation, the Prothonotary allowed the defendants the costs of the whole of the pleas, except that of payment of money into court; and he gave the following reasons for his decision—viz. The plaintiffs brought all the costs upon themselves, by claiming in their particulars a greater sum than they afterwards took out of court. The first plea was non assumpsit to all the monies claimed in the declaration, except that part which is covered by the payment of money into court: all the special pleas relate to the same part of the declaration as the non assumpsit; and the *nolle prosequi* entered to the non assumpsit, admits, that no cause of action existed beyond the amount paid into court. The costs of the special pleas have been, therefore, occasioned by the unnecessary statement in the declaration and particulars of a greater sum than was really due; and it appears to have been the intention of the legislature to visit the plaintiffs with the costs which they have occasioned. Neither was the credit allowed to the defendants in the particulars, of any avail to them in their pleadings, since, as the plaintiffs refused to state an account of which bills the credit was allowed for, the defendants were obliged to plead the payment of every bill, since they could not tell whether the amount of any particular bill was credited or not.

Kelly obtained a rule, calling upon the defendants to shew cause why they should not be disallowed their costs, taxed under

the judgment of *nolle prosequi*, signed in the cause. The case, he contended, was not within the spirit or the words of the section of the statute, which gave costs to the defendant only when a *nolle prosequi* had been entered upon any count, or as to any part of the declaration; whereas the *nolle prosequi* here was entered only to a part of the sum claimed. The consequence of granting costs upon an occasion like the present, would be to make the plaintiff confine himself, with an injurious strictness, to the particulars of his demand, and thereby give the defendant an advantage, to which, consistently with justice, he was not entitled.

Wightman, who shewed cause in the first instance, urged, that, upon principle, the officer's taxation was correct; the sums claimed formed, it could not be denied, an important part of the declaration, and were to be considered as such. It did not follow that injustice or wrong would be done to the plaintiffs, by compelling them to adhere rigidly to their just demands. The contrary was the fact, and if, in such case, the defendants placed special pleas unnecessarily upon the record, they would have to pay the costs. The vague and general nature of the particular, compelled the defendants to plead as they had pleaded. The plaintiffs, by giving merely a general credit for 483*l.* 10*s.* 8*d.*, rendered it imperative upon the defendants to adopt the present course, as necessary for their safety.

TINDAL, C.J.—The defendants are, there can be no doubt, entitled to certain costs, under the 33rd section of the 3 & 4 Will. 4. c. 42, the words of which are, "that where any *nolle prosequi* shall have been entered upon any count, or as to part of any declaration, the defendant shall be entitled to and have judgment for, and recover his reasonable costs in that behalf;" and the question is, what costs they are to which the defendants here are entitled? To what inconvenience would it not tend if we were to assent to this application: if, upon the one hand, we were to decide, that the defendant was not entitled to costs, we should render the statute inoperative; and, upon the other, what unnecessary discussion should we not be introducing, if we were to allow this course to be adopted after a *nolle prosequi* had been entered. The plaintiff should have

interposed at an earlier stage, and caused the pleas to be struck out, if they were put improperly upon the record. The rule should be discharged.

The other Judges concurring,—
Rule discharged.

1837. } DUNNAGE v. KEMBLE AND
Jan. 31. } OTHERS.

Trespass—Costs—Certificate.

In trespass for breaking and entering the plaintiff's dwelling-house, damaging locks, taking goods, &c., the defendant pleaded, first, not guilty; secondly, that there being an arrear of rent for eighty-four weeks due, he entered for the purpose of distraining, the outer door being open. A verdict having passed for the plaintiff on the first plea, with one farthing damages, and for the defendants on the second:—Held, that the plaintiff was not entitled to have his costs taxed without a certificate from the Judge.

Trespass for breaking and entering the plaintiff's dwelling-house, damaging locks, taking goods, &c.

Pleas—First, not guilty;—second, except as to breaking open the doors and damaging the locks, that the plaintiff eighty-four weeks next before the time when, &c., held the house as tenant to Kemble, at a weekly rent, and, the rent for eighty-four weeks being in arrear, the defendants entered, the outer door being open, to distrain, and did distrain the goods, &c. for the rent in arrear.

In his replication, the plaintiff joined issue upon the first plea, and as to the second, said that the door was not open, and that the defendants of their own wrong, &c.

A verdict passed for the defendants on the second plea, and for the plaintiff on the first, damages one farthing. *Bosanquet, J.*, before whom the cause was tried, did not certify under 22 & 23 Car. 2. c. 9, and the Prothonotary having refused to tax the plaintiff his costs without such certificate,—

Andrews, Serj. obtained a rule, calling on the defendants to shew cause why the officer should not tax the plaintiff his costs without the certificate. He relied upon the

rule of Hilary term, 4 Will. 4, which limited the effect of the plea of not guilty in trespass *quare clausum fregit*, and confined it to a denial of the trespass being committed as alleged, in the place mentioned. Under these circumstances, he submitted, that as the freehold could not come in question, the plaintiff was entitled to his costs without the Judge's certificate, and he cited *Hughes v. Hughes* (1), where it was held, that since the rule of Hilary term, 4 Will. 4, on a plea of not guilty in trespass *quare clausum fregit*, the plaintiff is entitled to full costs, although he obtains damages less than 40s., and the Judge does not certify.

Talfourd, Serj. shewed cause.—He admitted the correctness of the decision in *Hughes v. Hughes*, and also in *Smith v. Edwards* (2), where a similar doctrine was established; but he denied that the new rule was applicable. The case was not of necessity within its meaning and limit, for there were still many occasions when, upon a plea of not guilty, the freehold might come in question; and upon such plea the special matter might be given in evidence, under acts of parliament; as for example, in an action of trespass, under the Bankrupt Law, or in actions against Justices of the Peace on the Highway Acts, and under 11 Geo. 2. c. 19, the 21st section of which, authorizing such evidence under that plea, was drawn up nearly in the very words to be found upon the present record. These instances were sufficient to shew, that under the present form of pleading, the freehold might still come in question; consequently, the new rule did not apply, and the plaintiff was not entitled to costs without the Judge's certificate.

Andrews, Serj. and *Bompas, Serj.*, in support of the rule, relied on the cases referred to, and cited in addition *Bone v. Daw* (3).

The COURT said, they would look into the pleadings, and consult Bosanquet, J. They afterwards communicated to the Prothonotary, that they had considered the case,

and were of opinion, that the plaintiff was not entitled to costs without a certificate, under the stat. of Car. 2; and, therefore, the rule for directing the Prothonotary to tax his costs must be discharged, but without costs.

Rule discharged.

1837. } MASSEY AND OTHERS v.
Jan. 24. } NANNY, CLERK.

Stamp—Marriage Settlement—Annuity—Pleading.

A marriage settlement deed, whereby a party in consideration of the marriage, and a sum of money paid as a marriage portion by the father of the intended wife, covenants to pay an annuity to trustees, to the use of the husband and wife during their joint lives, does not require an ad valorem stamp, within 55 Geo. 3. c. 184. sch. part 1, as upon the sale of an annuity.

The objection, that the deed has not been inrolled, cannot be taken upon a plea of non est factum.

This was an action by the trustees, under the marriage settlement of R. C. Vaughan and Ann Massey, whereby the defendant covenanted in consideration of the marriage, and of the sum of 4,000*l.*, which E. Massey had agreed to advance as a portion to his daughter, to pay to the plaintiffs, by equal half-yearly payments, the clear yearly sum of 800*l.*, for the use of R. C. Vaughan and Ann Massey, during their joint lives. The action was brought to recover six months' arrears, and the defendant pleaded *non est factum*.

At the trial, before Park, J., at Guildhall, the deed was produced, and bore stamps of 1*l.* 15*s.*, 12*d.*, and 5*d.*: but it was not proved to have been inrolled. The plaintiff obtained a verdict; and—

Alexander, pursuant to leave, now moved to enter a nonsuit, submitting, that as the consideration for the annuity was marriage, and a sum of money, there was a sale of an annuity within 55 Geo. 3. c. 134. sched. part 1, and the deed required a stamp of 45*l.*; and he also objected, that the deed ought to have been inrolled under 53 Geo. 3. c. 141, conceding that it was

§ B

(1) 2 Cr. M. & R. 663; s. c. 5 Law J. Rep. (n.s.) Exch. 31.

(2) 4 Dowl. P.C. 621.

(3) 3 Ad. & El. 711; s. c. 4 Law J. Rep. (n.s.) K.B. 241.

doubtful, whether that objection was available under the plea of *non est factum*.

TINDAL, C.J.—It cannot be contended, that the transaction, in respect of which the settlement was made, was a sale. Neither can the case of *Denn v. Diamond* (1) be denied. There it was held, that a conveyance by father to son of a freehold estate, reciting that the father was minded and resolved to give and assure the same to his son, as well in consideration of the natural love and affection which he entertained for his son, as also in consideration of the provision which his son had that day made by his bond, or obliga-

tion in writing, of 1,500*l.*, in augmentation of the portion of his sisters, did not amount to a sale to the son; and, consequently, that the conveyance did not require an *ad valorem* stamp, under 48 Geo. 3. c. 14. sched. part 1. The transaction cannot be said to be a mere sale. The party was not to put the money in his pocket and carry it off. He was to do much more,—he was bound to educate the children and support his wife in a becoming manner, and in a station suitable to that which she held before. As to the other objection, that cannot be taken to the advantage of, as it has not been pleaded.

The other Judges concurring—

Rule refused.

(1) 4 B. & C. 243; s. c. 3 Law J. Rep. K.B. 211.

END OF HILARY TERM, 1837.

MEMORANDUM.

DURING this vacation, and previously to the commencement of the Spring Circuit, Mr. Justice GASKELL resigned his seat as a Judge of this Court. THOMAS COLTMAN, Esq., of the Inner Temple, one of His Majesty's Counsel, was appointed to the vacant office, and shortly afterwards received the honour of knighthood.

CASES ARGUED AND DETERMINED

IN THE

Court of Common Pleas.

EASTER TERM, 7 WILL. IV.

1837. }
May 17. } DOE dem. BRAINE v. MAPLE.

Ejectment—Witness—Interest.

In ejectment by a mortgagee to recover corporation lands, the rated inhabitants of the borough are competent to prove the title of the lessor, inasmuch as their testimony is adverse to their interest; it being their interest that things should remain as they were, and that the mortgagee should not recover the lands, from which, he would, upon recovery, be authorized to remove all others.

Ejectment by the mortgagee of certain lands at Ipswich, in Suffolk, against the tenant in possession.

At the trial, before Coltman, J., at the last Assizes for the above-mentioned county, it appeared that the action was brought under the following circumstances:—

The old corporation of Ipswich, whose property the lands were, made a lease of them in 1796, to one Ellis, who occupied until 1815, when one Salford became the occupant, and continued so until the defendant entered into the possession. The deed under which the lessor of the plaintiff claimed, bore date in 1815, and it purported to be an assignment of property

from Barthrop to T. Pytches, for the remainder of a term of 900 years, to secure 1,500*l.* and interest. This deed was stamped with a deed stamp, and recited the original mortgage in 1775, and a subsequent assignment to Batley, then town clerk of Ipswich, in trust for the corporation, and then an assignment from Batley to Barthrop. The defendant became tenant to the premises in 1818, (three years after the date of the deed of assignment to the lessor,) under a lease from the corporation. Upon the dissolution of the old corporation, under the late act, 5 & 6 Will. 4. c. 76, the tenants refused to pay their rents; and in August 1836, the lessor served the following notice upon the defendant:—"As mortgagee of the Ipswich Corporation Marshes, now in your occupation, I do hereby give you notice, and require you forthwith to pay to me all arrears of rent now due, and all rent that shall hereafter become due from you for the same, in order that such rent may be by me applied in or towards payment, satisfaction, or discharge of the interest money due, and to accrue due to me, as such mortgagee as aforesaid; and in default of your compliance herewith, legal measures will be taken for the recovery of such rent, interest, &c."

A verdict having been found for the lessor of the plaintiff, with liberty to the defendant to move to set that verdict aside, and to enter a nonsuit upon certain points reserved,—

Kelly now moved accordingly.—He objected, that the deed of 1815, under which the lessor of the plaintiff claimed, and the deeds of assignment, should have been stamped with *ad valorem* stamps, and that no proof had been given of the seisin of the corporation in 1775, the date of the original mortgage subsequently assigned to the lessor of the plaintiff. He further objected, that certain rate-payers of the borough of Ipswich, had been improperly admitted as witnesses, inasmuch as they were interested in the result of the suit, under section 92 of 5 & 6 Will. 4. c. 76. That section enacted, "That after the election of a treasurer, &c. the rents and profits of all hereditaments, &c. should be paid to such treasurer, and the monies so received, should be carried by him to a fund called 'The Borough Fund.'" It then directed the mode in which the fund was to be applied, and that the surplus, if any, should go, under the direction of the council, for the public benefit of the inhabitants, and improvement of the borough; and if the fund was insufficient, it should be made up by a rate. Thus, therefore, the witnesses had a direct interest in the recovery of the property by the plaintiff, for the purpose of creating a surplus fund, which should be expended for their advantage, and of preventing a deficiency, the burden of which was to fall upon themselves. The lessor of the plaintiff, although he had the legal interest as mortgagee, must still be considered as tenant to the corporation; and the witnesses having an interest as rate-payers, might be considered as landlords; and according to Buller, J., in *Bell v. Harwood* (1), "If two different persons are contending for the possession, who are to pay rent in different rights, the landlords could not be admitted as witness in ejectment." In this point of view, the case was as if the trustee called a *cestui que trust* as a witness in support of the action.

(1) 3 Term Rep. 308.

TINDAL, C.J.—I am unable to see upon what ground it can be said that these rate-payers, when called upon to give evidence, can be objected to, as incompetent from interest. This is an action of ejectment by the mortgagee against the tenant in possession, and the mortgagee is, in a court of law, considered as a purchaser, and who, as such, seeks to recover the actual possession, and turn out all whom he may find upon the land. Is it not, therefore, the interest of the rate-payers that things should continue as they were? And when they are called upon to give their evidence, as they were upon this occasion, were they not, in fact, called upon to testify against their own interest? Upon that ground, therefore, I am of opinion that the rule should not go, but I think it should be granted on the other general grounds.

The other Judges concurring—

*Rule discharged, on that point;
granted on the others.*

1837. }
April 17. } BOWMAN v. WILLIS.

Witness—Competency—Legatee.

In an action against a legatee, to recover the price of a chattel sold by him as part of the property specifically bequeathed, the executor and residuary legatee is a competent witness within 3 & 4 Will. 4. c. 42. ss. 26, 27, to prove declarations by the testator, that the chattel was not his property, but merely kept by him upon trial.

This was an action for money had and received to the plaintiff's use, brought by the plaintiff to recover the price of a horse which the defendant had sold at Tattersall's for the sum of 102*l.* 16*s.* 6*d.*

At the trial, before Tindal, C.J. it appeared that Dr. Willis, who died in September 1835, bequeathed his stud to the defendant; and the question was, whether the horse, which the defendant had sold, had been purchased by the testator of the plaintiff, or only kept upon trial. The plaintiff called as a witness Mr. Curtis, the executor and residuary legatee of the testator, who, after an objection to his

competency, proved certain declarations made by the testator, that the horse was not his property, but merely retained by him upon trial; and thereupon the jury gave a verdict for the plaintiff for the amount above mentioned.

Talfourd, Serj. now moved to set this verdict aside, and for a new trial. The witness was incompetent, as he was directly interested in the event of the suit—*Smith v. Prager* (1). The effect of establishing the plaintiff's claim, and that the horse was not the testator's property, is to relieve the residue to the extent of the value of the horse, which is obviously to the advantage of the residuary legatees.

TINDAL, C. J.—I question much if this case does not fall within the precise words of the statute 3 & 4 Will. 4. c. 42. s. 26 (2). No doubt no immediate benefit is intended to be derived to the witness from this verdict; but it is merely contended, that an intermediate benefit may accrue to him, on the supposition, that an action might be brought against him for the price of a valuable horse, and if so, he might set up this judgment. But, if his name is indorsed on the record under the 27th section of the statute, he cannot give such answer to the action; and, if the verdict is for the defendant—that is to say, against the party for whom he is called, this verdict, and the judgment upon it, would not be evidence against him for the purpose of proving that the horse was sold to the deceased: thus, *quidcumque videtur datu*, the evidence of the witness was not objectionable. There are many cases in which there may be at once a direct and intermediate interest, and the latter may be more important than the former; for example, in ejectment, the landlord cannot call the tenant in posses-

sion, as the immediate effect of the verdict may be to turn him out. It is not, I think, possible, if the step prescribed by the statute is taken, to frame the proceedings in such shape, that Curtis, the witness, could be the better for the verdict recovered by the plaintiff; for, if a future action were to be brought against Curtis, this verdict could not be produced for him, as it would appear, by the indorsement on the record, that the verdict was procured by his testimony. In fine, this is, as it appears to me, precisely the case intended by the clause of the statute, respecting the rejection of evidence on the ground of incompetency through interest.

BOSANQUET, J.—I am of the same opinion. The most common criterion of interest is, when the verdict may be given in evidence in favour of the witness, and this was the instance given in the statute. The words of the clause evince the anxiety of the legislature to leave the objection rather to the credit, than to the competency of the witness. The succeeding section, which directs the indorsement of the witness's name on the record, is decisive upon the subject.

The other Judges concurring—

Rule refused.

[Upon this subject of competency of witnesses, vide *Doe v. Clarke*, 3 Bing. N.C. 429; s. c. 6 Law J. (N.S.) C.P. 119.]

1837. }
April 21. } VESTRIS'S BAIL.

Bail,—Adding—Changing.

If bail are rejected as incompetent, others cannot be substituted without leave, under the 5th rule of 1 Will. 4.

Wightman appeared to justify bail.

Archbold opposed the justification, upon the ground, that the bail were changed without leave, contrary to the 5th rule of 1 Will. 4, which directs, that the bail of whom notice shall be given shall not be changed without leave of the Court or a Judge.

Wightman, contra, contended, that the present circumstances did not constitute

(1) 7 Term Rep. 62.

(2) Which enacts, "That if any witness shall be objected to as incompetent on the ground that the verdict or judgment in the action in which it shall be proposed to examine him, would be admissible in evidence for or against him, such witness shall nevertheless be examined. But, in that case, a verdict or judgment in that action in favour of the party on whose behalf he shall have been examined, shall not be admissible in evidence for him, or any one claiming under him; nor shall a verdict or judgment against the party on whose behalf he shall have been examined, be admissible in evidence against him, or any one claiming under him."

such a change of bail as was referred to in the rule. The bail, of whom notice had been given, were rejected, as improperly indemnified. The present case was at the utmost the substitution of good and unexceptionable bail for those who had been rejected; and it could not be called a change of bail within the meaning of the rule.

Archbold said, that, admitting the fact to be as stated, the practice of the Courts was in his favour, and although the former bail were rejected, their names still remained on the record with the officer.

The Court, feeling some doubt upon the subject, consulted with the Judges of the King's Bench and Exchequer, and finding that the interpretation put by them upon the rule was that for which *Archbold* contended, they thought it necessary to adopt a similar mode of practice; and the bail were, consequently, not permitted to justify.

1837. }
April 25. } BADDEN v. FLIGHT.

Covenant—Pleading—Riens in Arrear.

To a declaration in covenant on an indenture of lease, securing rent by quarterly payments, averring as a breach, that "after the making of the indenture, to wit, on the 25th of March 1836, a large sum of money, to wit, 66l. 5s., for two quarters of a year of the said term, ending on the day and year aforesaid, became and was due, and was in arrear;" a plea, "that no quarter's rent, ending on the said 25th of March 1836, then became and was due or in arrear, by virtue of the said indenture in the said declaration mentioned," is bad, as amounting to a plea of riens in arrear.

Declaration in covenant, on an indenture of lease, dated the 12th of August 1822, whereby the plaintiff demised certain premises to the defendant, his executors, administrators, and assigns, for a term of 13½ years, from Michaelmas-day then next ensuing, at the yearly rent of 132l. 10s., payable "by four equal quarterly payments of each and every year of the said term—that is to say, the 25th of De-

cember, 25th of March, 24th of June, and 29th of September." Breach, that, after the making of the said indenture thereby granted, to wit, on the 25th March 1836, a large sum of money, to wit, 66l. 5s., for two quarters of a year of said term, ending on the day and year last aforesaid, and then last elapsed, became and was due and was in arrear, to plaintiff, contrary to the tenor and effect, true intent and meaning, of said indenture and of said covenant of defendant, by him in that behalf made as aforesaid, &c.

Plea—2nd, as to the said supposed arrear of rent ending on said 25th of March 1836, that plaintiff ought not to have his action, &c., because he says, that no quarter's rent, ending on said 25th March 1836, then became, or was, or is, due or in arrear, by virtue of said indenture in said declaration mentioned, or according to any of the provisions, agreements, covenants, or terms therein contained, or anything there mentioned, in manner and form as plaintiff hath above, in his declaration, alleged.

Special demurrer(1) and joinder therein.

Channel, in support of the demurrer.—The plea of *riens in arrear* is not admissible in covenant, inasmuch as, the action being founded in contract, it is incumbent upon the defendant either to deny the contract, or allege performance, and shew the mode of performance. Here, the contract, and the terms and days on which payments are to be made, are admitted; and what is there in such case, to prevent the plaintiff from maintaining his action? The day on which the two quarters' rent are said to have been due, is immaterial; or, if material,

(1) The causes assigned were, that the plea of *riens in arrear* is not admissible in an action for a breach of covenant for non-payment of rent on a specified day. Nevertheless, said plea avers, that the quarter's rent, in said declaration alleged to have become due on the 24th of March 1836, is not due or in arrear; and also, for that said plea ought to have shewn specifically, and with sufficient certainty, how that quarter's rent was paid or discharged, and not pleaded generally, that it was not nor is due or in arrear; and also, for that said plea is a bad plea of satisfaction, and is argumentative; also, that it is double, as it puts in issue, not only that said quarter's rent ever became due or in arrear, but also that it was due or in arrear at the time of the commencement of this suit; and also, that such plea ought to have shewn specifically a performance or excuse for the performance of said covenant to pay that quarter's rent.

the defendant should have pleaded *non est factum*, or had the deed set out on oyer, when it would have been as part of the declaration, and might have been met by a special demurrer.

Hoggins, contra.—This plea is not within the doctrine, that *riens in arrear* is an inadmissible plea in covenant; for it merely traverses the fact averred in the declaration, that the last two quarters' rent were due on the 25th of March 1836. Clearly, the rent was not so due, and the defendant has a right to deny the fact.

TINDAL, C.J.—The plea here is, a denial that two quarters' rent are in arrear. The substantial allegation in the declaration is, that such sum is in arrear; for although the plaintiff afterwards says, "to wit, 65*l.*, due on the 25th of March," that allegation does not carry the case farther, the day being laid with a *videlicet*. The substantial allegation is, that the sum was due during the term, and is still in arrear. Under these circumstances, the defendant had no right to answer, that the sum was not due; still less had he a right to say *riens in arrear*. All the authorities, from *Hare v. Savill* (2) downwards, shew that *riens in arrear* is no plea in an action of covenant. There, in covenant upon an indenture, upon a special covenant to pay rent, at certain days therein specified and reserved, the defendant pleaded, that no rent was behind. Upon demurrer, it was held by the whole Court, that the plea was bad in covenant; for, by that plea, the defendant confesses the covenant broken, and that plea tends but in mitigation of damages. And, in reference to this immediate case, I cannot help throwing out that which I feel, and shall feel as long as I live, respecting the correctness of the advice given by Lord Coke—namely, that when facts are with a party, he should never stand upon a demurrer. Judgment should be for the plaintiff.

The other Judges concurring—

Judgment for the Plaintiff.

Note.—That *riens in arrear* is a good plea to an action of *debt* for rent, vide *Warner v. Theobald*, *Cowp.* 588.

(2) 1 Brownl. 19.

1837. }
April 29. } *In re KILBACK, A LUNATIC.*

Lunatic—Distringas.

The Court ordered a *distringas* to issue against the defendant, a lunatic, it having appeared that the usual applications had been made at a private madhouse in which he was confined, and that the owner thereof would not allow him to be seen in consequence of his insanity.

Tomlinson moved for a writ of *distringas* against the defendant under the following circumstances. It appeared, from the affidavits, that the usual applications had been made at the house, near Manchester, where the defendant was known to be; but the keeper would not allow access to the party, alleging, that he was in a state of hopeless insanity, and, consequently, that the service of any order upon him would be at once useless and mischievous. The object would be attained by making service upon the keeper of the house good service upon the defendant.

The Court doubted the propriety of such proceeding, as the house was a private madhouse, and the owner could be considered by them merely in the light of a private individual;—

And they granted the rule in the usual manner.

Note.—As to the issuing of process against a lunatic, vide *Steele v. Allan*, 2 Bos. & P. 362, and note; *Pillip v. Sexton*, 3 Bos. & P. 550. In the former case, Lord Eldon said, "I am afraid there is no prohibition in the law of England against arresting a lunatic."

1837. }
May 8. } *BATLEY v. LONG.*

Costs—Postea—Trespass.

Where the costs of an issue found for the defendant, will manifestly exceed the costs of the issues found for the plaintiff, the plaintiff is not entitled to retain the *postea* in his possession; but the Court, on the application of the defendant, will order him to redeliver it to the officer, for the purpose of proceeding to taxation.

In this action of trespass *quare clausum fregit*, the defendant pleaded, first, not guilty; second, that the close in question was not in the possession of the plaintiff; and thirdly, a right of way. A verdict passed for the plaintiff on the first plea, damages 1*s.*, and also on the second; and on the third plea, claiming the right of way, the jury found for the defendant. The *postea* having been delivered to, and retained by, the plaintiff—

Talfourd, Serj. obtained a rule, calling upon him to shew cause why it should not be delivered to the officer of the court for the purpose of having the costs taxed.

Ludlow, Serj. shewed cause, and contended, that there was no ground for the application. The *postea* was, in point of law, considered to be in possession of the Court: at all events, the plaintiff was entitled to the *postea*, as the verdict was found for him. The argument, that the defendant, upon taxation, would probably be entitled to a larger proportion of the costs, was immaterial, as the *postea* in its language did not allude to the comparative amount of costs to be borne by each party. In *Smith v. Edwards* (1) Coleridge, J. decided, that the plaintiff, who had succeeded and recovered damages on a part of his cause of action was entitled to have the *postea* delivered to him.

Talfourd, Serj., in support of the rule, denied that the finding of the jury was substantially for the plaintiff. The verdict upon the important plea, the right of way, had passed for the defendant, who would, of course, under the new rules, be liable only for the costs of the pleas found against him. Upon taxation the defendant would be entitled to the larger portion; and it was for this reason that the plaintiff avoided the taxation, and retained the *postea*, to which he had no right.

TINDAL, C. J.—We cannot, upon this occasion, help looking to the situation and position of these parties, with regard to each other; and we find that the plaintiff has obtained a verdict upon the pleas of not guilty, and that the close was not in the possession of the plaintiff; and that the defendant has obtained a verdict

upon the third plea of a right of way. Now, every one knows, that the greatest expense at the trial at the assizes, would proceed from the plea of the right of way; and it is equally well known, that when the costs come to be balanced and paid, the defendant, for whom the plea has been found, will have to receive by far the greatest share. This being so, the plaintiff will be slow in getting the costs taxed; he will be in no hurry to deliver to the officer the *postea*, which he has in his hands. It is also my opinion, that the jury made a slip in giving damages at all. It is clear, that they were nominal; they could not be intended as real damages, for walking over and injuring the plaintiff's close; and it was in consequence of such damages being given, that the officer thought the plaintiff was entitled to the *postea*. But, as I think, the plaintiff is not thus entitled. In my opinion it is the defendant, not the plaintiff, who is to put the law upon this occasion in motion and in force; and, therefore, the rule for delivering the *postea* to the officer should be made absolute.

PARK, J. of the same opinion.

BOSANQUET, J.—I am of the same opinion. The defendant, here, has succeeded upon that plea, by which the whole trespass is justified. He, no doubt, put the plaintiff to expense and trouble, by putting upon the record pleas which have been found for him; but, by the new rules, the plaintiff is entitled to the costs of these pleas, and of the evidence given in support of them. Under these circumstances, the *postea* should be given back by the plaintiff to the officer, who, by the practice, will retain and not part with it again without leave of the Court (2).

COLTMAN, J.—I am of the same opinion. It is the defendant who has substantially succeeded in the action. With regard to the costs, which are the subject of this discussion, it is to these costs the *postea* chiefly refers; and, therefore, it should be given back to the officer.

Rule absolute.

Note.—Vide *Knight v. Woore*, 6 Law J. Rep. (N.S.) C.P. 135.

(2) Rule, Trinity term, 13 Geo. 2, 1739.

(1) 1 Dowl. P.C. 621.

1837. } WRENCH, CLERK, v. LORD AND
April 17. } ANOTHER.

Church Lands—Overseers—Stamp.

An agreement, by which the churchwardens and overseers of a parish consent to the liquidation of a debt, to be charged upon the income of the church lands, is an incumbrance affecting land, and should have a mortgage stamp.

Quære — Can the churchwardens and overseers mortgage the church lands under the 59 Geo. 3. c. 12?

This action for money had and received was brought by the plaintiff, who had been rector of St. Mary Stouting, Kent, against the defendants, the present overseers of the parish, under the following circumstances:—

In 1821, the plaintiff became rector of the parish, and found the church in a dilapidated state. In 1824, he ascertained that there were six acres of land, the rent of which had been specifically devised for the repairs of the church, but which had never been so appropriated. Under the sanction of the archdeacon, and, with the concurrence of the parish, he gave orders for the repairs of the church, upon an understanding with the then officers that he was to receive the parish rents of the church lands for five years. After the repairs had been completed and paid for by the plaintiff, he applied to the parish for payment of the balance due to him, after deducting the five years' rent of the church lands, which balance amounted to 56*l.* 7*s.* No attention was at first paid to the application; but the matter was brought before a vestry meeting, held on the 10th of June 1830, when the following agreement was resolved on, and entered in the Minute Book of the parish:—

"The undersigned consent to the liquidation of the debt due to Dr. Wrench, amounting to 56*l.* 7*s.*, (to be charged upon the income of the church land,) 8*l.* 8*s.* to be collected by a church-rate, amounting in the whole to 61*l.* 15*s.*, such money so to be paid from the rents of the church land, after discharging the bills now outstanding, and such further repairs of the church as may be ordered by the archdeacon for the time being, during the progress of the

above-mentioned liquidation." Signed by the churchwardens and overseers.

The plaintiff received the 8*l.* 8*s.*, which was stipulated to be raised by a church-rate; but he received 10*l.* only, on account of the church land rents; consequently, his claim was for 40*l.* 11*s.*

In his bill of particulars, the plaintiff limited his demand to 30*l.* 1*s.* 6*d.*, because, when the action was brought, the defendants had been only two years in office, and the plaintiff could only claim against them for the two years' rent actually received by them, and 2*l.* 16*s.* which one of the preceding overseers had paid over to his successor, the defendant.

At the trial, before Tindal, C.J., at the Spring Assizes, at Maidstone, the plaintiff relied upon the agreement between him and the churchwardens and overseers; and upon the 17th section of the 59 Geo. 3. c. 12, by which the defendants were bound as a body corporate, by the act of their predecessors, and by which the lands in question became vested in the churchwardens and overseers (1).

The agreement being offered in evidence, stamped with a common agreement stamp of 20*s.*, it was objected, that the document was inadmissible, as it amounted, if to any thing, to a charge upon land; and, consequently, was not properly stamped. It was also contended, that the agreement amounted to a mortgage of the church

(1) The words of the section were, "that all buildings, lands, and hereditaments, which shall be purchased, hired, or taken on lease by the churchwardens and overseers of the poor of any parish, by the authority, or for any of the purposes of this act, shall be conveyed, demised, and assured to the churchwardens and overseers of the poor of every parish respectively, and their successors, in trust, for the parish; and such churchwardens and overseers of the poor, and their successors, shall and may, and they are hereby empowered to accept, take, and hold in the nature of a body corporate, for and on behalf of the parish, all such buildings, lands, &c. belonging to such parish; and in all actions, suits, &c., for or in any way relating to such buildings, lands, &c., or the rent thereof, &c., it shall be sufficient to name the churchwardens and overseers of the poor for the time being, describing them as churchwardens and overseers of the poor, &c.; and no action or suit, &c. shall cease, abate, or be discontinued, quashed, defeated, or impeded by the death of the churchwardens and overseers named, &c., or by their removal, or the removal of any of them, from, or the expiration of, their respective offices."

lands, which the churchwardens and overseers had no right to make, either in such character or as a corporate body. The Lord Chief Justice nonsuited the plaintiff; and now—

Wilde, Serj. moved to set the nonsuit aside.—The objection, that the parties had no right to mortgage the church lands, is not tenable, as there is nothing in the statute to prevent the churchwardens and overseers from dealing with the lands by mortgage, or in any other way that public convenience may require. *Doe v. Hiley* (2) shews the wide signification which has been put upon the 17th section of the statute, and the extent to which it has been carried. Various other sections, such as the 8th, 9th, 10th, 12th and 13th, point out modes of dealing with the land, and one object of the 17th section was to make the overseers and churchwardens *quasi* a corporation. The nonsuit, having proceeded principally upon this objection, ought to be set aside.

TINDAL, C.J.—It is said in the argument, that the nonsuit upon the trial of this cause was improperly directed, on the ground of a single objection which had been taken—viz. that the churchwardens and overseers had no authority to mortgage the lands vested in them for the repairs of the church; but from what really occurred, it is not necessary to come to a decision upon this, which is, no doubt, a very important question, and which, when it does arise, will be taken into due consideration. There was an objection taken upon the trial, (prior in point of time,) to that which is now put forward—namely, that the consent given by the churchwardens and overseers in vestry, and signed by them, amounted, if it amounted to anything, to a mortgage; and, therefore, the document required a stamp, as for a charge upon land. Now, if this be so, the document is not properly stamped, as the stamp is a common agreement stamp of 20s. After this objection, the case proceeded; but, on its being repeated, I was called upon to decide, and I was then of opinion as I am at present, that assuming for the moment that the parties had a right

to mortgage the land,—giving, however, decidedly no opinion upon the matter;—I still must come to the conclusion, that the instrument in question, by which the churchwardens and overseers gave their consent, and entered into an agreement to liquidate the debt of Dr. Wrench, did in point of fact, amount to a mortgage—to a charge upon the land; and, consequently, that it is not stamped as it should be. There should, in such case, have been a conveyance; and this agreement to charge the land, to which the present overseers were not parties, and of which, perhaps, they had no notice, does not descend to them. I cannot see or understand how this objection can be got over; and, in my judgment, the nonsuit was right.

VAUGHAN, J. and *BOSANQUET, J.* were of the same opinion.

COLTMAN, J.—I agree. I think the defendants, here, could only be charged by Dr. Wrench, as his bailiffs, for the amount of rent which they received for him. This instrument could not operate as a conveyance. The rule should be refused.

Rule refused.

1837. } *TIPPER AND ANOTHER v. BICK-*
April 28. } *NELL AND OTHERS.*

Assumpsit—Consideration—Pleading.

The plaintiffs alleged, in their declaration, that one R. applied to them to accept for his accommodation, certain bills of exchange, and offered them as a security for repayment of such monies as they might pay upon the bills, to procure the defendants to deliver to the plaintiffs certain deeds and writings; that R. requested the defendants, that on the accepting of the bills, they would undertake to deliver to the plaintiffs the deeds and writings, on payment of the bills by the plaintiffs; of all which, the defendants had notice, and in consideration of the plaintiffs accepting the bills, undertook and provided to deliver the deeds and writings to the plaintiffs, on payment of the bills by them:—Held, that the declaration was good, without an averment, that the plaintiffs accepted the bills at the special request and desire of the defendants, inasmuch as the acts of accepting the bills by the plaintiffs, and

(9) 10 B. & C. 885; a. o. 8 Law J. Rep. M.C. 105.

of giving the undertaking by the defendants, were simultaneous; and consequently the averment, necessary for the maintaining of an action on a bygone consideration, need not be introduced.

The declaration alleged, that before the making of the agreement and promise of the defendants thereafter mentioned, the defendants, on the occasion therein-after mentioned, represented to the plaintiffs that certain deeds and writings,—to wit, a certain deed of covenant between Alderman Crowder, of the one part, and Hugh Rowland the elder, on the other; also a lease from the Alderman to the same Rowland; also, amongst others, a deed of assignment and mortgage, dated the 29th of November 1826, made by Rowland and C. M. Cullum to W. Bicknell and W. Blewett, by way of mortgage, for securing the repayment of a large sum of money, &c., with interest; also a certain other instrument, dated the 3rd of July 1832, purporting to be a deed of assignment by the said W. Bicknell and W. Blewett of their interest in the said mortgage, to one Hugh Rowland the younger, for 500*l.*,—had been deposited with certain persons, to wit, the said W. Bicknell and W. Blewett; and whereas, and at the time of making the agreement and promise of the defendants next mentioned, the said Hugh Rowland the younger was desirous of purchasing and taking an assignment from the said W. Bicknell and W. Blewett of their interest in the said mortgage, at and for the sum of 500*l.*, to be paid by the said Hugh Rowland the younger for the same, and to obtain good bills for that amount, in order to satisfy the said sum of 500*l.*, and thereupon, to wit, on the 6th of July 1832, the said Hugh Rowland the younger applied to and requested the said plaintiffs to accept, for the accommodation of the said H. Rowland the younger, two bills of exchange, to be respectively drawn by the said H. Rowland the younger, upon the plaintiffs, each for the sum of 250*l.*, and payable respectively to the order of the said H. Rowland the younger, the one six months and the other twelve months after date, for the purpose of enabling the said H. Rowland the younger to use or negotiate the said bills for his own benefit, that is to

say, for the purpose of enabling him to indorse the said bills, and deliver the same to the said W. Bicknell and the said W. Blewett for the said sum of 500*l.*, to be paid as the consideration for the said assignment by the said Bicknell and Blewett of their interest in the said last-mentioned mortgage to the said Rowland the younger; and the said Rowland the younger then offered the plaintiffs, as a security to them for the repayment of such monies as they might pay upon the said bills as acceptors thereof, that he, the said Rowland the younger, would cause and procure the defendants to undertake to deliver to the plaintiffs the said deeds and writings on the payment by them of such bills of exchange, so to be drawn and accepted as aforesaid; and thereupon the plaintiffs consented, and were ready and willing to accept such bills of exchange for the purpose and upon the terms aforesaid, and upon such security as aforesaid, such security being of great value, to wit, of the value of 1,000*l.*; and thereupon, to wit, on the 6th of July 1832, the said Rowland the younger then drew the said several bills of exchange, bearing date the day and year last aforesaid, for the sum of 250*l.* upon the said plaintiffs, payable as aforesaid; and the plaintiffs then agreed to accept the same for the purpose and upon the terms aforesaid, and upon such security aforesaid; and the said Rowland the younger then requested the said defendants, that, on the plaintiffs' accepting the said bills as aforesaid, they, the defendants, would undertake to deliver to them the said deeds or writings on the payment by them, the plaintiffs, of the said bills, according to the tenour and effect thereof; of all which the defendants then had notice; and then represented to the plaintiffs that the said deeds and writings had been so deposited as aforesaid; and thereupon, in consideration of the plaintiffs' accepting the said bills for the purpose and on the terms aforesaid, they, the said defendants, then undertook and promised the plaintiffs to deliver to them as such nominees of the said Rowland the younger, the said deeds and writings on the payment by them of the said bills of exchange respectively, according to the tenour and effect thereof; and the plaintiffs aver, that they, confiding in the said undertaking and promise of the defendants, did

then accept the said two bills of exchange for the accommodation of the said Rowland the younger, for the purpose and upon the terms aforesaid, for the payment of 250*l.* each, to the order of the said Rowland the younger, and then delivered the said bills to the said Rowland the younger; and he then indorsed the same, and delivered the same to the said W. Bicknell and W. Blewett, for the purpose and upon the terms aforesaid, and which said bills respectively became payable, according to the tenour thereof, before the commencement of this suit. And the plaintiffs further say, that they duly paid and satisfied the said bills of exchange respectively, as and when the same respectively became due and payable, &c.; whereof the defendants, afterwards and before the commencement of this suit, had notice, to wit, on the 10th of July 1833, and were then and there afterwards requested by the plaintiffs to deliver to them the said deeds and writings, according to their said undertaking and promise, and a reasonable time for so doing elapsed before the commencement of this suit; yet the defendants have not, nor have any, nor hath either of them delivered to the plaintiffs the said deeds and writings, or any of them, but have wholly neglected and refused so to do, and have therein made default, contrary to the said agreement and promise; by means of which promises the plaintiffs have been and are deprived of the said security for, and means of obtaining repayment of, the amount of the said bills; and the same with interest thereon, amounting together to a large sum, to wit, 600*l.*, is now due and unpaid to the plaintiffs; and thereby also the plaintiffs have lost the benefit they would otherwise have derived from using and employing the monies so paid by them, and have incurred divers expenses in endeavouring to obtain the said deeds and writings, &c.

Demurrer, assigning for causes, that plaintiffs have not shewn in their declaration any consideration in law for the promise therein alleged to have been made by the defendants; and for that it does not appear, in any way, in or by said declaration, that the acceptance of the said bills by the plaintiffs, in the declaration mentioned, was given, or the said bills, or either of them, paid by the plaintiffs at the instance of the

defendants; or that the defendants in any way assented to the said offer made by the said Rowland the younger, of the said deeds or writings in the declaration mentioned, as a security for the plaintiffs, as in the declaration is alleged; or that the plaintiffs were induced to accept the said bills of exchange, or either of them, by the offer of such security, or by virtue of any application by the defendants to them made so to do; or that the defendants were parties to or in any way assented to the alleged arrangement between the plaintiffs and the said Rowland the younger; or that the said deeds, or any or either of them, were or was ever in the possession, custody, or controul of the defendants, or that they had at any time any interest therein, or in the said mortgage or the said assignment thereof, or in the payment of the said bills, or that the defendants had ever represented to the plaintiffs that the said deeds or writings, or any of them, had ever come to the hands of them, the defendants, or had ever been or were in their custody; and for that the said promise in said declaration is a mere *nudum pactum*, upon which no action can be sustained; and for that, &c. Joinder.

The margin of the paper book was thus marked: "The plaintiffs contend, that the declaration shews a sufficient consideration for the defendants' promise, that is to say, the obligation which the plaintiffs imposed on themselves, by accepting the bills, although all the defendants may not have been thereby benefited. That it was not necessary to allege that the bills were accepted at the defendants' request, as the consideration for their promise was not executed, but concurrent or executing; and that the defendants were responsible to the plaintiffs, on their absolute engagement to deliver the deeds to them."

Crowder, in support of the demurrer.—The main question here is, if there was any consideration by the plaintiffs for the alleged promise of the defendants. The principal party in the transaction was Hugh Rowland the younger. It was for his benefit, and to enable him to obtain the deeds, that the accommodation acceptances were to be given. He proposed to the plaintiffs to procure a security for their acceptances, and this security was the undertaking of

the defendants to deliver certain deeds. This was a mere arrangement between Rowland and the defendants; and what consideration was there which passed from the plaintiffs to the defendants? None. It is admitted, that to constitute a good consideration for the plaintiffs, there need not be a benefit accruing to the defendants; it would be sufficient if damage was suffered by the plaintiffs in consequence of their having done anything at the *special instance and request* of the defendants; but those words, according to *Osborne v. Rogers* (1), are necessary in the declaration, to support an action on a past consideration; for, as is there said, "it is not reasonable that one man should do another a kindness, and then charge him with a recompense; this would be obliging him whether he would or not, and bringing him under an obligation, without his concurrence." The only averment in the declaration here is, that the defendants *had notice*, which is not sufficient to establish the necessary privity, with regard to a past transaction. The case resembles that of *Price v. Easton* (2), where the declaration could not be supported, as there was no consideration shewn for the promise moving from the plaintiff to the defendant, nor any privity between them.

[TINDAL, C. J.—From the state of the facts here, does not this appear to be a mere executory consideration, in which a request may be inferred; in which the parties may be supposed to say, "Do you one thing, and I will do another" ?]

The transaction, the acceptance of the bills, was past and executed, and the defendants were not privies or parties to the doing of that which was beneficial to another. There is no doubt, that the idea of the undertaking by the defendants might have influenced the plaintiffs in accepting the bills; but still the necessary privity did not exist between the parties, and consequently the demurrer should be allowed.

Stephen, Serj. contra, was stopped.

TINDAL, C. J.—Upon the whole of this declaration taken together, we must, as it

appears to my mind, come to the conclusion, that all the transactions which form the subject of this discussion were done at the same moment of time—were, in fact and substance, a simultaneous act: all the parties interested, the plaintiffs, the defendants, and Hugh Rowland, were together at the time, and the agreement was, that the plaintiffs would accept certain bills upon a certain act being done by the defendants. Those acts being done, those things taking place at the same time, it follows, that the doctrine of law, which should be maintained and acted upon for the purpose of supporting an action upon a bygone consideration, does not apply. If the plaintiffs accepted bills upon a bygone consideration, without the request of the defendants, such consideration would, no doubt, be bad; but the only agreement entered into here between the parties was, that upon the defendants' undertaking to give up the deed and security, the plaintiffs would accept the bills. This was the promise which was made, with the concurrence and the knowledge of all. If the declaration had been framed upon mutual promises, it would, I think, be good; but it has been drawn upon the sounder reason and closer principle of those engagements being simultaneously made. Our judgment should be for the plaintiffs.

PARK, J.—I agree. All the transactions submitted to our consideration, appear to me to have been simultaneous.

BOSANQUET, J.—I, too, am of opinion, that there has been upon this occasion a sufficiently legal consideration on the part of the plaintiffs, to enable them to maintain their action against the defendants. A negotiation had, it appears, been entered into between the parties and Hugh Rowland, for the purpose of enabling the latter to pay the sum of 500*l*. If this were done, Rowland, would be enabled to take certain deeds out of the hands of the party in whose possession they were. This payment, however, Rowland was not himself able to make, and he intimated a wish that the plaintiffs should accept two bills for the amount, and this the plaintiffs would not do unless the defendants entered into an engagement to deliver the deeds. Rowland, for whose benefit the thing was to be done, requested such undertaking to be

(1) 1 Saund. 264, n. 1.

(2) 4 B. & Ad. 433; s. c. 2 Law J. Rep. (n.s.) K.B. 51.

given. But at this time the bills were not accepted by the plaintiffs; they were at perfect liberty to accept or not. Thus the transactions were contemporaneous, and they were entered into with the consent of all. The declaration, it should be borne in mind, also alleges, that the bills thus accepted were paid by the plaintiffs when they became due. From all the circumstances of the case, it appears to me abundantly clear, that the undertaking given by the defendants, was given at the same time with the acceptance of the bills, and judgment should be for the plaintiffs.

COLTMAN, J.—I am of the same opinion. The argument raised upon the discussion, by Mr. Crowder, would be tenable only upon the supposition, that the record disclosed a state of things widely different from that which it has, namely, that no stipulation had been entered into for the acceptance of the bills; but when we look into the record, we find it alleged to have been done for this very consideration. If this were denied, if it were said not to have been so, the matter should have been put in issue. The argument has, in truth, been founded on the misapplication of the legal maxim, that the consideration here contended for must appear, to support an action as upon a bygone transaction; but the state of things disclosed here, does not appear to be thus. This does not appear to be an executed consideration; consequently the maxim does not apply.

Judgment for the plaintiffs.

1837. } GOWER AND OTHERS v. VON
April 28. } DADELZEN AND ANOTHER.

Contract.

In an action for not accepting Gallipoli oil, according to a contract, by which the plaintiffs agreed to deliver, and the defendants to accept a cargo, viz. 240 casks of good merchantable Gallipoli oil, a plea that the casks were not well seasoned, or fit and proper for the purpose of containing good merchantable Gallipoli oil, was held bad, inasmuch as it did not allege that the article itself was injured or deteriorated in value; and it went not to that which was essential, but to that which was mere matter of form and description, viz. the mode of conveyance.

The declaration alleged, that heretofore and before the making of the promise, &c. to wit, on the 26th of October 1835, it was mutually agreed by and between the plaintiffs and defendants, in manner following, that is to say:—That they, the plaintiffs, should sell to the defendants, who should buy of and from the plaintiffs, a certain cargo of good merchantable Gallipoli oil, then being the cargo of the vessel *Fortuna*, and which vessel was then on her voyage from Gallipoli to Falmouth or Plymouth, said cargo consisting of L. R. 240 casks, containing 901 salmes and 9 pignatelles at 54*l.* per imperial ton, of seven and one-fifth salmes, and which then amounted in the whole to a large sum of money, to wit, 6,756*l.* 17*s.* 2*d.*, payable by cash, less 2*½**l.* per cent. discount, and which discount then amounted to a large sum of money, to wit, 168*l.* 18*s.* 8*d.*, on delivery of bill of lading on her arrival at Plymouth or Falmouth. The declaration then enumerated certain other ports, to which defendants were at liberty to direct the ship, upon payment of certain extra freight, insurance, &c. It then stated the arrival of the *Fortuna* at Plymouth from Gallipoli, and that, at the time of such arrival, she had on board a cargo of good merchantable Gallipoli oil, consisting of L. R. 240 casks containing 901 salmes and 9 pignatelles, being said cargo in said agreement, &c. hereinbefore mentioned, of which defendants then, &c. had notice. And plaintiffs say, that thereupon and within a short and reasonable time, in that behalf, after such arrival at Plymouth of such vessel, to wit, &c. they, the plaintiffs, tendered and offered to deliver to and leave with the defendants, a certain bill of lading of said cargo, being the bill of lading in such agreement mentioned, upon their paying to the plaintiffs the aforesaid price of said cargo in the manner aforesaid; and the plaintiffs then were able and willing to pay, and did, in point of fact, pay freight, insurance, &c. in the said agreement mentioned, &c.; and the plaintiffs were then ready and willing, and offered to defendants to deliver to defendants, and requested them to accept and receive said cargo at Plymouth, upon their paying to plaintiffs the price, in manner, &c. The declaration then alleged, that the defen-

dants were at liberty to direct, and might have directed the vessel to another port, but did not do so; that finally they refused to accept and pay according to the agreement, upon which plaintiffs were obliged to sell the cargo by auction, with due notice to defendants, for the best price that could be procured, viz. 5,555*l.* 14*s.* 5*d.*, being a loss, deducting discount, &c. of 1,032*l.* 4*s.* 4*d.*; and the plaintiffs were necessarily forced to expend and lay out another large sum of money, to wit, 266*l.* 9*s.* 9*d.*; and, by reason of the premises, plaintiffs have been greatly damaged, &c.

Plea—Second, that said casks containing said oil in said agreement and declaration mentioned, were not, at the time of the making of said agreement and promise in the said declaration mentioned, or at the time of the arrival of said vessel at Plymouth, or at the time plaintiffs tendered and offered to deliver and leave with defendants said bill of lading of said cargo, as in said declaration mentioned, well seasoned or proper casks for the purpose of containing good merchantable Gallipoli oil, according to the terms and within the true intent and meaning of said agreement in said declaration mentioned; but, on the contrary thereof, were badly seasoned, and unfit and improper casks for the purpose of containing such oil, as in said agreement mentioned, wherefore defendants did not nor would take, accept, or receive the said bills of lading and cargo at Plymouth, and did not nor would direct said vessel, with said cargo, to any one of the ports in the said declaration mentioned, and neglected and refused to pay to plaintiffs for said cargo, said price; concluding with a verification.

Special demurrer, and joinder therein (1).

(1) The causes assigned were, that defendants by their plea did not traverse or attempt to put in issue any matter of fact alleged, or necessary to be alleged by plaintiffs in their declaration, but introduced and attempted to put in issue a matter of fact not alleged, nor necessary to be alleged, namely, the fact whether the casks containing the said oil were, at the several times mentioned in the plea, well seasoned or proper casks, for the purpose of containing good merchantable Gallipoli oil, according to the terms, true intent, and meaning of the said agreement, and without, in their plea, shewing, or making it in any way appear that the sufficiency or good quality of the casks was, either expressly or by necessary implication, warranted, or contracted

Maule (in the absence of *Crowder*) was first heard in support of the plea.—The plea is a satisfactory answer to the plaintiffs' demand, as the contract was for "240 casks of Gallipoli oil," and the casks were evidently and necessarily a subject of sale as much as the oil. It was never intended that the oil should be deposited in the vessel, as if in a tank, and then removed by the vendee. And hence it results, that there was an implied warranty that the

or agreed for by the plaintiffs in their said agreement in the declaration mentioned; and that if it was the intention of the defendants, by and under their said plea, to set up any usage or custom, by which the sellers of Gallipoli oil, under such circumstances in the declaration mentioned, are, or would be held, even without any express agreement to that effect, to warrant, or contract, or agree for the proper quality and sufficiency of the casks in which the same may be contained, to the purchasers thereof, and by a breach of which warranty, contract, or agreement, any contract of sale relating to such oil, is rendered voidable by the purchasers thereof, and which usage or custom might therefore be deemed tacitly to have formed part of, and to have been incorporated with the said contract at the time of the making thereof, they should have expressly alleged the existence of such usage or custom, and that said contract was made with reference and subject thereto. Also it was not alleged, nor did it appear by the plea, that said oil was at all damaged or rendered unmerchantable within the meaning of said agreement, by reason of the premises; therefore, that said plea offered no justification or excuse for the non-performance by the defendants, of their part of said contract, and was no answer to the declaration, but was evasive, &c. and any issue raised would be immaterial. Also, that said plea attempted to put in issue the insufficiency and bad quality of said casks, not alone at the time of making such agreement, but also at the time of the arrival of the vessel, and of the tender of said cargo, although it was quite immaterial and irrelevant, for the purposes of the action, what the state of the casks happened to be at any other time than that of the making of the agreement, unless defendants alleged in their said plea, which they have not done, that the insufficiency and bad quality of said casks at the time of said arrival, and of said tender respectively, had been caused and occasioned by the default of plaintiffs. Also, for that defendants do not, in their plea, allege that said casks were, in themselves, and continually, of any less value by reason of their said insufficiency and bad quality, than they otherwise would be, or that defendants would have sustained any damage in respect thereof, by reason of their accepting said cargo. And also, for that said plea does not allege that said defendants elected to avoid, or gave the plaintiffs, at any time, notice of their intention to avoid the contract or agreement, by reason of the promises in the said plea mentioned or otherwise. And also that said plea was in other respects informal, &c.

casks should be well seasoned, and proper for the intended purpose; and the plea alleging that they were not so, is good. The plea is sustainable upon the principle laid down in *Jones v. Bright* (2), where it was held, that the plaintiff, who had purchased copper for the sheathing of a ship, from the defendant, which, owing to some intrinsic defect, had not lasted the average period, might sustain an action on the case in the nature of deceit. *Gray v. Cox* (3) is distinguishable, as, there, no express warranty was given, and no such general warranty as that contended for could, under the circumstances, be implied.

Crowder, in support of the demurrer.—No question can be raised as to the quality of the casks. The object of the contract was the sale of a cargo of good merchantable Gallipoli oil, not the sale of so many casks. That cargo was specifically pointed out; the price and quantity were settled; the ship by which it was to be brought, and the port at which it was to arrive, were named. Nothing was said as to the warranty of casks, and yet it is said that this is a contract for a certain quantity of oil, plus the casks. With as much propriety might it be argued, that, in a contract for a certain quantity of wool, the bags in which it was contained, were to be included, and that the article should not be accepted if they were defective.

TINDAL, C.J.—In my opinion, the second plea is no answer to the plaintiffs' complaint, nor does it deprive them upon this occasion of a right of action. The contract states an agreement for the sale of a certain cargo of good merchantable Gallipoli oil, then being the cargo of the ship *Fortuna*. Here, therefore, a right of sale is admitted. All the objections advanced by the defendants, go merely to matters of description; they are not of such importance as can vary in the slightest degree the right of action, or furnish an answer to the plaintiffs' demand. The plea admits that the contract was for good merchantable Gallipoli oil, and the objection is not directed to that which is essential; it is addressed to that which is merely matter of description, to the mode

in which the oil has been brought; and what the defendants say upon this subject, amounts merely to this, that the casks were not well seasoned, nor fit or proper for the conveyance of the article in question. Now such objection is, it is quite obvious, quite independent of and unconnected with that which is the essence of the contract; and besides, notwithstanding the allegation that the casks were not proper and well-seasoned, it does not appear that the oil was injured or deteriorated in value, so as, upon the offer to deliver, to justify the non-acceptance by the defendants. I am, of course, perfectly conscious that many cases may exist, in which oil and similar articles must be delivered in the vessels in which they are brought, and in which the vendee, in consequence of the deterioration in value, need not accept. Suppose, for example, a contract were made, by which a pipe of port was to be delivered in bottles, and the corks were in such a state as to suffer the oozing out of the wine, in such case, the vendor could not compel the other party to accept; but, in such case, the plea should go farther, it should go on and state that the wine, the article contracted to be delivered, was not in a merchantable state. But the plea here does not contain such allegation; and it is, in this respect, vicious, and does not go far enough. Our judgment should be for the plaintiffs.

PARK, J.—I am of the same opinion. Mr. Maule endeavoured to import some strength into his argument, by asserting that the plaintiffs made sale of the casks; but this was not the case. The contract was merely for the sale of good merchantable Gallipoli oil. He has also contended that there was a warranty by the plaintiffs, of the casks; but this proposition is equally unfounded. He then wished us to conclude, that because the contract was for the sale of 240 casks of sound merchantable oil, it was therefore an essential part of the contract, that these casks should be well seasoned. But this is not so: the casks were a kind of adjunct to the sale of the oil, and there is not a word concerning them in the contract. *Jones v. Bright* has been referred to, but it does not apply, as the defect imputed there, was in the commodity itself, the copper;

(2) 5 Bing. 533; s. c. 7 Law J. Rep. C.P. 213.

(3) 4 B. & C. 108.

and the Judges, of whom I was one, held, that it was totally distinct and different from the article which should be applied to the purpose for which that in question was sold. Here, it should be also recollected, that there was no injury done to the party. He would not even examine the article, or receive it into his custody.

BOSANQUET, J.—I am also of opinion, that the plea furnishes no answer to the action. In the contract, as set forth in the declaration, and as it is admitted in the plea, a description is given of certain oil, contained in a certain number of casks, which contained a certain quantity, on board the ship *Fortuna*. The declaration then avers an offer to deliver the article to the defendants, and the defendants' answer is, that the casks which contained the oil were not fit or proper for such purpose. The quantity and quality, the arrival of the oil, and a tender of it in a merchantable state, are all admitted; and the objection does not go to the whole of the consideration, which it should do, to operate as a bar to the action. In my opinion, if these casks were actually defective in any respect,—if, for example, the hoops were in such a state that a half gallon was lost out of each cask,—even in such case, the defect would be no answer to the action. In such case, it would be no answer to say, that the casks were not fit or proper to contain the oil, such oil agreeing, as it did, in quality, with that which was contracted to be delivered. Suppose, by way of illustration, that a contract were made for the delivery of certain bales of cotton, of a given description, which arrived in a certain state, and that some of the bales were ragged, and that the packages (though they arrived safely at their destination) were consequently in a state not fit for delivery; would it, in such case, be an answer to an action to suggest that some of the bales were ragged? I can see no difference between the case thus supposed, and the present. Our judgment should be for the plaintiffs.

COLTMAN, J.—I am of the same opinion, and principally for the reason given by my Brother Bosanquet, that the plea does not go to the whole of the consideration. The contract here, is for a certain quantity of oil; and, supposing the contract was

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about the vessels which contained the article, if the oil arrived, as it has here, good and merchantable, the objection to the casks would not be good, inasmuch as it goes only to a part, and not to the whole; and admitting the allegation that the casks were not fit or merchantable, it would not thence follow that the defendants were entitled to reject them; they would have a right of action, if any diminution or injury had been the consequence. The case is, in my opinion, clear and unequivocal, and there should be

Judgment for the plaintiffs.

1837. }
May 1. } YOUNG v. COLE.

Action—Pleading—Money had and received—Broker.

The defendant authorized the plaintiff, a stock-broker, to sell certain Guatemala bonds, which he accordingly did, and received the price, which he handed to the plaintiff, retaining his commission. A few days afterwards, the bonds were returned to the plaintiff as unmarketable, they not being sealed at a certain time, as required by the state, of which they formed the stock. The plaintiff immediately rescinded the contract, and returned the money to the purchaser. Upon the refusal of the defendant to refund,—Held, that an action was maintainable upon the general count for money paid, or money had and received.

Semble—that a broker on the Stock Exchange can rescind a contract without consulting his principal, inasmuch as the broker is considered as a principal quoad those with whom he deals.

Declaration in assumpsit for work and labour, as the broker and agent of defendant, and on his retainer, and for commission and reward due, and of right payable from defendant to plaintiff in respect thereof; with counts for money paid, for money had and received, and on an account stated.

*Pleas—non assumpsit; and non assumpsit except as to the sum of 1*l.* 5*s.*, and payment of that sum into court.*

Replication—similiter to the first plea;

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and damages *ultra* the amount paid into court, to the second. Issue thereon.

At the trial, before Tindal, C.J. at Guildhall, at the Sittings after Michaelmas term, the following appeared to be the circumstances of the case.

In September 1825, the defendant, at the request of a friend, purchased 1,500*l.* scrip of a loan to the state of Guatemala, which was to be sold when a certain profit could be realized; and the defendant, at the same time, purchased 500*l.* of the same scrip for himself. The scrip was bought at 9*l.* per cent.; an instalment of 10*l.* having been previously paid upon the amount of the loan. The subsequent instalments were duly paid up by the defendant, and the bonds were thereupon delivered to him by the contractors, and were held by him until the month of April last. A part of the sum raised was retained by the contractors as a reserved fund, to ensure the payment of the dividends; and the only dividends which had been ever paid, were paid out of that fund, no money having ever been remitted to this country to meet these demands. In the month of April last, there having been some advance upon the price which the bonds had for some time borne, the defendant's clerk, Mr. Dunn, who was intrusted with the management of the affair in the absence of Cole, the defendant, instructed the plaintiff to sell the 2,000*l.* bonds, and a sale was effected on the 26th of April, at 30*l.* per cent., 1,000*l.* to be delivered and paid for immediately, and the other 1,000*l.* to be delivered and paid for on the 3rd of May. Dunn, on the same day, delivered four of the bonds, numbered 629 to 632, for 250*l.* each, to the plaintiff, and received in exchange a cheque for 298*l.* 15*s.*, the amount for which they were sold, less by the broker's commission of 1*l.* 5*s.* This sum of 298*l.* 15*l.* was immediately passed by Dunn, in the defendant's books, to the credit of the defendant's friend, at whose instance the speculation was entered into, as the larger portion of the bonds belonged to him. On the morning of the 27th, Dunn called on the plaintiff, and requested to be furnished with a sold note, for the bonds sold for the 3rd of May; and the plaintiff then stated, that the purchasers wished to have the

remainder of the bonds delivered on the 29th of April, instead of the 3rd of May, and he gave Dunn a sold note, of which the following is a copy:—

"London, the 27th of April 1836, sold for J. H. Cole, Esq., 1,000*l.* Guatemala bonds, a 30th for 29th instant."

No objection was made at this time, nor was any hint given that the bonds were defective until the 28th of April, when the plaintiff's clerk called upon Dunn with the 1,000*l.* bonds delivered on the 26th, and required him to take them back and repay the 298*l.* 15*s.*, alleging, that the bonds were not marketable, in consequence of their not having been stamped according to an order issued in the year 1828 or 1829 by the Guatemala government, requiring the holders of bonds to produce them to, and have them stamped by an agent of that government, within a certain time, in default of which they would not be received by the state as valid. The defendant refused to refund; and the plaintiff having returned to one Bryant, the purchaser of the bonds, the money he had paid, brought the present action. The jury found a verdict for the plaintiff for 298*l.* 15*s.*; and the learned Judge gave the defendant leave to move to enter a nonsuit.

Sir F. Pollock obtained a rule *nisi* accordingly, and for a new trial, on the ground that the plaintiff was not entitled to recover on the count for money had and received, but should have declared specially according to the facts; and that he had no right, without the consent of the defendant, to rescind the contract, and by a voluntary payment to make the defendant his debtor. On the latter point, he cited *Street v. Blay* (1).

Wilde, Serj. and *Ogle* shewed cause.—The doctrine laid down in *Street v. Blay* does not apply, and the assumption, that the payment to Bryant was voluntary, is incorrect. The case is precisely within that of *Child v. Morley* (2), where Lord Kenyon was of opinion, that the payment of certain differences, which his principal refused to pay, by a broker, was not a voluntary payment, but made under the pressure of the situation in which he was

(1) 2 B. & Ad. 456.

(2) 8 Term Rep. 610.

involved by the defendant's breach of faith. Neither was the plaintiff bound to declare specially, for nothing remained to be done, and no value passed; and, independently of the usage of the Stock Exchange, where the broker is considered by those with whom he deals as a principal, might not Bryant, the vendee, have brought an action against the broker?—*Patteson v. Gaudesqui* (3). When, therefore, the broker found that he had made a contract which he had no right to make, he was justified in rescinding it the next day. And he was as well entitled to recover for money had and received, as the party was who discounted a forged navy bill, upon failure of consideration—*Jones v. Ryde* (4). The defendant there, as it was said by Lord Kenyon, put off an instrument as a navy bill of a certain description, and it turned out not to be a navy bill of that amount; just so, the bonds here did not turn out to be what they were said to be; as they were not sealed, they did not answer the known mercantile description, and the warranty to that effect, which was inferred from the description given of them—*Bridge v. Wain* (5), *Gardiner v. Gray* (6). The bonds were, in fact, waste paper; and without being compelled to have recourse to the authority of, or go to the same extent as *Lucas v. Worswick* (7), where it was held, that assumpsit lay for money had and received, to recover money paid by the plaintiff under a forgetfulness of facts, which were within his knowledge, the plaintiff is entitled to recover in this form of action. His situation may be compared to that of the sheriff, in *Austin v. Ward* (8), or to that of the bailiff in *Wilson v. Milner* (9), or to that of the bail in *Fisher v. Fallows* (10), where the plaintiffs were held entitled to recover in actions for money had and received.

Robinson, in support of the rule, contended, that the broker was not to be considered as a guaranty to the vendee that the bonds sold were sealed; and conse-

quently it was not competent to him to say to the defendant, "I have paid the purchaser back his money, and now you must pay me." Bryant, the purchaser, must be taken to be conversant with the business of the Stock Exchange, and he could not be supposed to buy waste paper. The bonds, in fact, were not waste paper, nor were they valueless; they may still be sealed, though the operation of sealing may now be attended with some degree of difficulty. The case cited, as to the right of the party to recover, who discovered a forged navy bill, does not apply; and the cases in which the sheriff, bailiff, and bail were parties, are equally irrelevant, inasmuch as there the money must, at all events, have been paid. The distinction, as to when the plaintiff should sue upon a general and a special count, is laid down in *Osborne v. Rogers* (11); and in *Gomperts v. Denton* (12), it was held, that the purchaser of a horse can recover for breach of warranty in an action for damages only, and cannot sue on the *indebitatus* count, as on a failure of the original consideration. No express warranty was given that the bonds were sealed; and per Grose, J. in *Parkinson v. Lee* (13), "If there is no such warranty, and the seller sold the thing, such as he believed it to be, without fraud, the law did not seem to imply that he sold it on any other terms than what passed in fact."

TINDAL, C.J.—As it appears to me, the sum of money for which the jury have found their verdict for the plaintiff, is properly considered as money had and received for his use. When the plaintiff delivered the sum of 800*l.* for the defendant, it was his own money, and at the time of such delivery, both were principals. When the money was originally paid, it was done upon an understanding arising out of a certain supposed state of facts, that the bonds which were given, enclosed in an envelope, were Guatemala bonds, of the only description which were saleable in the market. The circumstance took place under the impression, that the bonds transferred to the purchaser were, in fact,

(3) 15 East, 62.

(4) 5 Taunt. 488.

(5) 1 Stark. N.P. 504.

(6) 4 Campb. 144.

(7) 1 Mo. & Rob. 293.

(8) 1 Ry. & Moo. 116.

(9) 2 Campb. 452.

(10) 5 Esp. 171.

(11) 1 Saund. 169, B, n. i.

(12) 1 Cr. & M. 207; s.c. 2 Law J. Rep. (N.S.) Exch. 82.

(13) 2 East, 321.

such bonds, that is to say, that they were sealed, as such alone were saleable. But as things have occurred, the consideration for the 300*l.* has, as it appears to me, failed as completely as if a person had contracted to deliver certain foreign gold coins, and upon the day appointed for the delivery, he had given, instead of such coins, certain counters of the same size, but of no value whatever. There is no pretence for asserting here, upon the part of the defendant, that these documents, which were given as bonds, were of any assigned value. This is not the question of a warranty, as to that which has been given; but it is a question of the non-delivery of that which was contracted to be given. It is the case of the delivery of that which had no assignable value whatever. With regard to the question, whether the plaintiff had a right to rescind a contract entered into with a third person, without communicating with the defendant—the answer is, there was no contract entered into between the defendant and the third person, inasmuch as the defendant was not named. There was nothing to shew that the bonds were sold to Bryant by the defendant; and if the bonds had been sold at a certain price, and had not been delivered, and an action were brought for the breach, the action would be brought against the plaintiff, and not against the defendant, whose name does not appear, nor is it mentioned. Such would, in my opinion, be the result and consequence if the case stopped here; but, in addition to the circumstances above referred to, let us look to the particular practice of the Stock Exchange, where the broker is himself held liable, where the contracting parties do not look to the principal, and where, if, from circumstances which arise, it may be necessary to rescind the contract, the broker is at liberty to do so, without consulting his principal. It should be also borne in mind, that the defendant has not been injured by the conduct of the broker upon the occasion: if he were, this might *pro tanto* be an answer to the action. This is simply a case of money had and received for the use of the plaintiff. There is also another ground for coming to the conclusion at which I have arrived, and which stands perfectly clear of any objection which has

been advanced. Upon the 4th of May, after the transaction had taken place, the defendant was aware of all the circumstances. He wrote a letter to the plaintiff, in which he says, "If the bonds were my own, all would be right, and you would get your money; but they are not mine, they belong to a third person." But this he has not proved, he has not shewn that they did not belong to him,—that they were the property of another; and thus, in my opinion, he has set his seal upon the transaction, inasmuch as he has admitted by his letter, that he himself was liable, unless he shewed that the bonds were not his own, but the property of another; and this, it is evident, he has not done.

PARK, J. of the same opinion.

BOSANQUET, J.—I, too, am of opinion, that there should not be a new trial or a nonsuit. I also agree with the authorities which have been cited and submitted to our consideration. This is not a breach of warranty; in fact, there has been no consideration whatever for the price which has been paid, as the paper delivered for Guatemala bonds was perfectly worthless; a bargain was made for that which was not delivered; the contract was very properly rescinded; and Bryant required a return of his money, for which he had received nothing but waste paper. The money was returned, and one question was, if this could be considered as a voluntary payment? and I think it cannot. The case of *Child v. Morley* has been referred to, for the purpose of bringing the case within the expressions of Lord Kenyon, that the payment was not altogether voluntary; and in such opinion I for one concur. Here, also, the defendant called upon the plaintiff to act for him as his broker, and he was bound to reimburse him, as, by the regulations of the Stock Exchange, he would be expelled from the society unless he fulfilled and performed the contracts into which he had entered; and in the management of which, he was, by the same regulations, considered as a principal, with regard to those whom he has paid, and was treated as such; but in respect of his employer, he was still an agent, and was consequently entitled to call upon him on the count for money paid, or for that for the delivery of Guatemala bonds: upon either of these counts the

plaintiff is, I think, entitled to recover; and in addition, there is his acknowledgment of his liability if the bonds were his own, and a denial of such, as the bonds were not his, but were the property of others; this, however, he has not proved.

COLTMAN, J.—The principal question here is, whether the plaintiff had a right to rescind the contract into which he entered with Bryant; and, in my opinion, he had. The contract was for Guatemala bonds, that is, in fact, for those known and understood to be such in the market. In such state of things the principal had, I think, a right to rescind the contract, and obtain his money. Then, as to the other question, whether he had a right to rescind the contract without communicating with his principal—I also am of opinion that he had; for when the defendant authorized him to go on the Stock Exchange and transact his business there, he, by so doing, authorized him to act there as all other brokers do; and the authority thus given is still further recognized by the letter to which my Lord has referred. There is no ground for the application; and the rule should be discharged.

Rule discharged.

1837. }
May 8. } LUCAS v. GODWIN.

Contract—Pleading—Evidence.

The plaintiff, a builder, and the defendant's son, entered into an agreement, on the 25th of June 1836, for the building of six cottages; the work to be completed in a proper and workmanlike manner, upon the 10th of the ensuing October, and to be paid for on the 1st of January 1837. The work was not completed until the 15th of October, when no objection was made to the mode in which it was executed. In an action of indebitatus assumpsit against the defendant, the father, as principal,—Held, that as the work was executed, and nothing remained to be done but the payment of the money, the day of the stipulated completion, viz. the 10th of October, not being essential, but merely directory, an action lay upon an indebitatus assumpsit generally, and the plaintiff need not declare specially upon the contract.

An advertisement having appeared in a newspaper in September, three months after the agreement was entered into, stating, that certain property was bequeathed to the defendant and his son, which advertisement led strongly to the conclusion, that the father and son had entered into a fraudulent combination, for the purpose of obtaining credit from the plaintiff:—Held, that such advertisement might be given in evidence for the purpose of shewing the conduct and intentions of the defendant and his son, and that the agreement was fraudulent.

Indebitatus assumpsit for work, labour, and materials, &c.

Plea—Non assumpsit, and issue thereon.

At the trial, before Coltman, J., at the last Assizes at Huntingdon, the facts of the case appeared to be as follows:—

The plaintiff and Thomas Robinson Godwin, son of the defendant, entered into a contract to this effect:—"Memorandum of an agreement, made and entered into on this 25th of June 1836, between Mr. G. Lucas, builder, &c., of Peterborough, in the county of Northampton, on the one part, and Mr. Thomas R. Godwin, of Fawcett, in the county of Huntingdon, on the other—that is to say, the said G. Lucas agrees to do all the bricklayer's, plasterer's, and slater's work, (exclusive of slating laths,) and brick floors, in six cottages, about to be erected in Fawcett aforesaid, of the depth of twenty feet four inches each cottage, breadth thirteen feet, side measure, for the sum of 216*l.*, exclusive of stone foundations, the one half of which, at the prime cost of the stone, is to be paid for by the aforesaid Mr. T. R. Godwin; Mr. T. R. Godwin also hereby agrees on his part to pay unto the aforesaid G. Lucas, the above sum of 216*l.*, on the 1st of January 1837, on condition of the work being done in a proper and workman-like manner, together with the amount of one half of the foundations as before mentioned, and to be completed by the 10th of October 1836." Signed, &c.

Upon entering into this contract, the son stated to the plaintiff, that a legacy of 300*l.* had been left him by an aunt; that such would, when received by him, go to defray the expenses of the buildings (at Christmas last), and upon this statement,

the plaintiff was induced to give credit for the amount sought to be recovered. Upon the 23rd of September, the following advertisement appeared in the *Stamford Mercury*:—"Mr. Thomas Godwin's estate.—The administrator of the estate and effects of Thomas Godwin, formerly of Crowlands, Lincolnshire, mariner, on board His Majesty's fleet, and late of Philadelphia, America, who died on the 5th of July 1836, hereby gives notice, that he is about to pay over the sum of 400*l.* to Samuel Godwin, late of Crowlands, in the county of Lincoln, yeoman, and his son, Thomas Godwin, formerly apprentice at Rippingale, in the said county, wheelwright, who are entitled to 100 acres of land, together with the house, barn, and other buildings thereon situate at Philadelphia, America. If the above claimants will meet at the White Hart, Spalding, on the 27th of September, between the hours of 11 & 2 o'clock, they will be entitled to the same, by inquiring of Mr. W. Buck, administrator to the deceased."

It appeared, that this newspaper was printed and circulated in the county, and that on the 25th of September, the defendant inquired of a person if he had seen the advertisement, announcing that he was entitled to 100 acres of land at Philadelphia, and was to receive 400*l.*, and wished to borrow a horse, as he said he was going to Spalding to receive money. The defendant also spoke of an advertisement to other persons, and he and his son asserted positively that they had received the money in question, with the exception of 50*l.*, which, as they said, was retained by the administrator for his expenses, costs, &c. Upon the 29th of November, the son, then in prison on a criminal charge, gave the plaintiff a cheque for 200*l.*, upon the bank where he said the money was deposited, which was dishonoured. A verdict was found for the plaintiff, damages 242*l.*

Kelly obtained a rule to enter a nonsuit, according to leave reserved, or for a new trial, on the ground, that the action ought to have been brought against the defendant's son as the principal, or as the agent to whom the plaintiff had elected to give credit; and that the declaration ought to have been special. Upon these objections, he

cited *Paterson v. Gandasequi* (1), and *Davis v. Nichols* (2). He further objected, that the advertisement in the *Stamford Mercury* newspaper was improperly received in evidence; and he also moved on the ground of surprise, producing an affidavit, contradicting the evidence of an attorney who had been employed by the defendant's son; and referring, upon this point, to *Taylor v. Blacklow* (3), and *Doe v. Watkins* (4).

Byles (Burch was with him) (5), shewed cause.—The objection to the form of the declaration is not available. The contract was admitted to have been completed upon the 15th of October, and thus far the case is within the rule laid down in 1 *Saund.* 269, B, n. (i), viz. "The general counts may be resorted to in all cases where the contract is executed, and nothing remains to be done but the payment of the money." The argument, that such a general form is not allowed where the terms of the special contract are not, as in this case, performed, is answered by *Harris v. Oke* (6), where the plaintiff having failed to prove his special count, Lord Mansfield suffered him to go into proof of his general one. *Burn v. Miller* (7) also shews, that the completion of the work upon the 10th of October was not a condition precedent. This contract was also clearly one of the contracts mentioned by the Court in that case, "made with relation to time, upon which, although the works are not finished when the time is expired, the work and labour, or other beneficial matter, may, nevertheless, be recovered for." Here, also, as in that case, and *Alexander v. Gardiner* (8), the defendant waived the objection as to time, and it was not of the essence of the contract. Besides, in works of this description, there are always what are called *extras*; no time

(1) 15 East, 62.

(2) 2 Chit. Rep. 320.

(3) 3 Bing. N.C. 235; s. c. 6 Law J. Rep. (N.S.) C.P. 14.

(4) *Ibid.* 421; s. c. 6 Law J. Rep. C.P. 108.

(5) The cause was called on for argument out of its turn, in consequence of an affidavit produced by *Byles*, which stated, that the defendant, then in prison, was squandering his property, and that the plaintiff would be deprived of the fruits of his verdict, if he had not judgment of this term.

(6) Bull. N.P. 139.

(7) 4 Taunt. 745.

(8) 1 Bing. N.C. 671; s. c. 4 Law J. Rep. (N.S.) C.P. 223.

was limited for them, and, for aught that appears, it was the completion of these *extras*, which occupied the time from the 10th to the 15th of October. The plaintiff had also a right to charge the defendant, when it was discovered that he was the principal; and the defendant could not, as it was decided in *Hill v. Perrott* (9), set up a transfer or sale to himself, because his own fraud had procured it; and the mere possession unaccounted for, raised an assumpsit to pay. The Court will be also guided in their decision upon this part of the case by *Biddle v. Levy* (10), where, when goods were supplied to a minor, upon a fraudulent representation by his father, that he was about to relinquish his business in favour of the son, although the credit was given to the son, yet, as the father dealt with the proceeds, he was held responsible in assumpsit, for goods sold and delivered. Then, with regard to the receiving of the newspaper in evidence, it was shewn that the defendant was connected with it in a variety of ways; that he called the attention of others to the paper, and that others directed his observation to it.

Kelly and Gunning, in support of the rule.—It may be admitted, that if a contract is executed, and nothing remains to be done but the payment of the money, the rule, as cited from 1 *Saund.*, applies; but the agreement, here, though artificially drawn, was evidently conditional; the condition was, that the work was to be done upon the 10th of October, in a proper and workmanlike manner. Now, it is evident from these words, that the parties intended the contract to be subject to a condition; and if the plaintiff had alleged, that the defendant dispensed with it, the defendant might have had an opportunity of traversing the allegation. The declaration, therefore, should have been specially framed. The important point in this case is, however, as to the admission of the newspaper in evidence, and it is clear it should not have been admitted. The agreement was entered into in the month of June, and the newspaper was not published until the ensuing September; consequently, its contents could have nothing to do with a con-

tract made three months before. The publication did not take place until the work was nearly completed, and the question is, was the party induced to give credit by the representation in the paper? It is difficult to understand upon what principle of law or evidence this paper could be received. It did not appear that the defendant read it, or that he even saw it. The case should, on this point, be considered as if it had occurred before the stat. 38 Geo. 3. c. 78, when, on an indictment for a libel, it was not enough to shew the publication of a paper on the same day, and bearing the same title as that in which the libel was contained; but the prosecutor was obliged to go further, and prove the publication of the identical paper. It should also have been proved, that the defendant was acquainted with the contents of this identical paper. That which was produced, might have been a copy, and, if so, the absence of the original should have been explained and accounted for. Again, the time or day to which the conversation respecting the advertisement referred was not shewn, or whether it referred to any, and for aught that has appeared, there might have been another advertisement upon the subject in existence, and of a nature perfectly innocent.

TINDAL, C.J.—I see no reason for disturbing the verdict, upon the points to which our attention has been called. Three objections have been advanced to the propriety of the verdict remaining as it is. The first is to the form of the declaration; and upon this subject, it is said, that as the contract between the parties was of a special nature and description, the plaintiff, instead of endeavouring to support an action upon the general count for work and labour, should have declared specially upon the contract. Another objection is, that in the course and progress of the cause, an advertisement was improperly received in evidence. The third objection rests upon affidavits of surprise at the trial; but, perhaps, this requires the least degree of attention, and may be considered as the least important, inasmuch as, if the defendant were to succeed on this point, it would be upon the usual condition, of the payment of costs. As to the present objection, the contract

(9) 3 Taunt. 274.

(10) 1 Stark. N.P. 20.

is, it cannot be denied, for the doing of certain work: and for the purpose of ascertaining what was to be done, we must look to the contract, and, at the end of it, we find it said, "T. R. Godwin also hereby agrees on his part, to pay unto the aforesaid G. Lucas, the above sum of £16*l.* on the 1st of January 1837, *on condition* of the work being done in a proper and workmanlike manner, together with the amount of one-half of the foundations as before mentioned, and to be completed by the 10th of October 1836." Now this, in my opinion, does not amount to an actual condition; it seems, rather, a convention or contract between the parties, that the work was to be done at a certain day. It was, as I think, stipulated that the work was to be completed on a certain day, and if the work was not done by such day, if it was not done until a day after, such compact or agreement is not to be considered as a condition, and consequently the plaintiff should not be prevented from maintaining his count in this form. I am aware, and I admit the correctness of the rule, that when anything is performed by a certain day, and nothing remains to be done but the payment of the money, in such case, the plaintiff is not driven, for the purpose of enforcing the fulfilment of his contract, to an express statement or special declaration. He may have recourse to the general count, unless something is to be done, which renders it necessary to refer to the terms of the contract. But the condition here is not of such an important nature; it does not go to the essence; it does not affect the substantial right of action possessed by the plaintiff. The conclusion of the Court may, indeed, be in favour of the defendant, if the work was not done in a workmanlike or proper manner, and in conformity with that contract which is implied by the law. The defence, therefore, of the party upon this point, is not an answer to the action, inasmuch as it goes only to a part, and not to the whole. If the principle contended for were sanctioned, every little deviation from a contract would be attended with the like consequence, and thus the contracting party would receive no payment at all, although great benefit might result to the defendant from that which had been done. But from

recourse being had to the general count for work and labour, it was left to the jury to decide as to the compensation to which the party should be entitled. As to the second part of this objection, that the work was not completed until the 15th of October;—when we consider the situation of the builder, we cannot, I think, suppose it reasonable or probable that he should enter into a contract, by which, if the work was not done at a certain day, he was to receive nothing, and if the contract was broken to that extent only, the person on whose ground the work was done, should have the benefit for nothing at all. No doubt, contracting parties may enter into such an agreement if they please; but we must see our way clearly, before we give effect to such an unreasonable contract as this would most certainly be; and we cannot, I think, conclude, when we look at the words of the clause, that the plaintiff here did enter into such a contract. With regard to the objection founded upon the admission of the newspaper in evidence, it is said, that it had no bearing upon or reference to the question at issue; that it could not have any influence in shewing whether the son was the principal, or was acting as the agent of his father; that the contract was dated the 7th of June, and the advertisement did not appear until September, consequently, it is said, it should not have been admitted as evidence, for the purpose of explaining what occurred before its appearance. Now, for myself, I do not think that the objection founded upon the subsequent appearance of this advertisement, can be supported. I do not see why it should not be produced, for the purpose of shewing that the contract with the parties, for whose benefit this advertisement was inserted, was fraudulent. I think, under such circumstances, it was competent to the plaintiff to shew how the father and son were conducting themselves not only at the prior time, but at any time prior or subsequent, at least in regard to matters which might be fairly referable to such contract. No law of evidence, that I am aware of, is violated, by giving this evidence, for the purpose of shewing a fraudulent conspiracy between the father and the son, before the buildings were

begun. There is, I repeat it, nothing to prevent the party from throwing light upon the case, in the manner in which he has. The rules of evidence acted upon in such discussions, were not infringed by the reception of such evidence, and by leaving it to the jury to decide upon the conduct of the parties. It has been also said, that there was another difficulty, in consequence of which, the advertisement was inadmissible in evidence, namely, that it was uncertain to what day or time it referred. It turns out, however, that it was upon a day in September, which, though not certain, was capable of being made so by reference. The father in his account said, he was going to Spalding for money, and he wished to borrow a horse for the purpose. He prefaced his conversation, by asking if the party saw the advertisement which announced that he was entitled to 100 acres of land at Philadelphia, and that he was to receive 400*l.*, to be paid immediately. These were certain specific facts to which the advertisement referred. It also appeared that the newspaper was printed and circulated in the county, and its date was the 23rd of September. Why should not this paper be given in evidence of that which (upon the father's wishing to borrow a horse upon the 25th of September, for the purpose of going to Spalding to obtain the money,) was adverted to as having occurred in point of time two days before, and the performance of which, by the party's getting the money, was referable to two days after? It is also said, that there might have been, for aught that appeared, another advertisement perfectly innocent. But was not the defendant the person who was called upon to produce that other, if it was in existence? If the existence of another advertisement is meant to be a real substantial answer, is it not a little strange that the evidence given should tally so exactly with the advertisement which has appeared—and that in reality and substance, and not according to the fancy of the party? With regard to the affidavit that Wilkinson was employed as the attorney of the son, and not of the father, the answer is short: the fact should be made clear and distinct indeed, before we took from Wilkinson the weight to which he is entitled, more especially when

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the plaintiff had an opportunity, of which he did not avail himself, of examining his son. This, no doubt, would place the latter in a situation peculiarly disagreeable; but still, it is admitted on all hands, that he was within reach, being at the time in prison, and the father might have had the advantage of his testimony; but he did not think fit to avail himself of it. The rule should, I think, be discharged.

BOSANQUET, J.—I am also of opinion, that this rule should be discharged. In the first place, as to the form of the declaration, enough, I think, has appeared to support the general count of *indebitatus assumpsit*. It is contended, that as this was a contract conditional in its nature, the plaintiff was bound either to allege particularly such performance, or state some reason for the non-performance. But it should be recollected, that the contract was executed, and although it was not executed according to the precise terms, which were, that the work should be completed on the 10th of October, and it was not actually completed until the 15th, yet this performance required upon the above-mentioned date of the 10th, does not appear to me such a condition as furnishes an answer to the action, inasmuch as it does not go to the whole consideration. When we look at the words of the contract, we cannot, I think, find anything in its language or its meaning, which leads to the conclusion that the plaintiff should not have recourse to his general count; there is nothing to shew that he should not avail himself of this form of action, if the breach complained of, does not go to the whole consideration; and the remedy for the defendant, if he suffered injury from the deviation above referred to, would be, by his action for damages; and such should be his proceeding, if he suffered detriment from the non-completion upon the 10th of October,—his promise to pay upon the completion of the work upon that day, not amounting to a condition. With regard to the words which follow, and which make the payment to depend upon the work being performed in a good and workmanlike manner, it cannot surely be contended, that if the work was performed in an improper and unworkmanlike manner, in some small and particular part, there-

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fore the defendant was not to pay anything. If, indeed, the work were so ill done, as not to produce any benefit, then the defendant could not be compelled to pay; but if the defect were but small and trifling, if the breach of that which was stipulated to be done, were partial, damages might be recovered by the party entitled to complain. Thus, in my opinion, there is no objection to the general mode of declaration.

Now, with regard to the more material objection, the reception of the advertisement in evidence, it should be recollected, that the real question was, whether the defendant was the principal in the contract entered into by the son. And to meet the claim of the plaintiff upon this head, it was alleged upon the part of the defendant, that the reliance upon the son for so long a period of time, (the alleged fact of the father being the principal, being, as it was said, only known in the early part of January,) was inconsistent with the supposition of the son being employed by the father, and consequently that the son was to be held as the principal. Now, it was very important for the plaintiff, for the purpose of meeting this part of the case, to shew the conduct of the son, and that not merely at the time of entering into the contract, as, it appears to me, every thing which refers to the work which forms the subject of discussion, was receivable in evidence, as well before as after the execution of the contract. And, as to the question, whether the advertisement was admissible according to the rules of evidence—I am also of opinion, that it was receivable according to such rules. The statement upon the trial was, that the father spoke of an advertisement generally. He did not speak of any particular copy; he did not so express himself as to identify any one; he merely asked, "Have you seen an advertisement?" He then made mention of certain particular circumstances. Upon this subject, it is not necessary to repeat that which has been said by my Lord; it is merely sufficient to say, that when the advertisement, the admissibility of which forms the subject of discussion, was produced, it was found to correspond and tally with the circumstances and incidents of which the father had previously spoken.

The paper was also a public one, and circulated in the county. For these reasons, the paper was, I think, evidence for the purpose for which it was produced, namely, to shew, from the father's mode of speaking, his conduct and his privity as to the transaction. As to the affidavits respecting the testimony of Mr. Wilkinson, they do not contradict such testimony in the clear, conclusive, and satisfactory manner which they ought, and, therefore, they do not require much consideration.

COLTMAN, J.—With regard to the form of the declaration, if the condition was such as it is asserted to be, the plaintiff could not recover, either upon the implied or express contract; not upon the latter, as the work was not completed upon a particular day; not upon the former, as there was a contract in existence: this would be manifestly unjust. The party, here, is entitled to recover upon his count for work and labour. There is nothing in the stipulation to shew that the consideration is of the nature contended for. That the work should be executed upon the 10th of October, is to be considered as a part of the contract, which is merely directory; and, under such circumstances, the *indebitatus assumpsit* count is sufficient. The second objection seems, as it appears to me, to be taken upon the general ground that a prior fraud cannot be proved by evidence of subsequent acts, and that no subsequent conduct could be admitted, for the purpose of reflecting light upon the original conspiracy; and I was called upon to prevent the plaintiff from giving such evidence, and to compel him to substitute other grounds, from which it should appear whether the transaction was fraudulent or not. I, however, did admit the evidence, upon the ground that there was no rule of law which excluded the admission of subsequent acts, for the purpose of proving an antecedent state of circumstances. It was also said, that if the case was free from these objections, it would not still be received as evidence, and this objection seems to assume two different shapes. In the first place, it is said, that it does not refer to the transaction, and that if it did, it was but a copy, and should not be received. Now, as to the first, the advertisement appears to me to show

strongly to what it did refer. It was of a very peculiar description. It spoke of Mr. Buck, and of the White Hart, and of the Tuesday following, which was the 27th of September. Now this goes, in my opinion, very strongly to shew the connexion between the advertisement and the subject of this discussion. It is also said, that it was a mere copy, and not that particular advertisement which was referred to by the defendant, and consequently it should not have been received in evidence. But in the conversations held upon the subject by the defendant, he did not speak of any particular copy, or of any particular paper then in his hands:—he expressed himself without any such restriction. He spoke of an advertisement in general terms. Suppose a man were to impute a certain transaction to another, or to allege that he was placed in a situation which might be injurious or discreditable to him,—for example, that he appeared as a bankrupt in the *Gazette*, would it be an answer to an action to say that the defendant did not say the plaintiff appeared in a certain *Gazette*, but in another? It certainly would not, as the party spoke of the *Gazette* generally. So it is, in my opinion, in the case before us. The party spoke of an advertisement generally, and he cannot be allowed to object that he meant a particular advertisement, which has not been produced. As to the affidavits, they do not afford a sufficient contradiction to the evidence of Mr. Wilkinson; and even if that were struck out altogether, there would be still sufficient to maintain the action. The rule should be discharged.

Rule discharged accordingly.

1837. }
April 18. } ERNEST V. BROWNE.

Pleading—Payment of Money into Court.

In debt, the defendant pleaded never indebted, except in the sum of 3l. 7s., and as to that, a payment into court. The plaintiff's bill of particulars stated a demand for goods sold and delivered of 5l., and gave the defendant credit for 1l. 13s., leaving the balance 3l. 7s., the amount of the sum paid into court. On verdict for the plaintiff with 1s. damages—Held, that notwithstanding the admission in the particulars, he was en-

titled to retain his verdict, inasmuch as the defendant's plea, that he was never indebted in a greater sum than 3l. 7s., was not supported; and such plea made it necessary for the plaintiff to try the fact.

Debt. The first count of the declaration was for work and labour in obtaining the loan of a sum of money for the defendant; the second, for goods sold and delivered; and the third, on an account stated.

The defendant pleaded, that except as to the sum of 3l. 7s., parcel, &c., he was *never indebted*, in manner and form, &c., concluding to the country. And as to the 3l. 7s., parcel, &c., he brings it into court; and that he was not indebted in a greater amount than the said sum of 3l. 7s. *Verification.*

In his replication, the plaintiff joined issue on the former plea, and traversed the other, on which issue was joined.

The bill of particulars as to the demand in the second count, for goods sold and delivered, was as follows:—For a cart sold, 5l.; and it gave credit to the defendant for 1l. 13s., leaving a balance of 3l. 7s.

Upon the trial, before Tindal, C.J., a verdict was found for the defendant as to the first count, for work and labour;—for the plaintiff upon the second, with 1s. damages; and no evidence was given upon the count on an account stated.

Alexander moved to set the verdict on the second count aside, and enter it for the defendant. The failure upon the trial, he said, was occasioned by the accidental omission of a plea of payment of 1l. 13s.; and, in consequence of such omission, the party was prevented from proving the fact.

[TINDAL, C. J.—This may be so; but how can we get rid of the plea which the defendant has put upon the record, that he was *never indebted* in a greater sum than 3l. 7s., whereas it appears he was?]

The bill of particulars shews that the plaintiff has no right of action upon the count for goods sold and delivered; and in *Coates v. Stevens* (1), Parke, B. said, "You had no necessity to plead the pay-

(1) 2 Cr. M. & R. 118; 4 Law J. Rep. (N.S.) Exch. 167.

ment of the sum of 10*l.*, as that was admitted by the bill of particulars."

TINDAL, C.J.—The case referred to was in assumpsit, where damages were sought to be recovered; the present is an action of debt, where the defendant has alleged that he was *never indebted* in more than a certain sum, whereas it appears that he was. The admission, strong as it is in the bill of particulars, is only evidence of the payment, and there is no plea to shew that such evidence should not be received. The plea, as the defendant has pleaded it upon the record, made it necessary for the plaintiff to try the fact, whether the party was ever indebted in a greater sum, and it furnishes no answer. The rule should be refused.

The other Judges concurring—

Rule refused.

1837. }
May 2. } WEBB v. RHODES.

Attorney—Retainer—Lessor and Lessee.

The lessee and the tenant for life, of certain property, signed a memorandum of agreement, by which it was agreed, that the lessee should have a further lease for a certain term, if the tenant for life should so long live; and, that the attorney of the tenant for life, should draw the lease and counterpart at the expense of the lessee; and the lessee had, subsequently, interviews with the attorney, on which he perused the drafts, approved of what had been done, and desired that they should be engrossed. Upon the death of the tenant for life, before the lease was executed,—Held, in an action by the attorney against the lessee, that the defendant was liable to the plaintiff for the costs of what had been done, inasmuch as the defendant's conduct was such as warranted the presumption that he had retained the plaintiff as his attorney, upon that particular occasion, and for the performance of that particular business.

Debt. The first count of the declaration was for work done as an attorney and solicitor, and materials for the same, provided by the plaintiff for the defendant, upon his retainer, and for fees due and

payable to the plaintiff, in respect thereof; second, for money paid by the plaintiff, for the use of defendant at his request.

Plea—*Nunquam indebitatus*; on which issue was joined.

The action was brought to recover the sum of 14*l.* 2*s.* 9*d.*, the amount of the plaintiff's bill of costs, for preparing an agreement, and the drafts of two leases under the following circumstances:—The defendant wishing to obtain a further term of certain land, which he occupied, applied to a Miss Knight, who had a life estate in the premises, and she agreed to grant him a lease for seven, fourteen, or twenty-one years, if she should so long live; and the plaintiff, who was Miss Knight's professional adviser, was instructed to prepare the following agreement:—"Memorandum of an agreement made this 24th of January 1833, between M. A. Knight, of the one part, and J. Rhodes, of the other. The said M. A. Knight agrees to let, and the said J. Rhodes agrees to take and rent of and from the said M. A. Knight, all those several pieces of meadow or pasture, situate at, &c., and the parties agree that a lease shall be granted, commencing at Michaelmas next, for the term of seven, fourteen, or twenty-one years, in case the said M. A. Knight shall so long live, at and under the yearly rent of &c., which lease shall contain the like covenants, conditions, and agreements, or such of them as shall be considered necessary, as the lease under which the said Rhodes now holds the said lands. And it is also agreed, that the said lease, and also a counterpart, shall be prepared by Mr. Webb, solicitor, Reading, at the expense of the said J. Rhodes."

This memorandum was duly signed by Rhodes and Miss Knight, in the presence of a third party. An appointment was then made by the plaintiff and defendant, for the purpose of preparing the draft; but the plaintiff, in consequence of other business, was unable to attend. A correspondence then ensued between the parties, and a delay was occasioned by the defendant, requiring the insertion of a clause which Miss Knight refused. Finally, Miss Knight's brother, the tenant in tail, consented to join his sister in the lease, and the plaintiff and defendant met in

Chancery Lane on the 17th of July 1834, pursuant to a letter written by Rhodes, when the parties went through the draft, which was altered consistently with Miss Knight's interest, according to the suggestion of the defendant, who approved of it, and desired that the draft might be engrossed by the plaintiff as it then stood. It was, however, necessary to have the draft approved by the lady's brother, the tenant in tail, and, during the negotiation, Miss Knight died. The defendant refused to pay the costs incurred, on the ground that the lease was not completed; and he also alleged that it was Miss Knight's executors who ought to pay, as the plaintiff was not retained or employed by him.

On the trial, which took place before Park, J., a verdict was found for the plaintiff for 14*l.* 2*s.* 9*d.*—the learned Judge giving the plaintiff leave to move to enter a nonsuit.

Crowder moved accordingly, and contended, that the action was not maintainable. There was no privity of contract between the parties. The plaintiff was never the attorney of Rhodes; he had no retainer from him; and if the defendant was liable at all, it was to the executor of Miss Knight, who should have been the plaintiff. He distinguished *Grissel v. Robinson* (1), as a lease there was ultimately granted, and the usage that the lessee was to pay the expenses, was relied upon.

Hoggins and *Neville* shewed cause, and contended, that sufficient privity did exist between the plaintiff and defendant, to maintain the action. The defendant, by signing the memorandum, by which it was agreed that Webb was to do the business, had established the fact of privity against himself. The memorandum was also evidence of an express retainer, and the defendant's conduct upon many subsequent occasions, was sufficient to establish an implied one. They also distinguished the present from the cases of *Rigley v. Daykin* (2), and *Pratt v. Vizard* (3), as there, no privity was established between the litigating parties.

(1) 3 Bing. N.C. 10; s. c. 5 Law J. Rep. (N.S.) C.P. 313.

(2) 2 You. & Jer. 83.

(3) 5 B. & Ad. 808; s. c. 3 Law J. Rep. (N.S.) K.B. 7.

Wilde, Serj. and *Crowder*, in support of the rule, admitted the general usage, of the lessee and the mortgagor being liable for the expenses of the necessary documents and conveyances; but, in such cases, an equivalent always passed, which did not here. The plaintiff was not the attorney of Rhodes the defendant; and it could not be contended that the memorandum and the letters written by the defendant, could have the effect of making the plaintiff the defendant's attorney, and operating as a general retainer. To construe every communication made to an attorney into a retainer, would be highly dangerous, and would lead to endless litigation. The opinion of Hullock, B., in *Rigley v. Daykin*, was adverse to the plaintiff. He there said, "In order to raise the question, it was necessary to shew a retainer, in pursuance of which, the business was done." Try the case by this test—would an action lie against Miss Knight? It would not, as the lease was not executed. Besides, the memorandum of agreement was not signed by the plaintiff. This was indisputably necessary, to establish his right of action; and no subsequent concurrence could supply the omission.

TINDAL, C. J.—As it appears to me, there is no reason for disturbing the verdict, which has been found for the plaintiff. The question in the case is, whether, from the evidence given upon the trial, sufficient appeared to induce the jury to infer that a retainer had been given by the defendant Rhodes, to the plaintiff, to enable him to recover for so much of the work as has been done; not, as it has been argued at the bar, a general retainer as an attorney in every business in which the interference of an attorney might be required, but as attorney, so as to deserve a stipulated reward in the particular work done. Now, the first item of the bill is for one-half of the amount of the charges between Miss Knight and Rhodes, the defendant. Here, it should be recollected that these two persons were, at that moment of time, perfect strangers to each other; and, as such, they went into the office of the plaintiff, an attorney, residing at Reading. Hence, in my opinion, it appears that they had no joint purse between them, for the purpose

of defraying the expenses which might arise. It is, I think, easy, from such state of things, to infer that each was to pay a moiety of the expense incurred. This conclusion is, I think, to be attained from looking at the agreement. All the parties, Webb, Miss Knight, and Rhodes, were present at the time, and the arrangement thus entered into was signed by the two latter. This, in my opinion, is as if Webb was also a party to the agreement. What is it in effect, but saying, Let the agreement be drawn up at my expense, and I, Rhodes, will pay you? What, I ask, is this, in effect, but an express retainer of the plaintiff? And it is this circumstance which, as I think, distinguishes this from the cases cited. There was not in them such express retainer at all; the parties there chose to stand in the position in which the law placed them, and this takes the present out of those cases. It will, I think, be also advisable to support the verdict, for the purpose of preventing that circuitry of action, which would necessarily arise from the plaintiff being compelled to bring an action against the landlord for a certain amount, and then compelling the landlord to bring an action against the tenant for precisely the same sum. I agree perfectly in the inconvenience which may arise from supposing that retainers have been given upon all occasions; and I should not wish to extend the doctrine beyond those occasions in which a retainer is actually wanted; but, under all the circumstances, I think that the objection here, viz. the want of a retainer, cannot prevail, and that the jury were right in assuming that a retainer had been actually given. As to what has been said in respect of the lease and counterpart, these, it must be observed, are not material; they were merely incidental to the agreement. As to the other objection, that they were not executed, and consequently they conferred no benefit, the answer is, it was known to all parties that the lease was to have been made by a tenant for life; she died before the execution, and the case comes within, and is governed by the principle, *actus Dei nemini nocet*. It could not be expected that the attorney was to be a guarantee that Miss Knight should live until all was completed; and it was equally

clear that he did not intend to go without his payment from somebody or other. The verdict is right.

PARK, J.—I am of the same opinion, and was so at the time of the trial. I should not have given the party leave to move to enter a nonsuit, but that Mr. Crowder pressed it upon me, and I, diffident of my own judgment, wished that the Court should be consulted. In taking the meaning of the agreement, which was signed by the plaintiff and defendant, into consideration, we are to look at it as if it had been signed by the three parties. Suppose Miss Knight had not died, and the plaintiff had brought an action against her, could he have maintained it in the face of his own agreement? I agree in the authority of the cases cited, but they are not applicable here.

BOSANQUET, J.—As the cause in which leave has been given to move for this nonsuit, was but for a small sum, if the plaintiff is found to be entitled to recover any thing, the rule should be discharged. Upon reviewing this transaction, the fair inference is, that when the two parties, Miss Knight and the defendant, went to an attorney, the intention was, that each would have to pay half the expenses; and as to the lease and counterpart, they, as incidental, were included. Then an arrangement was entered into between landlord and tenant, in consequence of which, Webb, the plaintiff, was to do the work at the expense of the defendant. This arrangement was, it should be recollected, entered into in the presence of all the parties; if the case stopped here, there would, I think, be no doubt of the intention of the parties. But what must our conclusion be, when we find that the party was present who was to derive a certain benefit and advantage from the transaction? Surely in such case our conclusion must be, that he has no right to call upon Miss Knight, though the plaintiff, the person employed, was her general attorney, inasmuch as he was the attorney employed to prepare the agreement, and the defendant was to defray all the expenses. As to the objection that the lease was not completed, this certainly was not the fault of Webb; and it is sufficient to say upon the subject, that it was not executed, nor could it be, as the

tenant for life, the intended lessor, had died. The rule should be discharged.

COLTMAN, J.—I am of the same opinion. The question here is, not, I think, precisely identical with that which has been suggested in argument, that an action could not be maintained against Miss Knight, as the lease had not been executed. It is sufficient to say upon this point, that it was not prevented by her fault. It is unnecessary to say much upon the subject, as it is clear, that if there is evidence to shew that the plaintiff had a retainer from the defendant to do the work, he is, whether the work is completed or not, entitled to payment for so much as has been done. With regard to the retainer, there was, I think, sufficient ground on which the jury might and ought to infer that it was given for the purpose and the business in which the parties were concerned. The facts of the case lead irresistibly to this conclusion. The plaintiff was the attorney of Miss Knight, and in such capacity he transacted business for her, before that in which Rhodes was interested; and in the course of that, an arrangement was proposed, into which Rhodes appeared anxious to enter, for the purpose of saving expense, that Webb was to act as attorney for both parties, and that he was to look to the defendant as paymaster. I confess, that, upon the discussion, I was struck by the argument as to the reduction of a minute portion of the demand. I was struck by the argument, that if the parties were to be bound by the written paper, it should be signed by them all. But it is not necessary to give an opinion upon it, in consequence of the sum being so small; and I do not mean to conclude myself, by any observation upon the subject. In fine, there is no reason for disturbing the verdict, and the rule should be discharged.

Rule discharged.

1837. }
May 5. } BRIGGS v. BURNARD.

Process—Irregularity—Waiver.

In the copy of a writ of summons, served upon the defendant, the teste was wrong, it being the 18th of April 1830, instead of the 18th of April 1837. The indorsement upon

the copy was correct, and so was the writ itself. Upon being served, the defendant applied to the plaintiff, regretted the expense incurred, and offered to pay half the debt and costs:—Held, that such conduct upon his part amounted to a waiver of the irregularity in the previous proceedings.

Shee obtained a rule, calling upon the plaintiff to shew cause why the copy of the writ of summons, issued in this action, should not be set aside for irregularity. The defect imputed to the proceeding was, that in the copy of the writ served upon the defendant, the teste was wrong, it being in these words, "Witness, &c., at Westminster, 18th of April 1830," whereas it should have been 1837. The indorsement upon the copy set forth correctly, that the writ was issued on the 18th of April 1837. The writ itself was also correct.

Addison shewed cause, and contended, that the application was made too late. The writ issued on the 18th of April, and the party did not come to the Court until the 27th, whereas he should have come in four days—*Hinton v. Stevens* (1), where it was held, that an objection to a notice of declaration, on the ground of variance from the writ, must be taken within four days from the time of serving the notice, whether in term or vacation. But even if the Court were adverse to the plaintiff on this point, and if they attached any importance to this alleged irregularity, the conduct of the party himself amounted to a waiver, inasmuch as the affidavits shewed that he called upon the plaintiff, regretted the expense incurred, and offered to pay half the debt and costs;—*Raves v. Knight* (2), and *Lloyd v. Hawkyard* (3).

Shee, in support of the rule, contended, that the irregularity amounted to an important violation of the Uniformity of Process Act, the 10th section of which limited the duration of writs to four months, and the object of the statute would be frustrated if the teste, by which such duration was to appear, was not correct. He also denied that the application of the defendant to the

(1) 4 Dowl. P.C. 283.

(2) 1 Bing. 132; s. c. 1 Law J. Rep. C.P. 11.

(3) 1 Man. & Ryl. 320; s. c. 6 Law J. Rep. K.B. 28.

opposite party, amounted to a waiver. It was merely an offer to settle, and it should not be prejudicial to the party by whom it was made.

TINDAL, C. J.—The only question here is, whether the party has, by his conduct upon this occasion, waived the objection, which has arisen wholly, it should be recollected, on the copy of the writ of summons, with which he has been served. All the cases which have been referred to seem to say, that after the party has the means of knowing that an objection may be taken, especially of such a trifling nature as the present, he is bound to take advantage of it within a reasonable time, and not go to the opposite party, for the purpose of effecting an arrangement upon terms. The rule should, I think, be discharged with costs.

The other Judges concurring—

Rule discharged, with costs.

1837. }
May 9. } POLE v. ROGERS.

Witness—Commission—Cross-examination—Costs.

In an action on a life policy, a commission having been obtained to examine witnesses in Paris and Boulogne, under 1 Will. 4. c. 22. s. 4, the Court, on the application of one of the parties, and without the consent of the other, added to the Judge's order, a power to cross-examine the witnesses, vivâ voce.

Costs not allowed on shewing cause against a motion to add to a Judge's order such a power.

In this case, an action upon a life policy, a Judge's order had been obtained, for a commission for the examination of witnesses, at Paris and Boulogne, under the 1 Will. 4. c. 22. s. 4.

Wilde, Serj. obtained a rule for an addition to the order, to this effect, that it should be lawful for the opposite party to cross-examine *vivâ voce*. The case was one, he said, which particularly required that such course should be adopted; the object being to ascertain the habits, mode of living, and health of the party, on whose life the policy was effected; and, under such circumstances, the question, which should

be put by the one party would arise, not so much upon the interrogatories, as upon the answers given to them by the witnesses. The justice of the case would require an actual cross-examination, and this could not be attained by interrogatories alone. Besides, the case was provided for by the section of the statute, the words of which were, "that it shall be lawful, &c. to order a commission to issue for the examination of witnesses, &c., by interrogatories or otherwise, and by the same or any subsequent order or orders, to give all such directions touching the time, place, and manner of such examination, &c., as may appear reasonable and just.

R. V. Richards shewed cause, and urged the inconvenience, or even impossibility, of attaining the object proposed, as, in order to make the cross-examination effectual, some gentlemen of the profession should go from this country. The Court would also consider the importance of establishing a precedent upon the subject; for though in one case (1), a similar application was granted, it was with the consent of both parties. But as such consent was not given here, it was to be considered as an original application, and now made for the first time. If the precedent were now established, the same course should be adopted in every action to be brought in future upon a life insurance, where witnesses resided abroad; and much inconvenience and injustice would be the inevitable consequence.

The Court, taking all the circumstances into consideration, and seeing that the commission was directed to Paris and Boulogne, places which, perhaps, of all others out of the kingdom, would afford the greatest facility for the *vivâ voce* cross-examination, thought it but reasonable to make the addition required, and made the *Rule absolute*.

R. V. Richards applied for the costs of shewing cause; but as the motion was to add to, not to amend the Judge's order—

The application was refused.

(1) Semble, Duckett v. Williams, reported upon another point, 1 Cr. & J. 510; s. c. 9 Law J. Rep. Exch. 177.

1837. { BLATCHFORD v. THE MAYOR
April 27. { AND CORPORATION OF PLY-
MOUTH.

Covenant — Construction — Execution — Proviso.

The defendants (the corporation of Plymouth) demised to the plaintiff a certain mill, with its gear, machinery, &c., together with the use of the stream of water running or flowing in a leat or trench belonging to the defendants, from the northern end of the said demised premises, unto the said mill, and the launder, in which the same water then ran or flowed, and the flood-hatch, sluices, and other water-works, &c., excepting and always reserving out of this present demise and grant unto the said defendants, their successors and assigns, so much and such part of the said stream of water, running or flowing in the said leat or trench, belonging to the said defendants, as should be sufficient for the supply of such and so many of the inhabitants of the town and borough, and all such bodies politic and corporate, officers and departments in his Majesty's service, having establishments in or near to the said borough, or other person or persons whomsoever, as the said defendants had then already contracted or agreed, or should, at any time thereafter, contract or agree to supply with water from the said stream or leat. Provided, nevertheless, that such a quantity of water should be always left to flow to the said mill, as should be sufficient for the due working thereof, for the space of twelve hours each day of the said term intended to be thereby granted, times of needful reparation and cleansing, and casualties from fire or frost, &c., excepted. Then came a covenant for quiet enjoyment, without lawful hindrance of or by the defendants or their assigns, or any other person or persons whomsoever, rightfully claiming, or to claim, by, through, under, or in trust for them, any or either of them, or by their act, means, or privity.

Upon the supply of water flowing to the mill, being less than that which was required to work it twelve hours in the day,—Held, that an action against the lessors for breach of the covenant for quiet enjoyment, by wrongfully and injuriously drawing and taking, and causing to be drawn and taken,

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quantities of water from the stream, although the residue left was not sufficient for the working of the mill twelve hours each day, could not be sustained, inasmuch as the supply of such a quantity of water as would work the mill for twelve hours each day, was not a thing demised, as the defendants were bound by agreements prior to the demise, to furnish certain other parties with supplies of water, and the meaning of the proviso as to the supply for twelve hours' work to the mill was, that the defendants should not, in the exercise of any prospective rights, diminish the quantity supplied to the mill, below that which was flowing at the time of the demise. —Held also, that the breach was not well assigned, as it did not come under, nor was it comprehended in anything against which the defendants had provided in the covenant for quiet enjoyment, they, themselves, having done nothing, and there having been no change or alteration effected by any person, in that which was, or was supposed to be, the subject of the demise since the contract had been entered into,—the act complained of, being committed by those who claimed under prior agreements, and by title paramount.

The declaration alleged, that the defendants, by their then name of the mayor and commonalty of the borough of Plymouth, had demised, leased, &c. to the plaintiff, his executors, &c. for a term of twenty-one years, from the 24th of June 1832, a certain mill-house and mill, used for the grinding of corn or grain, commonly called or known by the name of the Higher Grist Mill, situate, lying, and being on the western side of the road leading from Plymouth to Tavistock, within the borough of Plymouth, with all and singular the millwheels, millstones, going and running gear, bolting machine, &c., and all other machinery, engines, utensils, implements, &c., then standing and being in or upon the said mill-house, &c. particularly specified in a schedule or inventory, and also a certain dwelling-house, &c., together with the use of the stream of water running or flowing in the leat or trench belonging to the defendants, from the northern end of the said demised premises, unto the said mill, and the launder in which the same water then ran or flowed, and the flood-hatch,

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sluices, and other waterworks therein, together with all erections, buildings, walls, fences, ways, paths, passages, toll, custom, privileges, easements, profits, commodities, and appurtenances whatsoever, to the said mill-house and premises belonging, or in anywise appertaining, excepting, and always reserving out of this present demise and grant unto the said defendants, their successors and assigns, so much and such part of the said stream of water running or flowing in the said leat or trench belonging to the said defendants, as should be sufficient for the supply of such and so many of the inhabitants of the town and borough of Plymouth, and all such bodies politic and corporate, officers and departments in his Majesty's service, having establishments in or near to the said borough, or other person or persons whomsoever, as the said defendants had then already contracted or agreed, or should at any time thereafter contract or agree, to supply with water from the said stream or leat. Provided, nevertheless, that such a quantity of water should be always left to flow to the said mill, as should be sufficient for the due working thereof, for the space of twelve hours at least in each and every day of the said term intended to be thereby granted, times of needful reparation and cleansing the said trench or leat, the breaking of the banks thereof, and casualties of fire and frost excepted, and also excepting full right and liberty for defendants, their successors, &c. to enter twice in each year, to inspect, &c. ; and the said defendants did, for themselves, their successors and assigns, covenant, promise, and agree to and with the said plaintiff, his executors, &c., that the said plaintiff, his executors, &c., observing and performing the said covenants and agreements, &c., and for quiet enjoyment for and during the full and lawful term of twenty-one years, without any lawful hindrance of or by the said defendants or their assigns, or any other person or persons whomsoever, rightfully claiming, or to claim, by, through, under, or in trust for them, any, or either of them, or by their acts, means, privity, &c. Breach that the defendants, on the 31st of March 1833, and on divers days between that day and the commencement of the action, *wrongfully and injuriously drew and took, and caused to*

be drawn and taken from and out of the said stream, divers large quantities of the water thereof, although the residue of the water of the said stream, which on those days was left to flow to the said mill, was not sufficient for the due working thereof for the space of twelve hours on any or either of these days, although no casualties of fire or frost, nor any times of needful reparation or cleansing of the said trench or leat, or any breaking of the banks thereof, required the drawing or taking thereof; and the said defendants on those days and times wrongfully and injuriously hindered, denied, molested, and interrupted the said plaintiff in the use of the said mill-house and machinery, whereby the said plaintiff, during all the time aforesaid, hath been hindered and prevented from working the said mill, and hath lost and been deprived of divers great gains and profits, &c.

The defendants, in their plea, denied the taking or drawing, or procuring to be taken, &c. the water out of the stream, although the residue of the water was not sufficient for the due working of the mill for twelve hours on any or either of the said days, &c. They also traversed the allegation of their molesting or interrupting the plaintiff in the use of the said mill-house, mill, or other machinery; concluding to the contrary. Similiter.

At the trial, before Alderson, B., at Exeter, the following appeared to be the facts of the case :—

The plaintiff was the tenant of the Higher Grist Mill, in the borough of Plymouth, the property of the defendants, which mill was worked by a stream or leat of water, conducted in a trench, twenty or thirty miles, for the supply of the inhabitants of Plymouth.

By 27 Eliz. c. 21, power was given to the mayor and commonalty of Plymouth, and their successors, to dig a ditch or trench six or seven feet over in all places, over all grounds lying between the river Mew or Mewry, for the convenient or necessary conveying of the same river to the town; and at the end of the statute was a proviso, that nothing in the said act should extend to give liberty to bring the said water, or any part thereof, out of its ancient course, unless every such person or persons as were owners of any mill or

mills situate and standing upon or near the said river Mew or Mewry, should first be compounded with, if the said mill, by the bringing of the said water, or any part thereof, into the said town of Plymouth, be impaired or injured.

Under this statute, the watercourse or stream was made. A modern act, that of 5 Geo. 4. c. 49, was also passed for the regulation of the same water, entitled, 'An act for enabling the commissioners for victualling his Majesty's navy, to purchase certain premises for completing a victualling establishment at Cremill Point, near Plymouth, in the county of Devon, and for supplying the said establishment with water, which, after reciting the statute of Elizabeth, and that a full and adequate supply of water should be afforded to the said victualling establishment at Cremill Point, and also to the Royal Navy Hospital, at East Stonehouse, from the said trench or leat, and that the mayor and commonalty were willing to furnish the same, gave the corporation power to enlarge, deepen, and cleanse the stream, and establish a reservoir. By the 3rd section, the corporation were to supply daily 400 tons of water, for which they were to receive a rent of 250*l.* per annum; by the 4th, they were to supply, if required, a further supply of 80 tons daily, at a rent of 50*l.* per annum. The statute also gave penalties for injuring the leat or trench, by drawing off the water, &c., and contained the usual clause, that it should be deemed and taken to be a public act, and should be judicially taken notice of as such, by all Judges, Justices, and others, without being specially pleaded. A verdict having been found for the plaintiff—

Sir W. W. Follett, pursuant to leave, had obtained a rule *nisi* to set the verdict aside and enter a nonsuit.

Wilde, Serj., Erle, and Moody, shewed cause.—The fair meaning to be collected from the lease, is, that the lessee shall have a supply of water flowing to the mill for twelve hours each day; and if the stipulated quantity has been lessened by contracts previously made or subsequently continued by the lessors, the action is maintainable, and the plaintiff is entitled to retain the verdict. The exception cannot affect this construction, for "every exception is the act or

word of the lessor or grantor, and shall therefore be taken *strictè* against him"—*Com. Dig.* 'Fait,' (E), 8; and if repugnant to the grant, it is void. The proviso also limits and fastens upon the exception—per Bayley, J., in *Wymer v. Kemble* (1). In *Barton v. Fitzgerald* (2), it was held, that the generality of a covenant for title, which was supported by the recital of the bargain for an absolute term of ten years, was not restrained by other covenants, which went only to provide for or against the acts of the assignor himself, or those who claimed under him. So in *Morris v. Edgington* (3), where a lease demised a messuage consisting of two parts, separated by intervening reserved land, subjected only to a specific right of way for the lessee to a third building, for a specific purpose, which reservation, strictly interpreted, would preclude him from all access to the one part, which was accessible only by crossing the reserved land in one or two directions, the one by entering it from the residue of the demised premises, the other, and far more convenient, by entering it from a public street: it was held, that the lessee was entitled to a way across the reserved land from the public street to that part. *Bac. Abr.* 'Cov.' (I), 'Breach,' and *Andrews v. Paradise* (4), may be also referred to upon this part of the case. Neither are the defendants protected by the statute 5 Geo. 4. c. 49. That act, notwithstanding the clause at its conclusion, is, according to Lord Coke, in *Holland's case* (5), a private act, or *statutum speciale*; and the doctrine of Lord Hale in *Lucy v. Levington* (6), applies with full force. His Lordship there says, "Every man is so far a party to a private act of parliament, as not to gainsay it, but not so as to give his interest," and after referring to *Barrington's case* (7), he adds, "Suppose an act says, 'whereas there is a controversy concerning land between A and B, it is enacted, that A shall enjoy it,' this does not bind others, though there be no saving, because it was only intended

(1) 6 B. & C. 479—84; a. c. 5 Law J. Rep. K.B. 232.

(2) 15 East, 530.

(3) 3 Taunt. 24.

(4) 8 Mod. 318.

(5) 4 Rep. 76, A.

(6) 1 Vent. 175.

(7) 8 Rep. 136.

to end the difference between those two." Such acts, according to the opinions of Lord Mansfield in *The King v. Toms* (8), and Lord Hardwicke in *Hornby v. Houlditch* (9), ought to be considered only as common conveyances, and directed by the same rules of law. The clause, in fact, only applies to the forms of pleading—*Brett v. Beales* (10).

Sir W. W. Follett, Crowder, Rowe, and Butt, in support of the rule.—There is no intention to dispute the effect of a covenant for the supply of water to a mill for twelve hours a day, and that an action could be maintained for a breach of such covenant; but the question is, whether the covenant for quiet enjoyment has been broken. Now, in 1833, when the lease was granted, the lessors were bound by the act 5 Geo. 4, to supply the victualling office, and other government establishments, with water, and by the statute of Elizabeth, other mills were also to be supplied. These acts of parliament were binding upon all, and, since the demise, no change has taken place, and there has been no act of commission or omission by the lessors. As to the proviso, the effect of construing it in the manner contended for, would be to make the proviso enlarge the grant, for, at the time of the demise, a portion of the water, as the contracting parties knew, was reserved for other purposes, and the defendants could not, and did not intend to demise to the plaintiff, that which was out of them, but merely to give the plaintiff the benefit of the surplus water, after the parties entitled under the acts of parliament, had been supplied. It is impossible to infer an intention of warranting that supply which it was not in the power of the lessors to grant, and which the lessee could not expect to receive. As to the exception, if the construction contended for by the plaintiff is allowed, it is clearly bad—*Shep. Touch.* 76, 77. It is submitted, however, that according to the authorities, there has been no breach of the covenant for quiet enjoyment, as that covenant only extends to the acts of Mary Broderick, her heirs, executors, &c., or of the defendants, their successors or assigns,

(8) Doug. 407.

(9) 1 Term Rep. 93; note to *Ludford v. Barber*.

(10) 1 M. & M. 421.

or those claiming rightfully under them—*Browning v. Wright* (11), *Morrice v. Frame* (12); and the assent of the lessors to an act they could not prevent, was not a breach of the covenant—*Hobson v. Middleton* (13). They also referred to *Spencer v. Marriott* (14), *Woodhouse v. Jenkins* (15), *Nowell v. Richards* (16), *Pickett v. Loggan* (17), *Ogilvie v. Foljamb* (18); and to *Beaumont v. Mountain* (19), as an authority that the Court were bound to take judicial notice of the act 5 Geo. 4, as a public act.

TINDAL, C.J.—This is an action by a lessee against his lessors, for an alleged breach of covenant, in not allowing him the use of a mill-stream, as demised by the lease. Two objections are advanced by the defendants, by way of answer to the action. First, it is said, that the right in respect of which the action is brought, did not pass by the demise; and, secondly, even admitting that it did, that according to the mode in which the breach is alleged, the plaintiff is not, upon the evidence as it appeared in court on the trial, entitled to recover. The questions, therefore, for our decision are two. Suppose the right to the water passed by the demise, was it, or was it not, the subject-matter of the demise? The words of the lease are, "the Higher Grist Mill, situate at, &c., with all and singular the mill-wheels, mill-stones, going and running gear, bolting machine, and all other engines, utensils, &c. in the schedule attached to the lease, with the use of the stream of water running or flowing in the leat or trench belonging to the defendants, from the northern end of the said demised premises unto the said mill, and the launder, in which the same water then ran and flowed, and the flood-hatch, sluices, and other waterworks therein, together with

(11) 2 Bos. & Pul. 13.

(12) 4 Taunt. 329.

(13) 6 B. & C. 295; s. c. 5 Law J. Rep. K.B. 160.

(14) 1 B. & C. 457; s. c. 1 Law J. Rep. K.B. 134.

(15) 9 Bing. 431; s. c. 2 Law J. Rep. (N.S.) C.P. 38.

(16) 11 East, 633.

(17) 14 Ves. 239.

(18) 3 Mer. 33.

(19) 10 Bing. 404; s. c. 3 Law J. Rep. (N.S.) C.P. 118.

all erections, &c." Now, if the description ended here, and there were no proviso or exception, as it appears to me, the manifest intention of the parties would be to pass, by the demise, all that could be passed—all the machinery specified in the schedule, with the use of the water in the leat, precisely in the manner and to the extent in which it was then running and flowing. Now, that being so, as nothing has been done by the defendants, since the demise, to diminish or lessen the quantity of water, the plaintiff, under such circumstances, would have no right of action; and when we look at the proviso and exception, and consider, that the plaintiff demands, according to the proviso for which he contends, a supply of water for twelve hours each day, for the use of the mill, we must, in such case, conclude, that unless he shews that he has not the enjoyment, without molestation, of the quantity of water thus stipulated for, he cannot complain of a breach of the contract into which he has entered. In this state of circumstances, it is now necessary for us to come to the consideration of the exception. Its words are as follows:—"Excepting and always reserving out of this present demise and grant, unto the said defendants, their successors, and assigns, so much and such part of the said stream of water, running or flowing in the said leat or trench, belonging to the said defendants, as should be sufficient for the supply of such and so many of the inhabitants of the town and borough of Plymouth, and all such bodies politic and corporate, officers and departments of His Majesty's service, having establishments in or near to the borough, or other persons whomsoever, as the said defendants had then already contracted or agreed, or should at any time thereafter contract or agree, to supply with water from the said stream or leat." Now, if this exception were taken alone, it would, without any doubt, be void, as repugnant to the grant, inasmuch as it would enable the grantor to take away the benefit of the grant before made, by which the use of the water was given to the plaintiff. Strictly speaking, this could not be within the intention and meaning of the exception; as, strictly and legally speaking, the excep-

tion must be part of the thing granted, and of a thing *in esse*; and the rule is thus laid down in *Co. Litt.* 47, (A,) "*Poterit enim quis rem dare, et partem rei retinere vel partem de pertinentiis, et illa pars quam retinet, semper cum eo est, et semper fuit.*" The sensible and plain construction of the latter part, as it stands in reference to the former, is, I think, as if the right of demise had been, properly speaking, parted with before. The most proper construction to put upon the demise is, as it appears to me, to consider it as a grant of a limited nature alone, of that upon which there was previously imposed a guard or limit. In this demise, after the grant, the condition of the supply of water for the use of the mill for twelve hours, may be considered as complied with; and, I think, the natural and probable power and object of this proviso was, that it should have this operation. The parties had no power to grant that which had been before granted in part, but they had a power to impose such limit, as that there should be no further diminution. This, I think, may be also inferred from the situation of the parties. This grant was not framed as the former grants were. The parties agree as to the subject-matter of the demise; of which it is to be presumed they are good judges. A supply of water is to be given to others, but this, it is said, is to be limited and restrained, so as to give water for twelve hours a day for the use of the mill. It appears, however, to me, that this is not the just and true construction to be put on the indenture; and if so, the plaintiff, as to this point, is out of court.

Now, with regard to the covenant for quiet enjoyment, the words are,—“and the said defendants, &c. did thereby for themselves, their successors, &c. covenant, promise, and agree to and with the said plaintiff, &c., that he should and lawfully might, peaceably and quietly have, hold, and occupy, and enjoy the said mill-house, mill, machinery, &c., for and during the full and complete term of twenty-one years, &c., without any lawful hindrance, denial, molestation, or interruption whatever, of or by the said Mary Broderick, her heirs, executors, &c., or of or by the said defendants, their successors or assigns, or by any other person or per-

sons whomsoever rightfully claiming, or to claim, by, through, under, or in trust for them, or either of them, or by them, any or either of their acts, means, consent, default, privity, or procurement." Now, if the amount of the reduction of the water was below that which the plaintiff contended should be allowed to him, such diminution would not afford him a ground of action, as that for which he contended, and in consequence of which, the supposed right of action accrued, was not at all demised to him. In the next place, admitting, for a moment, that the use of a certain quantity of water was demised to him, let us see if the breach which he has assigned has been established by the evidence submitted to the jury. The words are—[here His Lordship recapitulated the words.]—Here are, therefore, three particular classes of acts to be guarded against:—first, acts done or committed by the lessors;—second, by those who claim, or others claiming by any right or title under them; and the third protection is against acts done with the privity, permission, consent, &c. of the defendants. But the breach, as appeared by the evidence given on the trial, was not by acts done by them or by their consent, as nothing whatever has been done since the execution of the demise. The result might have been different, if it had appeared in proof that anything had been done; but it was agreed upon by both sides, that nothing had been done; but that which has been complained of, and made the ground of action, had been done by parties claiming right and title under prior deeds. Under such circumstances, the evidence which has been given, would fit the case of assigning as a breach that which has been done by these persons under such title. But it does not come within—it is not comprehended under that triple division of covenants contained in the demise; covenants which, directly or indirectly, give no protection against agreements entered into by former, and only protect against those constituted by present, deeds. All the books—and amongst them *Com. Dig.* 'Pleader,' (G.) 2—shew, that the alleged breach should be co-extensive with the covenant into which the parties had entered, and the agreement by which they were bound. Here, the party has

not proved at the trial, what he set up. He set up at the trial that the defendants had acted in violation of certain covenants; but he has not proved what he set up. It is not now necessary to inquire into the effect and power of the clauses of acts of parliament, by which these grants were made, and whether they were binding and valid. There is authority enough to shew, that the acts were not done under or by the defendants, and the rule should be made absolute.

PARK, J. of the same opinion.

BOSANQUET, J.—There are two questions on which the decision of the case mainly depends, and the first is as to the subject-matter of demise; the second is, as to the form of action. The first question, as it is obvious, is the more important, inasmuch as it goes to the rights of the parties; the other merely goes to the mode of vindicating those rights. For the plaintiff it is contended, that the effect of the demise, taking into consideration the exception and proviso at the same time, is to preserve and supply a quantity of water for the plaintiff, for the use of the mill for twelve hours in the day. Now, to me, this does not appear to be the intention and meaning of the deed; and such construction cannot, in my opinion, be put upon it. I will not enter at much length into this part of the subject, in consequence of the observations made by my Lord. The words of the grant are—[here His Lordship repeated them.]—The exception is a reservation out of the thing demised. The present demise to the plaintiff is of the use of the stream running and flowing in the leat or trench, &c., except that which was a sufficient quantity for the inhabitants of the borough, for certain corporate officers of His Majesty's service, and for several others. Now, the effect of the exception, if it stopped here, would be so entirely derogatory to the grant, that it would destroy it altogether, and would enable the defendants to take back the whole of the stream; and such could not be the construction which the parties intended to put upon the deed. Now, with regard to the proviso for the twelve hours' supply of water, what is its meaning? and to what is it to be applied? Its sense, as it appears to me, is to limit that which was to be

done in future, after the execution of the demise, and that the defendants were not to be at liberty, in the exercise of prospective rights, to reduce the quantity of water below that given; but, if the stream was to be left as it was before, if no alteration or change was made in it, if nothing was done by the defendants after the execution of the deed, to change or diminish the quantity below that contended for, viz. the supply for twelve hours in the day, there is an end to the claim set up by the plaintiff. But, supposing the question to be doubtful or otherwise, the point will be, whether the action can be supported on the covenant for quiet enjoyment. From the evidence it appeared, that the plaintiff contemplated protection from the acts of the defendants, and those claiming under them. But the cause of complaint, as to that which is alleged to be the subject of the demise, is not founded on such, but upon the acts of parties claiming prior to the lease. There are also certain claims and titles under acts of parliament, under the authority of the legislature; these should be also considered as contracts, and in the nature of contracts; and it is not necessary to enter into a discussion, in regard to the statutes referred to—no matter what the act was, prior to the deed, if it was one by which the quantity of water was taken out and diminished to a less quantity than would work the mill for twelve hours a day, the plaintiff cannot succeed upon the clause of the deed, if this construction is correct. He must be equally unsuccessful as to the clause for breach of quiet enjoyment, as such breach is not properly assigned. The breach should be of the enjoyment of that which was demised. How is the breach assigned here? Is it not caused by certain claims under contracts prior to the demise, and similar acts of different persons, which disturb the enjoyment of the thing demised? It is alleged, that the defendants *wrongfully* took, and caused to be taken, the water, &c. Now, is it perfectly clear that nothing was done to alter the state of the water after the execution of the demise; nothing had taken place to diminish the amount of the water since the demise; and yet it is alleged, that the defendants were the actual cause of the diminution. The plaintiff is

not, however, contented with such allegation; but he adds, the defendants caused and procured the water to be diminished below the quantity specified in the proviso. The terms of the breach are, no doubt, sufficiently wide under certain circumstances; but if the party was prejudiced in his rights, by contracts entered into prior to the demise, the breach should be framed so as to meet it. The terms of the breach here assigned, are not such. The rule for entering a nonsuit should, therefore, be made absolute.

COLTMAN, J.—It would be sufficient to decide the case upon the latter point—namely, that the breaches, as proved in evidence, were not the breaches which have been assigned by the plaintiff; and they should be framed so as to meet and support the claim of the party under the demise. This single point would, I repeat it, be sufficient to warrant the Court in coming to a conclusion upon the subject; but we should, I think, take the other point also into consideration, as that first referred to is not sufficient for the purpose of enabling us to state conclusively our judgment on the subject in discussion, or express to the parties the opinions which we have formed upon the merits of the case. The question is, if the falling off of the water from the mill was contrary to the contract or covenant entered into by these parties, by which, as it is said, such water was to be supplied for twelve hours a day. The parties, it should be recollected, well knew the facts and circumstances of the case, the plaintiff himself being in occupation of the mill, with knowledge, of course, that the water was to be taken off for the corporation and others. To this they were tied down, before the supply for twelve hours was to be given. It is not, I think, likely that such a contract should be made. I know not whether I can, according to the strict principles of law, look to facts of this nature, when I am taking into consideration the construction of a deed; but, if the facts could be thus looked into, it would appear, that the plaintiff, the tenant of the premises, could not have been ignorant of the circumstances at the time.

I will now look simply to the deed, and its material words are those which refer to

the subject-matter of the granting part; and in strictness of law, the proviso, still less the exception, cannot have the effect of enlarging such grant. In the granting part, they serve only to explain in what sense the terms used in the grant are to be understood. We must at once admit that the deed is inartificially drawn, and, instead of reflecting light, it has cast uncertainty and darkness over the transaction. It has introduced the doubt which exists, by referring to grants already made. Now, with regard to the exception, that should be, in strict legal sense, a part of the thing demised, whereas, the parties here except the entire thing demised—they except the whole stream, not a part. Thus, the exception is not narrowed as it should be. This arose from ignorance; or, perhaps, the error might have been committed, from a wish to do everything *majori cautela*. Certainly the words in the exception, "so much and such part of the said stream of water running or flowing in the said leat," &c., do anything but throw light on the case, in reference to the state of things then existing. In fine, as nothing has been done to alter the state of things, the plaintiff has all the water to which, under the covenant, he was entitled, and the rule for a nonsuit should be made absolute.

Rule absolute accordingly.

1837. }
May 6. } WYLLIE v. PHILLIPS.

Attorney—Action—Payment.

After a writ of summons was issued, but before it was served, the defendant prevailed upon the clerk of the plaintiff to accept the debt, at the same time informing him that such acceptance would not discharge him (the defendant) from the costs incurred. The attorney afterwards called upon the defendant to discharge the costs, as the debt was accepted without the plaintiff's consent, and after the writ was issued,—offering him, however, a certain reduction; and this proposition not being assented to, he served the writ, and delivered a declaration. A Judge's order having been made for staying proceedings without costs, as the debt had been paid before

service of the writ, the Court amended the order, by directing proceedings to be stayed upon payment of the costs of the day.

In this case—

Kelly obtained a rule for rescinding a Judge's order, made under the following circumstances:—

A writ of summons issued against the defendant, at the suit of the plaintiff, on the 18th of February: several attempts were made between that day and the 25th to serve the defendant, but without effect. Upon the day last mentioned, the defendant went to the private dwelling of the plaintiff's clerk, with whom he happened to be acquainted, and prevailed upon him to accept the debt, saying, at the same time, that such acceptance would not have the effect of discharging him, the defendant, from the costs which had been incurred. Upon this being communicated to the plaintiff's attorney, he informed the defendant that the debt had been accepted without the plaintiff's consent, and after process had issued, and that he, the attorney, would continue proceedings if the costs were not paid; offering, however, to make a deduction from the costs of the writ of 6s.

The writ having been served, and eighteen days having elapsed from the service, and the defendant taking no notice of the proposition which had been made, the declaration was delivered. Upon attending the summons for staying the proceedings in the cause without costs, on the ground of the debt being paid before the service of the writ, the learned Judge expressed some doubt; he said, however, he would make the order; but expressed a wish, that the matter should be brought before the Court.

Wilde, Serj. shewed cause, and contended, that the order of the learned Judge was correct, and should be upheld by the Court. The debt was paid before process had been served; consequently, the claim was satisfied, and the litigation should have terminated. If, under such circumstances, the attorney incurred costs, he had no one to blame but himself, and he was justly liable to those expenses which his own conduct had occasioned. His own letter here shewed, that he was aware of the facts

of the case, and yet, with such knowledge, he served the writ and delivered a declaration.

Kelly, in support of the rule, relied on the want of authority on the part of the plaintiff's clerk, to receive the debt in question, after the matter was placed in the hands of the attorney, and the misrepresentation of the defendant, by which the clerk was induced to accept the debt.

TINDAL, C.J.—If this order had stayed the proceedings upon payment of the costs of the day, it should not have been disturbed; but, as the money was paid after the issuing of the writ, which forms the dividing line, payment of the debt alone was not enough. I must say, however, that as everything which was done after the issuing of the writ took place with the knowledge of the attorney, he should not have persevered in delivering his declaration without bringing the party to account, for acting in the mode imputed to him. The order should be amended by staying the proceedings upon payment of the costs of the day.

PARK, J. and **BOSANQUET, J.** of the same opinion.

COLTMAN, J.—In my opinion, the attorney was too sharp in delivering his declaration. The order should not be set aside, but amended as directed by my learned Brothers.

Judge's order amended accordingly.

1837. } **CORNISH AND SIEVIER v. KEENE**
Jan. 30.* } **AND ANOTHER.†**

Patent—Validity.

A new combination of old materials previously in use, producing a new result, may be the subject-matter of a patent.

Thus, the placing of elastic threads or strands of Indian rubber, previously covered by filaments wound round them, alternately, side by side with yarns of cotton as a warp, and combining them by means of a web when in extreme tension, and deprived of their

elasticity, thereby producing a new fabric of limited elasticity, was held to be entitled to the protection of a patent, although the materials thus combined were before known and used.

The enrolment of a specification, after the patent of another party for the same invention has been sealed, and his discovery known upon the market, does not of itself alone afford any proof whatever of the want of novelty, in the manufacture made under the patent of that party.

Case, by a patentee and the assignee of part of his interest, for the infringement of a patent for a certain improvement or improvements in the making or manufacturing of elastic goods and fabrics, applicable to various useful purposes.

Pleas—First, not guilty. Second, that Sievier was not, before and at the time of the making of the said letters patent, the true and first inventor of any improvement or improvements in the making or manufacturing of elastic goods or fabrics, applicable to various useful purposes, in manner and form as the plaintiffs have alleged; and of this defendants put themselves upon the country. Third, that the said alleged invention, in the said letters patent mentioned, was not before and at the time of making the said letters patent a new invention, as to the public use and exercise thereof in that part of the United Kingdom, &c.; nor was the same invented or found out by the said Sievier; by reason whereof the said letters patent were wholly void. Verification. Fourth, that the invention was not an improvement in the making or manufacturing of elastic goods or fabrics applicable to various useful purposes; concluding to the country. Fifth, that plaintiff, Sievier, did not particularly describe and ascertain the nature of his alleged invention, and in what manner the same was to be performed by any instrument in writing, in manner and form as the plaintiffs had in their declaration alleged; concluding to the country.

At the trial, before Tindal, C. J. at Westminster, the plaintiffs gave in evidence the specification of Sievier's invention, sealed on the 17th of January 1833, and enrolled in the ensuing July, in which, after describing the invention to be one for

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* This case was decided in Hilary term.

† Vide 5 Law J. Rep. (N.S.) C.P. 121, where the rule was refused on the ground of misdirection.
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an improvement or improvements in the making or manufacturing of elastic goods or fabrics applicable to various useful purposes, and designed for the production of an elastic web, cloth, or other manufactured fabric for bandages, and for such articles of dress as the same may be applicable to, the third object (that on which the discussion arose) of the inventor was stated to be, to produce cloth from cotton, flax, or other suitable material not capable of felting, in which shall be interwoven elastic cords or strands of Indian rubber, coated or wound with a filamentous material. The mode of accomplishing this object was thus set forth: "In manufacturing an elastic cloth from cotton, flax, or other material, which is not intended to be milled or felted, I introduce into the fabric threads or strands of Indian rubber, which have been previously covered by winding filaments tightly round them, through the agency of an ordinary covering machine or otherwise; these strands of Indian rubber being applied as warp or weft, or as both, according to the direction of the elasticity required. By thus combining the strands of Indian rubber with yarns of cotton, flax, or other non-elastic, I am enabled to produce a cloth, which shall afford any required degree of elastic pressure, according to the proportions of the elastic and non-elastic material. It remains only to add, that the strands of Indian rubber are in the first instance stretched to their utmost tension, and rendered non-elastic, as described in my former specification; and being in that state introduced in the fabric, they acquire their elasticity by the application of heat after the fabric is made." The specification lastly disclaimed the invention of any particular kind of machinery as necessary for the manufacture.

With regard to the third object of the invention, there was a variety of conflicting testimony; the plaintiff's witnesses affirming the article to possess good qualities, not known before; that it was lighter, more porous, cheaper, and more fit for surgical bandages. Its novelty was also deplored to, and it was said not to have been in use before March or April 1833. The defendant's witnesses expressed themselves in a widely different manner as to the utility of the article, and condemned

it altogether. The defendants also denied its novelty; and in support of this proposition, they put in two patents, one of Sievier's, which was sealed the 1st of December 1831, and enrolled in June 1832; and another patent of one Hancock, sealed and enrolled the 8th of August 1820, in which this invention, such as it was, was, according to them, treated of and known.

A verdict having passed for the plaintiffs—

Sir F. Pollock moved, pursuant to leave, to enter a nonsuit, on the ground that there was no novelty in the article, and that it could not with propriety be called an invention. The plaintiff's claim to protection was for the known application of known materials to a known object, and the case was within the principle laid down in *Saunders v. Aston* (1), and *Brunton v. Hawker* (2); in the former of which it was held, that a patent was not maintainable, as the invention consisted only in combining two things which were not new; and the use of the toothed ring, in forming the flexible shank of the button, though new, was not the object of the invention, but only a mode, among others which were already known, of carrying it into effect; and in the latter it was decided, that a patent for improvements in the construction of ship's anchors, windlasses, and chain cables, could not be supported unless there was novelty in each invention; and, therefore, where it turned out that there was no novelty in the construction of the anchors, it was held, that the patent was wholly void. The specification was also so obscurely expressed as to entitle the defendant to a nonsuit. He also moved for a new trial, upon the ground that the verdict was against evidence, and upon affidavits, stating, that in the year 1832, a patent for the same object had been taken out by one Desgrand, of which fact the defendants had acquired the knowledge since the trial.

The Attorney General (*Sir J. Campbell*), *Wilde*, and *Spankie, Serjs.* and *Hindmarsh*, shewed cause.—The objection that this was not a new manufacture, is met by the verdict of the jury, the proper tribunal for deciding that fact. The title of the patent

(1) 3 B. & Ad. 881; s. c. 2 Law J. Rep. (N.S.) K.B. 265.

(2) 4 B. & Ald. 541.

and the specification should be taken together, and then it will appear that the patentee had three objects in view, in the attainment of which Indian rubber was a principal ingredient; but the application in each was different, and for the attainment of different ends. The main object was the procuring of a limited elasticity, and this was to be acquired by the juxtaposition of an elastic material, with that which was not so, and by such means confining and limiting the elasticity of that which was elastic; and the result to be attained, as upon this occasion it has been attained, was a fabric more convenient, more durable, and less expensive than any known. The combination also formed a material of a lighter and more porous nature, and it was peculiarly beneficial in the formation of surgical bandages, as it bore any pressure, and was capable of infinite variety. As to the specification, it is sufficiently intelligible, but, if not, that objection cannot be raised upon the present pleadings—*Derosne v. Fairie* (3), *Præd v. Duchess of Cumberland* (4), *Simmons v. Hunt* (5), *Flight v. Buckeridge* (6), *Morgan v. Man* (7), *Roberts v. Mariett* (8). As to the verdict being against evidence, there was testimony on both sides, and in such case the Court will not interfere. The evidence, as to the public use of the article in England before the patent, was not satisfactory; for even if parties make experiments for the purpose of effecting discoveries, and fail, and throw the articles away, such does not amount to a public use—*Jones v. Peirce* (9); and a doctrine nearly similar may be extracted from *Lewis v. Marling* (10). Hancock's patent was, no doubt, prior to that by the plaintiff, but there was no resemblance, as the object was not attained in the same way; and as to Desgrand's, as that might have been discovered before the trial, it is no ground for granting a new trial.

(3) 2 Cr. M. & R. 476; s. c. 5 Tyr. 394.

(4) 4 Term Rep. 585.

(5) 1 Marsh. 155.

(6) 3 Bing. 215; s. c. 4 Law J. Rep. C.P. 45.

(7) 1 Sid. 180.

(8) 2 Wms. Saund. 188.

(9) 10 Gods. Suppl.

(10) 10 B. & C. 22; s. c. 8 Law J. Rep. K.B. 46.

Sir F. Pollock, Cresswell, and Knowles, in support of the rule, relied on the cases cited on obtaining the rule, as authorities that the combination of two known things, neither of which was new, as the thread of caoutchouc, with linen or cotton thread, could not be the subject of a patent. They also insisted, that, under the fifth plea, they were entitled to take the objection to the correctness and sufficiency of the specification; and they cited *Dudlow v. Watchorn* (11), and *Lysaght v. Walker* (12).

TINDAL, C. J.—The discussion on this case arises on a motion to the Court, to set aside a verdict obtained by the plaintiffs, the assignee and the original patentee, in an action for the infringement of a patent, and to grant a new trial, upon three grounds: first, that in point of law the invention, for which the patent was taken out, was not the subject-matter of a patent; secondly, that the verdict was against the evidence given at the trial; and thirdly, upon facts disclosed in an affidavit.

The patent in question, which bore date the 17th of January 1833, was "for an improvement or improvements in the making or manufacturing of elastic goods or fabrics, applicable to various useful purposes;" and the patentee in his specification, which was enrolled in July 1833, described his invention in general terms to be designed for the production of an elastic web-cloth or other manufactured fabric, for bandages, and for such articles of dress as the same might be applicable to: and the specification then described more particularly the three distinct objects which the patentee proposed.

At the trial of the cause, it was admitted on the part of the defendants, that the principal ground on which the patent was sought to be impeached, was with reference to the third object, described in the specification; and the whole of the evidence produced by the defendants, and the main part of the argument before us, applies itself to that object alone.

The third object proposed by the patentee was, "to produce cloth from cotton, flax, or other suitable material, not capa-

(11) 16 East, 39.

(12) 5 Bli. N.S. 23.

ble of felting, in which shall be interwoven elastic cords or strands of Indian rubber, coated or wound round with filamentous material." The patentee afterwards describes the mode of effecting the third object to be, "by introducing into the fabric threads or strands of Indian rubber, which have been previously covered by winding filaments tightly round them, through the agency of an ordinary covering machine or otherwise: these strands of Indian rubber, being applied as warp or weft, or as both, according to the direction of the elasticity required. That by thus combining the strands of Indian rubber with yarns of cotton, flax, or other non-elastic material, the patentee was enabled to produce a cloth which should afford any degree of elastic pressure, according to the proportions of the elastic and non-elastic material." The patentee added, "that the strands of Indian rubber were, in the first instance, stretched to their utmost tension and rendered non-elastic, as described in a former specification to another patent: and being in that state introduced in the fabric, they acquire their elasticity by the application of heat after the fabric is made."

Now the first objection made to the patent so described, is, that the invention is not the subject-matter of a patent. That it is neither a new manufacture, nor an improvement of any old manufacture; but is merely the application of a known material, in a known manner, to a purpose known before.

The question, therefore, as to this point, is, does it come under the description of "any manner of new manufacture," which are the terms employed in the statute of James? That it is *a manufacture*, can admit of no doubt; it is a vendible article, produced by the art and hand of man; and of all the instances that would occur to the mind when inquiring into the meaning of the terms employed in the statute, perhaps the very readiest would be that of some fabric or texture of cloth. Whether it is new or not, or whether it is an improvement of an old manufacture, was one of the questions for the jury upon the evidence before them; but that it came within the description of a manufacture, and so far is an invention which may be

protected by a patent, we feel no doubt whatever. The materials indeed are old, and have been used before; but the combination is alleged to be, and if the jury are right in their finding, is, new, and the result or production is equally so. The use of elastic threads or strands of Indian rubber previously covered by filaments wound round them, was known before; the use of yarns of cotton or other non-elastic material was also known before; but the placing them alternately side by side together as a warp, and combining them by means of a weft when in extreme tension and deprived of their elasticity, appears to be new; and the result, namely, a cloth, in which the non-elastic threads form a limit, up to which the elastic threads may be stretched, but beyond which they cannot, and, therefore, cannot easily be broken, appears a production altogether new. It is a manufacture, at once ingenious and simple. It is a web combining the two qualities of great elasticity, and a limit thereto.

The second objection to the verdict is, that it is against the evidence. The only issue to which this objection has applied itself in the course of the argument is the issue, whether the invention was new as to the public use thereof in England. Now, the evidence at the trial which applied itself to this question, consisted of two perfectly distinct heads or classes—the documentary evidence of former patent and specifications, and the parol testimony of the witnesses. It was urged that the present invention was, in the whole, or a material part of it, already known to the public, by the specification to the patent obtained by Hancock, which was enrolled in August 1820, and the specification to the former patent enrolled by Sievier in June 1832. As to Hancock's patent, it is manifest that if it applied at all to the invention for which the patent now under discussion was taken out, it applied only to the first object stated in the specification; all contention as to which object was given up at the trial. But the description in Hancock's patent shews a material distinction between his discovery and that of Sievier. Hancock's patent was taken out for a discovery "of the application of a certain material to certain articles of dress,

by means of which the same may be rendered more elastic;" and the mode by which this was effected is described in the specification to be that "of applying strips of Indian rubber in cases or pipes formed in the article after it was complete." The first object of Sievier's patent is, that of introducing the cords or strands of Indian rubber between the loops or stitches of the fabric, so as to form a constituent part of the fabric itself. And as to the former patent of Sievier, it was a patent taken out for the making of cables, ropes, whale-fishing and other lines, lathe and rigger bands, bags and purses, of filaments or threads of Indian rubber covered with cotton or other materials; the bands and bags were to be knitted, not woven; and there was no attempt to mix with them any non-elastic material to strengthen, or for any other purpose. These patents, therefore, do not by any means, as it appears to us, impeach the novelty of the present invention.

As to the evidence of the various witnesses brought forward on each side at the trial, it must be admitted that there was evidence on both sides. The question raised for the jury was this:—whether the various instances brought forward by the defendants, amounted to proof that before or at the time of taking out the patent, the manufacture was in public use in England; or whether it fell short of that point, and proved only that experiments had been made in various quarters, and had been afterwards abandoned. This question is, from its nature, one of considerable delicacy; a slight alteration in the effect of the evidence will establish either the one proposition or the other, and the only proper mode of deciding it is, by leaving it to the jury. On the present occasion they heard the evidence patiently, and appeared to apply it with intelligence; and we can see no reason to be dissatisfied with the conclusion at which they arrived.

With respect to the third ground upon which this rule to shew cause was obtained in this case, viz. that since the trial the defendant has discovered a patent taken out by one Desgrand, the patent being sealed in November 1832; without entering into the question, whether the invention, for which the patent in dispute

was taken out, was or was not described in the specification of Desgrand, we think it sufficient to observe, that this specification was not enrolled till May 1833, whereas the article made under the plaintiff's patent was publicly made and sold upon the London market, to a very large extent, in March and April of the same year. And although the specification of Sievier's was not enrolled till July 1833, we think the mere fact of the enrolment of Desgrand's specification after the plaintiff's patent was sealed, and this discovery known upon the market, does not of itself, alone, afford any proof whatever of the want of novelty in the manufacture made under the plaintiff's patent.

We therefore think there is no ground for disturbing the verdict; and that the rule for a new trial must be

Discharged.

1837. }
April 29. } PAGE V. JADIS.

Warrant of Attorney—Interest—Judgment.

Where a warrant of attorney is given to secure payment of a certain sum and interest, judgment cannot be entered up for principal and interest upon an affidavit, stating what is due for interest; but there must be a reference to the Prothonotary to compute the amount of interest.

Cooke moved to enter up judgment for 273*l.* 8*s.* 8*d.* upon a warrant of attorney given to secure the payment of 250*l.*, and interest. He produced an affidavit, stating, that the additional sum of 23*l.* 8*s.* 8*d.* was the amount of interest due; but—

The Court were of opinion, that such proceeding was irregular, as the proper course would be to refer the matter to the Prothonotary, who would compute the amount of interest due, and judgment might then be entered accordingly.

Rule refused.

1837. } ARCHBISHOP OF CANTERBURY
May 9. } v. DANIEL TUBB.

Administration Bond—Oyer.

In an action against the surety in an administration bond, by creditors of the intestate, brought without the assent of the Archbishop of Canterbury, the obligee, and without the assignment of the bond by him, the plaintiffs made profer of the bond. Upon oyer craved, with which the creditors could not comply, as the bond was in the custody of the officer of the Prerogative Court, who would not produce it without the order of the Ecclesiastical Judge, which was refused, or under a subpoena, the Court refused an application, that an authenticated copy of the bond, furnished by the plaintiff and at his expense, or the production of the bond to the defendant's attorney or agent, at the register office at Doctors Commons, when the Court should direct, should be deemed sufficient oyer, inasmuch as by assenting they would, upon motion, interfere with the rights of the Prerogative Court;—would deprive that Court of the exercise of its discretion in deciding whether such bond should be put in suit, and enable a party to sue without giving an indemnity; thereby rendering the Archbishop, the nominal plaintiff, liable to costs to any amount.

Wilde, Serj. had obtained a rule, calling upon the defendant to shew cause why the order of Gaselee, J., made on the 14th of April 1835, in the affidavit mentioned, should not be set aside, and why the defendant should not be deemed to have sufficient oyer of the bond in the said affidavit also mentioned, or why the production of the said bond to the defendant's attorney or agent, at the register office in Doctors Commons, where the same remains at such time as this Court shall direct, should not be deemed sufficient oyer of the said bond, the plaintiff, by his counsel, hereby undertaking to pay to the said defendant or his attorney his costs of attending to inspect the same, and thereupon the said order to be discharged.

The following circumstances, as appeared by affidavit, gave rise to the application.

Charles Tubb, late of Holborn, having

died in September 1831, intestate, administration of his estate and effects was, on or about the 30th of September 1831, granted to Catharine Tubb, his widow. The intestate was in his life and at his death indebted in the sum of 400*l.* and upwards to Crowley & Sharman; and the widow having, as administratrix, possessed herself of the estate and effects, and having rendered no account, Crowley & Sharman, on behalf of themselves and the other creditors, in November 1832, filed a bill in Chancery against the widow, as administratrix, for an account and distribution, and thereupon process of subpoena to appear and answer. The bill was issued, but could not be served, as the administratrix had changed her residence, and, notwithstanding every inquiry, her place of abode could not be discovered; consequently the suit could not be further prosecuted. Upon this, Crowley & Sharman brought the present action upon the administration bond against the defendant as one of the sureties, and in the declaration made profer of the bond. The defendant demanded oyer and a copy of the bond; whereupon an application was made to the record keeper of the Prerogative Court at Doctors Commons, who had the custody of the bond, that a clerk might be allowed to attend at the office of the defendant's attorney with the original bond, on payment of the usual fee; but that party refused the application, alleging, that he was not authorized to allow the bond to be taken out of the registry, unless he was served with a subpoena to attend upon a trial, or upon the hearing of a cause. It also appeared, that upon the 30th of March, after the demand of oyer, the clerk of the plaintiff's attorney went to the office of the defendant's attorney, and furnished him with a true copy of the bond; and in verification thereof produced the official and authenticated copy of the bond; and the defendant's attorney paid for such oyer, and made no objection to the course pursued. Upon the 13th of April, however, the defendant's attorney obtained a summons, calling upon the plaintiff to shew cause why all the proceedings in the action should not be stayed until the production of the original bond upon which the

action was brought, and why the defendant's attorney should not be served with a copy thereof. The summons was duly attended; and the learned Judge, apprised of all the facts, made the order as prayed. Upon this, an application was made to the Judge of the Prerogative Court for leave for one of the officers of the registry to attend with and produce the bond at the office of the defendant's attorney, in order that it might be compared with the copy already given,—which application was refused. The bond was still in the registry of the Prerogative Court, and might be inspected there by the defendant, his proctor or agent. It further appeared that the action was brought without the privity, knowledge, or consent of the Archbishop; and that the bond had never been assigned, nor the usual bond of indemnity entered into by Crowley & Sharman to the plaintiff, the Archbishop, to bear him harmless against any loss, costs, or damages, or expenses to which he might be put for or on behalf of said action, or any proceedings that might be taken on such bond. It also appeared that the keeper of the records in the Prerogative Court would have attended with the bond on the trial, on being served with the writ of *sub poena duces tecum*; but he would not produce it without the permission of the Judge of the Ecclesiastical Court.

Upon making the application, the learned Serjeant cited and relied upon *The Archbishop of Canterbury v. House* (1), where Lord Mansfield held, that a creditor has a right, *ex debito justitiæ*, as well as the next of kin, to sue upon an administration bond in the name of the Archbishop or his ordinary. He also referred to the observation there made by the Lord Chief Justice, that "no next of kin ever struggled for the administration of an insolvent estate with an honest view;" and "that the object of the administrator was to sell the administration to the creditors."

R. V. Richards and *Arnold* shewed cause.—The application in this case, which is *primæ impressionis*, cannot be complied with. The granting of oyer does not depend upon the disposition or feeling of the

Court; it is matter of right; and if granted when it ought to be refused, or *vice versâ*, it would be error on the record; and in a case like the present, when the plaintiff has made profert of the deed, nothing can be done inconsistent or incompatible with such profert. It was for the first time in *Read v. Brookman* (2), that a deed was allowed to be pleaded, as lost by time and accident, without profert (3); and since that case, the usual way is to plead the deed lost by time or accident, or in the possession of the defendant; but the peculiarity here is, that it is in the possession of the plaintiff on the record. *Thoresby v. Sparrow* (4), where oyer could not be dispensed with, though the deed was shewn to be lost, shews how rigidly the rule was adhered to; and in *Totty v. Nisbitt* (5), it was said, by Buller, J., "You have declared with a profert, and after that the Court cannot say that the defendant shall not have oyer; all we can do for you is to order that the production of a copy shall be oyer;" and as the plaintiff had no copy, a rule was obtained for amending the declaration. To the same effect is *Matison v. Atkinson* (6). Hence, therefore, not alone the necessity of oyer is established, when profert is made, but it is also the rule that the party, of whom oyer is demanded, must carry the deed to the opposite party—*Page v. Divine* (7). Independently of this difficulty in the case, there is another of equal importance—this bond was never assigned by the Archbishop for the purpose of being put in suit; and this distinguishes the case from *The Archbishop of Canterbury v. Robertson* (8), where, a general order had been obtained from the Prerogative Court to put the bond in suit. Such order is essentially necessary; and the Archbishop should be indemnified from costs, if the estate hap-

(2) 3 Term Rep. 151.

(3) This mode of pleading was said to have been introduced by the late Lord Tenterden, then Mr. Abbott; vide the observations of Lord Ellenborough upon the case itself, in *Hendy v. Stephenson*, 10 East, 55.

(4) 1 Wils. 16; s. c. as *Soresby v. Sparrow*, 2 Str. 1187.

(5) Note to *Read v. Brookman*.

(6) Ibid.

(7) 2 Term Rep. 40.

(8) 1 Cr. & M. 181; s. c. 3 Law J. Rep. (n.s.) Exch. 101.

(1) Cowp. 140.

pened to be insolvent. The consequence of upholding the doctrine now sought to be established would be, that a third party might throw costs upon the nominal plaintiff without his knowledge or consent. They also referred to *Greenwood v. Benson* (9), *Devey v. Edwards and Tapper* (10), *The Archbishop of Canterbury v. Tapper* (11).

Wilde, Serj. in support of the rule, relied on *The Archbishop of Canterbury v. House*, and the doctrine laid down there by Lord Mansfield. The assignment of the bond cannot be actually necessary to sanction that which is to be done *ex debito justitiæ*. *Totty v. Nisbitt* is adverse to the defendant, as Buller, J. said there, "that the production of a copy should be oyer;" and an authenticated copy had been given to the party here and accepted. The Court will act here upon the same principle as when the party beneficially interested brings an action, and a release is fraudulently given by the nominal plaintiff. All the Court have to do is to order the defendant's attorney to go to the register office of the Prerogative Court, instead of the office of this court in the Temple, and obtain that oyer for which he affects to be so anxious, and which, in fact and substance, he has had already.

TINDAL, C. J.—This certainly is a case *primæ impressionis*; and, as to myself, I am not so satisfied upon the subject, as to substitute this mode of oyer for that which is ordinarily given by the courts of law. I cannot, without allowing the defendant to be heard more fully upon the subject, assent to the introduction of that which is, in fact, a substitute for a certain proceeding given by the law for the benefit of the defendant, more especially as the excuse for such substitution does not appear upon the record. I cannot bring myself upon this, which is a point of practice, to decide upon the rights of the Prerogative Court; and such would, in effect, be the result of our determination, if we were to assent to the application which is now made. We have, I think, no

right to act thus, more especially when we consider, that if the bond would be produced upon a writ of subpoena *ad testificandum*, we should, by making the rule absolute, take away from the Prerogative Court all controul, as to whether the action should or should not be brought; and though Lord Mansfield has laid it down broadly, in *The Archbishop of Canterbury v. House*, that a creditor has a right, *ex debito justitiæ*, to sue upon an administration bond in the name of the Archbishop or his ordinary, yet I think the doctrine should be understood with some restriction or qualification. If it were not—if the suit could be prosecuted without the leave of the Archbishop, any one, who was entitled under the Statute of Distributions, either to a part or to the whole, might make the Archbishop liable for costs to any extent or amount. There might, perhaps, be more unwillingness upon the part of the Court to come to this conclusion, if, by so doing, a failure of justice were to ensue. But such is not the case; as, if the party prefers it, an application may be made for a mandamus to compel the production of the document, and by such means the real plaintiff and the Prerogative Court would, if I may so express myself, be brought face to face; and then, if the bond were not produced, it could be ascertained and determined whether the non-production was in conformity with the rights of the Court. In my opinion, the rule should be discharged; but, under all circumstances, without costs.

PARK, J. and BOSANQUET, J. concurred.

COLTMAN, J.—I have been strongly of opinion from the commencement, that the application could not be acceded to. We have no jurisdiction over that which is done at the Prerogative Court of Canterbury. Our jurisdiction merely extends to what is done at Westminster, and that which is now the subject of discussion has not occurred here. Besides, no failure of justice can be complained of, for if the party has a clear right to use the Archbishop's name, the latter will be compelled to grant him permission; otherwise he will not.

Rule discharged, without costs.

(9) 3 Atk. 248.

(10) 3 Add. Ecl. Rep. 68.

(11) 8 B. & C. 151; s. c. 6 Law J. Rep. K.B. 250.

1837. }
 April 17. } TYLER v. CAMPBELL.

Bail—Affidavit—Account Stated.

In an affidavit to hold to bail on an account stated, it is sufficient to allege, that the debt was due on an account stated: the introduction of the word settled is unnecessary.

Barstow moved for a rule, calling upon the plaintiff to shew cause why the defendant should not be discharged out of custody, upon entering a common appearance. The application was founded on a defect in the affidavit to hold to bail, which alleged, that the defendant was indebted to the plaintiff in the sum of 800*l.*, on an account stated, without saying "settled," as in the precedent in Mr. Tidd's *Practical Forms*, p. 86.

[TINDAL, C.J.—How can a balance be said to be stated if it is not settled? The meaning of the plaintiff clearly is, that upon settlement, the defendant was indebted.]

In *Visger v. Delegal* (1), Lord Tenterden said, "there are certain forms of affidavits to hold to bail in common use, and generally known and understood. The safest course is, that individuals should conform to those, and not depart from them, and then call upon the Court for such a construction as may remedy the fault." The Court would, no doubt, be influenced by this opinion, and avoid the uncertainty which was sure to follow from the rejection of precise and accurate terms, and the substitution of those which were supposed to be equivalent.

TINDAL, C.J.—There is, as it appears to me, no ground for this objection. The words of the form lately given for the common count on an account stated are, "and in — for money found to be due from the defendant to the plaintiff, on an account then and there stated between them." These are the only words given in the form; and the word "settled," the necessity of which is now contended for, has not been introduced. Since, therefore, the affidavit of

debt has here followed in substance the words in the count, it is, I think, sufficient; and the rule should be refused.

The other Judges concurring—
Rule refused.

1837. }
 April 22. } SMITH v. SMITH, in re CRAMOND, ONE & C.

Attorney—Lien—Costs—Collusion.

Where in an action of trover, and verdict for the plaintiff, proceedings are stayed, on the defendant delivering up a chattel, and payment of costs—quære, whether the plaintiff's attorney has a lien for his costs on the chattel, so as to make the defendant liable for the amount, if, after notice, he delivers the chattel to the plaintiff?

But to entitle the plaintiff's attorney to issue execution for the damages recovered against the defendant, by reason of the defendant's enabling the plaintiff to get possession of the chattel, and thus to deprive the attorney of his lien, he must make out a case of collusion between the parties for that purpose.

Trover for a watch.

The plaintiff having obtained a verdict, damages 52*l.* 10*s.*, (vide 5 *Law J. Rep.* (N.S.) C.P. 305), TINDAL, C.J., made an order to stay further proceedings upon the defendant delivering up the watch to the plaintiff, his attorney or agent, and payment of costs.

The plaintiff and his attorney were not upon good terms, and each of them gave the defendant's attorney notice to deliver the watch to him; and it also appeared, that the plaintiff was indebted to his attorney. When the parties appeared before the officer, and the costs were taxed, and before final judgment was signed, the defendant's attorney handed the watch, chain, &c. to the Prothonotary, for the purpose of deciding to which of the parties, the plaintiff or his attorney, it should be given; and whilst the watch was upon the table, and in custody of the officer, the plaintiff seized upon and ran away with it. In the course of the same day, the plaintiff's attorney went to the office of the defendant's attorney, and received the

(1) 2 B. & Ad. 571; n. o. 9 *Law J. Rep.* K.B. 284.

costs in the cause, according to the order of the Lord Chief Justice.

Stammers had obtained a rule, calling upon the defendant to shew cause why the plaintiff's attorney should not issue a writ of execution against him, for the sum of 52*l.* 10*s.** The affidavits did not state any other circumstances of collusion between the plaintiff and the defendant, than those above mentioned.

Byles shewed cause, contending, that the plaintiff's attorney had no lien on the watch; and, therefore, that the defendant would not have been liable to the attorney for the amount of his costs, even if he had voluntarily delivered the watch to the plaintiff. But supposing that he had such lien, it was incumbent upon the plaintiff's attorney to establish a clear case of collusion, to entitle him to proceed against the defendant—*Nelson v. Wilson* (1). He also stated, that a bill of exchange had been given for the amount of the costs, which made it doubtful whether the attorney had any lien.

Stammers, in support of the rule, urged, that the circumstances set forth in the affidavits established a case of collusion, and that the attorney's lien attached upon the chattel substituted for the damages, in the same manner as upon the damages themselves. In *Ormerod v. Tate* (2), it was held, that an attorney has a lien upon a sum awarded in favour of his client, as well as if recovered by judgment; and if, after notice to the defendant, the latter pay it over to the plaintiff, the plaintiff's attorney may compel a repayment of it to himself, and he will not be prejudiced by a collusive release from the plaintiff to the defendant; and in *Griffin v. Eyles* (3), it was held, that an attorney had a lien for his bill of costs, on money levied by the sheriff under an execution, on a judgment recovered by his client, and is entitled to have it paid over to him, notwithstanding the sheriff had notice from the opposite

party, against whom the execution issued, to retain the money in his hands, and that the Court would be moved to set aside the judgment for irregularity; and notwithstanding a docket had been struck against the client. Besides, the attorney here retained his right of lien upon the chattel, by making his claim before the Lord Chief Justice on his making the order, and by giving notice to the defendant's attorney.

TINDAL, C.J.—This rule, for suing out execution, should, as it appears to me, be discharged. The only ground for assenting to the application, would be the existence of collusion, between the parties, as to the disposal of the watch, for the purpose of depriving the attorney of his lien. Admitting, for the sake of argument, that the attorney had his lien, that it was not taken away or interfered with by the bill of exchange, which is said to have been given, and that the order which suspended further proceedings in the cause left him with a right to his lien upon the chattel, as upon a judgment, precisely as he stood before; still, as it appears to me, no evidence of collusion between the parties has been given. This is evident, as well from the silence of the affidavits upon the subject as from other circumstances, which occurred upon the day when the watch was taken. On that day, all the parties, the plaintiff, the defendant, and the plaintiff's attorney were present; and the latter was distinctly told, that in consequence of the disputes between the plaintiff and himself, the watch would not be given to either, but that it would be delivered to the Prothonotary. This was accordingly done, and it was then taken, perhaps, wrongfully, from the desk upon which it was placed. How can this be called an act of collusion, to deprive the attorney of his costs? What, I now ask, is the conduct of the attorney himself?—does he complain of what occurred to the officer, who was *quasi* a Judge of the Court? Does he take any step? Does he require a return of the watch? He does not. He makes no complaint whatever of what has been done in the officer's presence; but he goes in the afternoon of that day to the office of the oppo-

* It was supposed, (erroneously, however,) that the *postea* was lost, and the Court, on the motion of *Stammers*, directed that the judgment should be entered from the minutes of the Associate, without making out a new *postea*.

(1) 6 Bing. 563; s. c. 8 Law J. Rep. C.P. 226.

(2) 1 East, 464.

(3) 1 H. Black. 122.

site attorney, and receives the taxed costs in the cause, as if nothing had happened. He then suffers the greater part of the next term to intervene, although he had the remedy in his hands. Since, therefore, he remained quiescent for so long a time, I think he should have continued so; and, under all the circumstances, the rule should be discharged.

PARK, J. of the same opinion.

COLTMAN, J.—The only collusion here would be, that when the defendant handed over the watch to the Prothonotary, there might have been an agreement between the brothers, that the watch should be held so as that the one would be enabled to take it. If such was the case, it might have appeared in the affidavit of the attorney; but there is nothing in his affidavit to lead to that impression; and the attorney's own conduct goes strongly to shew, that he did not suspect collusion. The rule should be discharged.

Rule discharged.

1837. }
April 22. } *In re BATES.*

Affidavits—Title—Fines and Recoveries.

Affidavits of verification under 3 & 4 Will. 4. c. 74, taken before a commissioner, allowed to be filed, although not entitled in this court.

In this case, the officer expressed some unwillingness to file a certificate under the late act, 3 & 4 Will. 4. c. 74, (for the abolition of fines and recoveries,) inasmuch as the affidavits verifying the same were not entitled in this court. It, however, appeared from the jurat, that they were taken before a commissioner of the court; and—

Atcherley, Serj. urged that this circumstance, coupled with the inference that must of necessity be drawn from the fact of the Court of Common Pleas being the only tribunal having jurisdiction in such matters, rendered it unnecessary that the affidavits should be more fully or more particularly entitled.

The Court agreed with the learned Serjeant, and directed the documents to be duly enrolled.

1837. }
April 24. } *DOE dem. RHODES AND OTHERS*
v. ROBINSON.

Ejectment—Notice to Quit—Agent.

A notice to quit given to the tenant in possession, by the agent of the lessor's agent, without evidence of authority given or recognized by the principal, is not sufficient to maintain an action of ejectment.

In this action of ejectment, tried before Coleridge, J., at York, the question turned upon the validity of a notice to quit, given on behalf of the lessors, who were mortgagees, to the defendant, the mortgagor in possession. The notice was given by a Mr. Constable, who subscribed himself attorney and agent for the mortgagees; but on the trial, he admitted that he neither knew the lands in question, nor the lessors; that he received the rents by some general agency, and did not know whence the power originated, or by whom it was given; and that he was merely the agent of Messrs. Upton & Son, who were the agents of the mortgagees.

A verdict passed for the plaintiff, with leave to the defendant to move to enter a nonsuit.

Wightman obtained a rule accordingly.

Sir G. Lewin shewed cause, and cited *Goodtitle v. Woodward* (1), where it was held, that notice given by an agent is sufficient, if his authority is subsequently recognized; and *Doe v. Warlters* (8).

Wightman, in support of the rule, denied the application of the doctrine put forth in the cases referred to, as there was no subsequent ratification of the authority of Constable by the mortgagees; but he was merely the agent acting under a general authority from the agents of the mortgagees.

TINDAL, C.J.—If we were to allow this verdict to stand without further investigation, that is to say, if we were to hold that a notice to quit, given by the agent of an agent, is sufficient to maintain an action of ejectment, we should be carrying the law farther than it has been carried before. More satisfactory evidence should be given

(1) 3 B. & Ald. 689.

(2) 10 B. & C. 626; s. c. 8 Law J. Rep. K.B. 297.

as to the authority from the original mortgagees to their agents at Leeds, or to Constable, who took upon him to give the notice to quit. As, however, some evidence upon the subject has been produced, the party should not be nonsuited; but the case should, I think, go to a new trial.

BOSANQUET, J.—Some more satisfactory evidence should be given upon the matter referred to by my Lord, and it would then be for the jury to decide.

Rule for a new trial, absolute; costs of the former trial to abide the event.

1837. }
May 5. } *In the matter of —.*

Fines and Recoveries—Amendment.

Where four recoveries had been suffered of certain lands, and in the deeds for the first two, the word "tithes" was inserted, together with the general words, "manors, hereditaments, messuages," &c., but was omitted in deeds for the last two recoveries, and the tithes had gone with the lands, and had been in the possession of those who had the lands for twenty-five years:—Held, that such case was within the 8th section of the 3 & 4 Will. 4. c. 74, and that the proceedings need not be amended.

Scriven, Serj. applied to the Court under the following circumstances:—Four recoveries had been suffered of certain lands, and in the first two deeds creating the settlements, the word "tithes" was used with those generally inserted upon such occasions, namely, "manors, hereditaments, messuages," &c. In the two subsequent deeds, the word "tithes" was not mentioned at all, but the other words were. It was, however, to be inferred that the tithes did pass, as they were in the possession of those who had the lands for twenty-five years. Some doubt had arisen upon the matter, (as the omission did not appear from the deed making the tenant to the præcipe,) whether there should be a motion made to amend the proceeding, or whether the recovery would be good without any amendment, under the 8th section of the 3 & 4 Will. 4. c. 74 (1).

(1) Which enacted, "That if it shall be apparent from the deed making the tenant to the writ of

The Court were of opinion, that no amendment was necessary, the case being within the 8th section above cited. The intention of passing the tithes was obvious, and *verba per relationem inesse videntur*.

1837. }
May 6. } *HULIN AND OTHERS V. POWELL.*

Warrant of Attorney—Variance.

Where the warrant of attorney was for confessing a judgment, at the suit of the plaintiffs, their executors or administrators, and the affidavit attested the execution of a warrant to confess judgment, at the suit of the plaintiffs alone, omitting the words "executors and administrators:"—The Court allowed judgment to be entered, upon the condition of producing an amended affidavit of attestation.

Tyrwhitt, upon moving to enter up judgment upon an old warrant of attorney, stated to the Court a variance, which existed between the warrant and the affidavit, made by the attesting witness of its execution; the former being to confess judgment at the suit of the plaintiffs, their executors or administrators, whilst the affidavit attested the execution of a warrant, to confess judgment at the suit of the plaintiffs alone, omitting the words "executors or administrators." He referred to *Baldwin v. Atkins* (1), where, there being a similar variance between the warrant and affidavit of execution, the Court would not allow judgment to be entered up; but he hoped that, upon the production to the officer of an affidavit amended in this respect, the Court would grant the application.

entry, or other writ for suffering a common recovery, that there is in the exemplification, record, or any of the proceedings, &c., any error in the name of the tenant, &c., or any omission of lands intended to have been passed by such recovery, &c. In every such case the recovery, without any amendment of the exemplification, record, or proceedings, in which such error, misdescription, or omission shall have occurred, shall be as good and valid, and shall be held to have passed all the lands intended to have been passed thereby, in the same manner as it would have done if there had been no such error, misdescription, or omission."

(1) 2 Dowl. P.C. 391.

The Court consented, upon the condition that an affidavit of attestation should be produced, amended in the respect above referred to.

1837. }
May 6. } HOLIDAY v. LAWES.

Costs—Set-off—Attorney's Lien.

Under rule 93 of Hil. term, 2 Will. 4, the plaintiff is entitled to set off the costs of a discharged rule to deliver up the bail-bond to be cancelled against the costs of a judgment as in case of a nonsuit.

In this case the defendant having been arrested, and given a bail-bond, had obtained a rule to shew cause why the bail-bond should not be delivered up to be cancelled, on the ground of a defect in the affidavit of debt. This rule was discharged with costs [see *ante*, p. 101; s. c. 3 Bing. N.C. 541,] and subsequently the defendant, who had become bankrupt, obtained judgment as in case of a nonsuit, and his costs thereon were taxed by the Prothonotary.

Aitcherley, Serj. obtained a rule, calling upon the defendant to shew cause why the Prothonotary should not review his taxation, and why the plaintiff should not be at liberty to set off against the amount of the costs after such review, so much of the costs allowed to the plaintiff by the allocatur on the rule above mentioned, served on the 4th of October, as might be sufficient to liquidate the same.

Wilde, Serj. shewed cause, contending, that the regulation respecting the set-off of costs, related to costs in equal degree, as the costs of one judgment against the costs of another. The plaintiff might have enforced payment of the costs of the discharged rule by attachment, or have proved against the bankrupt's estate, or have moved for a *stet processus*; and he ought not, therefore, thus to be allowed to defeat the lien of the defendant's attorney. He cited *Doe v. Carter* (1).

Aitcherley, Serj. contra, contended, that the case was within rule 93 of Hilary term, 2 Will. 4 (2).

(1) 8 Bing. 330; s. c. 1 Law J. Rep. (N.S.) C.P. 97.

(2) Which directs "That no set-off of damages

Per Curiam.—The case comes precisely within the rule referred to, and the plaintiff should therefore be allowed to set off these costs against those of the judgment as in case of a nonsuit.

Rule accordingly.

1837. }
May 6. } LINDSEY v. WELLS.

Declaration—Irregularity.

The plaintiff's describing himself in the declaration as Henry H. Lindsey, is no ground for setting aside the declaration for irregularity.

Thomas obtained a rule for setting aside the declaration as irregular.—The irregularity complained of was, that the plaintiff had styled himself Henry H. Lindsey, whereas he was bound to state his second name at full length, and give the defendant that degree of certainty and knowledge which were necessary to his defence.

Watson shewed cause, and contended, that there was nothing irregular in the declaration.

Thomas was heard in support of the rule.

The Court were of opinion that there was no ground for the objection, and discharged the rule with costs; giving the defendant a week's time to plead.

1837. }
May 6. } DOE d. CAPS v. CAPS.

Mortgage—Costs—Ejectment.

The costs given to a mortgagee by 7 Geo. 2. c. 20. s. 1, where the mortgagor, in an action of ejectment, brings principal and interest into court, are to be taxed as between party and party, and not as between attorney and client.

In this case, the mortgagee brought his action of ejectment for the recovery of

or costs shall be allowed to the prejudice of the attorney's lien, for costs in the particular suit, against which the set-off is sought; provided, nevertheless, that interlocutory costs in the same suit, awarded to the adverse party, may be deducted."

the lands mortgaged; and the defendant, the mortgagor, in pursuance of the 7 Geo. 2. c. 20. s. 1, having brought into court the principal monies and interest due on the mortgage, the question between the parties was, whether the costs given to the mortgagee by the same statute, should be as between attorney and client or as between party and party. The officer having taxed them as between party and party,—

N. R. Clarke obtained a rule, calling on the defendant to shew cause why the Prothonotary should not review his taxation, and tax the costs as between attorney and client. This, he contended, was the proper construction to be put upon the statute (1). It was, he urged, unjust that the mortgagor should, by his refusal to pay, drive the mortgagee to litigation, and by his availing himself of the statute, render his proceedings nugatory, and recover the possession, after putting the plaintiff to an expense, which the defendant, by his conduct, forced upon him. He referred to *Nowell v. Roake* (2), where it was held, that in an action for mesne profits, the plaintiff may recover, by way of damages, costs incurred by him in a court of error, in reversing a judgment in ejectment obtained by the defendant; Lord Tenterden being of opinion, that the jury might reasonably consider costs between attorney and client as the measure of the damages which he had sustained. He also stated the practice of the Court of King's Bench upon such occasions to be to tax the costs liberally, although not actually as between attorney and client.

Wilde, Serj. shewed cause, and contended, that the construction sought to be established was not that which should be put upon the statute, the intention of which obviously was, that the costs should be taxed, as the officer here had taxed them, that is, as between party and party. The practice of the Court had been uni-

form upon the subject for nearly the last century.

After consulting with the officers of the Court—

TINDAL, C.J. said—If this were *res integra*, I should put that construction upon the statute which Mr. Clarke has. I think the costs should be such as furnish a complete indemnity to the mortgagee. But the course of practice is different, and has been so for nearly the last 100 years, and the same mode of taxation has, as I am informed, been adopted in the other courts. We cannot step out of the usual course upon this occasion; and the rule should be discharged.

The other Judges concurring—

Rule discharged.

1837. { *In the matter of the taxation*
May 8. { *of the bills of costs of A. C.*
BRANSON.

Costs—Taxation—Fines and Recoveries.

Charges for business done by an attorney in procuring the acknowledgments of married women, under 3 & 4 Will. 4. c. 74, (for the abolition of fines and recoveries,) and in enrolling the certificates, held not to be charges at law or in equity, so as to render the bill taxable.

A bill, containing certain items for business done under the 3 & 4 Will. 4. c. 74, 'An act for the abolition of fines and recoveries, and for the substitution of more simple modes of conveyance,' was delivered by Mr. Branson to his clients. The items were as follows:—"Charges for drawing and engrossing certificates of acknowledgment by the wife of Stephenson, and other married women; for attendances to appoint two of the perpetual commissioners under the said act, to take the acknowledgments of the said married ladies; for filling up the certificates and affidavits; for attendances on the married ladies, and examining them apart from their husbands, as to their intention to give up their interests in the estates, without any provision in lieu thereof; for attending them before the said commissioners, and for the fees paid to the

(1) The words of which are:—"If the person, &c., having a right to redeem such mortgaged lands, &c., shall at any time, &c., bring into court, where such action shall be depending, all the principal monies and interest due upon such mortgage, and also such costs as have been expended in any suit or suits at law or equity, upon such mortgage."

(2) 7 B. & C. 405; s. c. 6 Law J. Rep. K.B. 26.

latter; for attendances to swear to the affidavits of the acknowledgments; and for the money paid for the oaths and exhibits; for attendances to leave the certificates for enrolment, and the fees paid thereon; and for attendances to bespeak, and for office copies thereof, and for fees paid for the same." A Judge's summons was taken out, calling upon Branson to shew cause why the bills should not be referred to the Prothonotary to be taxed; but the learned Judge, before whom the summons was attended, declined making any order, or giving any opinion whether the bills were taxable or not; and the matter was referred to the Court.

Hoggins moved for a rule, calling upon Branson to shew cause why the bills should not be referred for taxation. The charges in this bill are for business done at law or in equity. Business of this nature may be considered to be done at law, as much as the holding of a court leet of a manor by a steward, which was held to be connected with the professional character of the party as an attorney, and therefore to make the bill taxable—*Luzmore v. Lethbridge* (1); or as business done in the Insolvent Court in proving the discharge of an insolvent, which was held to require the delivery of a bill, &c., under 2 Geo. 2. c. 23. s. 23—*Smith v. Wattleworth* (2); and in that case, Lord Tenterden said, "the statute was extremely beneficial to the subject;" or as the engrossing of an affidavit of debt to hold a party to bail—*Winter v. Payne* (3); or as attending a lock-up house, obtaining a defendant's release, and filling up a bail-bond—*Fearne v. Wilson* (4).

[TINDAL, C.J.—How can this be said to be business done in court, any more than the enrolling of a deed of bargain and sale?]

The statute evidently considers the business under this statute as done in court; everything is under the controul of this Court; the certificates and affidavits are to be filed of record here. It is the Lord Chief Justice of the Court who appoints the perpetual commissioners, and they are removeable at his pleasure.

[TINDAL, C.J.—I am not even required by the statute to appoint an attorney to the situation.]

Besides, the Court possess and retain a power at common law to order bills generally to be taxed (5). As certain business, as to fines and recoveries, was supposed to be done in court, and the bills taxed accordingly, the same doctrine will be extended to those conveyances which have been substituted by the legislature; and the items contained in this bill will be held to be taxable.

Wilde, Serj. shewed cause, and contended, that the items were not taxable. No argument in favour of such proceeding could be deduced from that which occurred in regard to fines and recoveries, as, upon those occasions, there was supposed to be a cause in court. This, however, is not now the case; fines and recoveries have been abolished, and there are substituted for them certain conveyances, which neither are nor can be considered as proceedings in court.

Hoggins was heard in support of the rule.

TINDAL, C.J.—I am of opinion that this rule should be discharged. An early statute, with regard to attornies, is that of 3 Jac. 1. c. 11, by which they are required to give a true bill unto their masters or clients, of all charges concerning the suits, &c., subscribed with their own hands or names, before such time as they or any of them shall charge their clients with any of the same fees or charges. Then comes the 2 Geo. 2. c. 23, referring to the same subject-matter, the 23rd section of which enacts, "that no attorney or solicitor shall commence any action or suit for the recovery of any fees, charges, or disbursements at law or in equity, until the expiration of one month or more after such attorney shall have delivered to the party to be charged, &c. a bill of such fees, charges, or disbursements, &c.;" and the question is, whether the latter statute, which is made in reference to the same

(1) 5 B. & Ald. 898.

(2) 4 B. & C. 364; s. c. 3 Law J. Rep. K.B. 244.

(3) 6 Term Rep. 645.

(4) 6 B. & C. 86; s. c. 5 Law J. Rep. K.B. 28.

(5) 2 Chit. Rep. Anon. 155.—But upon this subject vide *Weymouth v. Knipe*, ante, p. 61; s. c. 3 Bing. N.C. 387; *Dagley v. Kentish*, 2 B. & Ad. 411; s. c. 9 Law J. Rep. K.B. 133; and *Clutterbuck v. Combes*, 5 B. & Ad. 400.

subject-matter with the former, does not comprehend exclusively those disbursements which take place in suits at law or in equity. And here it should be recollected that the Courts have been ever desirous to bring within the statute even disbursements which, *prima facie*, and to an unob-servant person, do not properly seem to be within it. They have decided to this effect, with regard to a *dedimus potestatem* (6), in the levying of a fine. This certainly was going a great way, where the action was fictitious only, and where there were in truth no such persons as the deforciant and tenant: and if fines still continued in existence or in use, the *dedimus potestatem* would produce the same result, and would make the bill in which it was charged liable to taxation, as it had been once established. We now come to the 3 & 4 Will. 4. c. 74, the very title of which shews that fines are no longer a part of the law. It is entitled, 'An act for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance.' The word, it is to be observed, is "assurance," and assurance means nothing more than a conveyance from one to another. It is very true, that there are officers whose duty it is to record these assurances in court, and over whom the Court retains power; but, nevertheless, these transactions are nothing more than conveyances between party and party, and do not bring the bill within the statute.

PARK, J.—I am of the same opinion. The act of Geo. 2, referred to by my Lord, is extremely beneficial in its nature, and will be upheld by all who are anxious for the administration of justice. But in bringing cases within it, the Courts have gone to the very verge—to the extreme limit; and I am not disposed to carry matters farther. True it is, that these deeds are enrolled in the court; but an enrolment often takes place for safe custody. If a deed of this description were executed before a Judge or Master in Chancery, it would still be enrolled here

(6) Vide *Ex parte Prickett*, 1 New Rep. 266, where the Court determined, as the Lord Chief Justice states;—it was there held, that a *dedimus potestatem*, which presumed a previous writ of covenant, was sufficient to make the bill taxable under the statute.

for safe keeping. The transaction does not resemble a suit between party and party.

BOSANQUET, J.—I agree. This is not a proceeding at law or in equity, not even in contemplation of either.

COLTMAN, J. concurred.

Rule discharged.

1837. }
May 8. } HANNAH V. WILLIS.

Bail,—Payment of Money into Court in Lieu of.

Where a party, upon being arrested, paid the sum indorsed upon the writ, and 10l. besides, to the sheriff, under the 43 Geo. 3. c. 46. s. 2, and before the expiration of the eighth day (the time allowed him to put in bail to the action) tendered the additional 10l., under the 7 & 8 Geo. 4. c. 71. s. 2, to the officer of the court, to abide the event, which the officer refused to accept, upon the ground that the sum sworn to and the 10l. given to the sheriff had not been lodged in court, and these latter sums were not, in fact, lodged in court until the ninth day from the arrest, when the additional 10l. were also paid in:—Held, that the plaintiff was entitled to take the money out of court, the defendant's remedy being against the sheriff.

Knowles obtained a rule calling upon the defendant to shew cause why the sum of 200l. the debt, together with 10l. in addition thereto for costs in this action, severally deposited by the said defendant in the hands of the sheriff of the county of Middlesex on his being arrested, in lieu of giving bail in this cause, and by the said sheriff since paid into the hands of the Prothonotaries of this court, as appeared by their certificate, should not be paid out of court to the plaintiff or his attorney, bail above not being put in for the defendant in this action. It appeared from the affidavits that the party was arrested on the 28th of April, and, consequently he had until the 5th of May to put in bail to the action. Upon the arrest, he paid the sheriff's officer 200l., the sum indorsed for bail on the writ, together with 10l. to answer costs, under the 43 Geo. 3. c. 46. s. 2. But, as bail above was not put in on the 5th, and the two

sums above stated, with 10*l.* additional, were not deposited with the officer of the Court, under the 7 & 8 Geo. 4. c. 71. s. 2, to abide the event of the suit, the plaintiff was entitled to take the money out.

Petersdorff, on shewing cause, relied on affidavits which stated, that, upon the arrest, the defendant's attorney deposited in the hands of the sheriff's officer the sum sworn to, 200*l.*, and 10*l.* for costs, according to the statute; that, on the 29th, an appearance was entered for the defendant, and, on the same day, an application was made to the Prothonotary to receive the additional sum of 10*l.* in lieu of bail, which he refused, as the several sums of 200*l.* and 10*l.* already deposited with the sheriff had not been paid in. The sheriff's officer was then applied to to pay in the sums forthwith, which he promised to do, but did not make such payments until the 6th of May, when the additional 10*l.* were also paid in. Under these circumstances, the fault, if any, was that of the officer; and as the defendant had done everything required at his hands, he should not be punished for an omission which could not with justice be imputed to him.

Knowles was heard in support of the rule.

Per Curiam.—The rule should be made absolute. The defendant, if he deems himself injured, has his remedy against the sheriff.

Rule absolute.

1837. }
April 21. } *DOE dem. WARREN v. ROE.*

Ejectment—Landlord and Tenant—Notice to appear.

The Court will not grant a rule nisi, according to the statute 1 Geo. 4. c. 87, where the tenant refuses to deliver up possession, unless the notice at the foot of the declaration served, is in the form prescribed by that statute.

Ejectment by landlord against tenant under 1 Geo. 4. c. 87.

Bere moved for a rule *nisi* in the usual form, calling upon the tenant to shew cause why, upon being admitted defendant, he should

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not enter into the undertakings and recognition as prescribed by the statute (1). He stated that the declaration served was in the ordinary form, and did not contain at the foot a notice calling on the tenant to appear in court on the first day of the term then next following, there to be made defendant, and to find such bail, if ordered by the Court, and for such purposes as were specified by the act of parliament; but he submitted that the omission was immaterial, and would be found to make no substantial difference in the course of proceedings, as it would be easy to add a special notice, that the tenant should appear on the first day of the term, and comply with the more formal requisites of the statute.

TINDAL, C.J.—In my opinion, the declaration must be varied, so as to bring the parties within the statute. The lessor here has served a declaration in ejectment, which the Court cannot adopt, without running over certain words in the statute, those which call upon the tenant, in the notice at the foot of the declaration, to appear in court on the first day of the term, there to be made defendant, and give bail, &c. When a statute introduces a new law for the purpose of regulating certain proceedings against the tenant, the conditions must be complied with. The terms here, which require the tenant to appear on the first day of the next term, and give bail, are evidently new. They have not been complied with, and the rule should be refused.

The other Judges concurring—

Rule refused.

1837. }
April 24. } *CLARKE v. ELIZA LUCY VESTRIS*
AND TWO OTHERS.

Bail-bond—Loss of Trial.

Where the plaintiff required that the bail-bond should stand as a security for the debt and costs, on the ground of his having lost a trial by the delay of the defendants in perfecting special bail; and it appeared that the defendant's attorney, before special bail

(1) See the form of the rule, Tidd's Forms, 630, 9th edit.

had been perfected, had delivered a plea in the original action, and agreed to receive the issue, and offered to go to trial at the next sittings, which was four days afterwards, and that such proceeding should not amount to a waiver of bail; and also that the trial was not lost when the defendants moved the Court:—Held, that the case was not within the rule of Hil. term, 2 Will. 4; and that the rule for staying proceedings on the bail-bond, should be made absolute on payment of costs, and the defendant in the original action taking short notice of trial.

Henderson obtained a rule, calling upon the plaintiff to shew cause why all proceedings in this action upon the bail-bond should not be stayed, upon payment to the said plaintiff, or his attorney, of the costs of and occasioned by such proceedings, to be taxed by one of the officers.

The application was made under the following circumstances:—A writ of *capias* issued against the defendant Vestris, at the suit of the plaintiff, upon which she was arrested on the 28th of March. Upon that day a bail-bond was given to the sheriff. Notice of special bail, having been put in, was given on the 4th of April, and an exception was tendered to the bail on the 5th, and notice of such exception was tendered at the office of the defendants' attorney. Upon the 6th of April, a notice of justification of bail was delivered at the office of the plaintiff's attorney, for the bail therein mentioned to justify at chambers. The notice was attended, but, in consequence of some irregularity, the bail were not allowed to justify. On the 8th of April another notice was delivered for the same bail to justify at chambers on the ensuing Wednesday. Upon that day, there was no Judge at chambers, and upon the next, one of the bail was allowed to justify, but the other was not. On the 14th of April, a notice was given to justify the bail rejected at chambers upon the next day, viz. 15th of April, in open court at Westminster. This was accordingly done, as it was alleged for the plaintiff, upon an understanding between the parties, that the bail-bond in the original action should stand as a security. The defendants' attorney, however, it was said, abandoned the rule, and refused to take it out of the

office, and upon the Monday following, that is, the 17th of April, another notice was given for justifying the same bail in open court on the 19th of April, and upon that day the bail was allowed to justify. A declaration was delivered to the defendants' attorney, in the original action, on the 5th of April, the day after notice was given of special bail being put in, indorsed, "Delivered conditionally until special bail be perfected, and the defendant must plead hereto in four days, or judgment." On the 6th of April a rule to plead was given in the said action. The venue in the original action was laid in London. The plaintiff took an assignment of the bail-bond on the 8th of April.

Busby shewed cause, and contended that the plaintiff, within the rule of Hil. term, 2 Will. 4 (1), was entitled to have the bail-bond stand as a security, as he had lost a trial. The bail ought to have been justified on the 8th of April, but by the delay until the 19th, the plaintiff was too late to give notice of trial for the 21st or 28th, the sitting days in London, where the venue was laid.

Henderson in support of the rule, relied on an affidavit which stated, that the attorneys for the defendant Vestris delivered a plea in the original action on the 17th of April, the day on which the final notice of justification was given, together with a notice that they would consent to accept the issue, and notice of trial immediately in that cause, for the first sitting in the term, which would be on the 21st, four days afterwards, and that such a course should not be deemed a waiver of bail, which proposition was rejected by the plaintiff. He also contended that the case was not within the rule of Hil. term, as, to render that rule applicable, the trial should have been lost, when the Court was originally moved by the defendants. This was not the case here, as the application was made to stay

(1) By which it was ordered, that upon staying proceedings either upon an attachment against the sheriff, for not bringing in the body, or upon the bail-bond, on perfecting bail above, the attachment or bail-bond shall stand as a security, if the plaintiff shall have declared *de bene esse*, and shall have been prevented, for want of special bail being perfected in due time, from entering his cause for trial, in a town cause in the term next after that in which the writ is returnable, &c.

the proceedings on the 19th. And the last day for sittings was the 28th, so that the plaintiff might have given his notice, and gone to trial upon that day. Upon this point, he referred to *Stride v. Hill* (2), where it was held, that to have the bail-bond stand as a security, it must appear that a trial was lost at the time of moving for the rule.

The Court were of opinion that the case was not within the rule; that the plaintiff was not prevented from going on by the conduct of the defendants; and that the rule should be made absolute, upon payment of costs, and the defendants taking short notice of trial.

Rule absolute accordingly.

1837. } **BROOKS v. BROOKS, in re**
April 27. } **E. RICE, ONE, &c.**

Attorney's Bill—Taxation.

An attorney's bill containing the following items, held, not to be taxable:—"Attending appointment, examining deeds with schedule, preparing and receiving the same, and giving a receipt; attending for judgment-paper, receiving and giving receipt for same; attending appointment, and discussing plaintiff's situation, and the effect of defendant's death on the security; going through and explaining the several deeds and effect of the judgment, and advising that notice should be immediately given of the judgment, and that leasehold and freehold premises should be sold, and the executrix required to join therein; that judgment should be revived for that purpose; that execution should be put in, and furniture taken; writing accordingly, with notice of judgment, and requesting intervention."

V. Lee moved that the bill of Mr. Rice, an attorney, containing the items above mentioned, should be referred to the Prothonotary for taxation. He produced an affidavit, which stated that a judgment was entered up in this court in Michaelmas term, 1824, and deposing to a belief that such judgment was the one referred to in

the bill; and he cited *Smith v. Taylor* (1), where charges by an attorney for attending and advising a suit, were held to be taxable.

Per Curiam.—This case is one degree removed from those which have been already decided upon the subject, and which have gone far enough. In *Smith v. Taylor*, there was an existing action. Some step should be taken to attain the object sought for here. The rule should be refused.

Rule refused.

1837. }
April 27. } **BOULTON v. WELSH.**

Promissory Note—Notice of Dishonour.

The indorsee of a promissory note wrote to the indorser, the day after the note became due, the following letter:—"Sir, the promissory note for 200l., drawn by Henry Hanley, dated the 18th of July last, payable three months after date, and indorsed by you, became due yesterday, and is returned to me unpaid. I therefore give you notice thereof, and request you will let me have the amount thereof forthwith":—Held, not to be a sufficient notice of the dishonour by the maker.

In this action of assumpsit upon a promissory note, by the indorsee against the indorser, the question turned upon the sufficiency of the notice of dishonour by the maker. The alleged notice was contained in the following letter from the plaintiff to the defendant, dated the day after the note arrived at maturity:—

"33, Northampton Square,

"22nd of October 1836.

"Sir,—The promissory note drawn by Henry Hanley, dated the 18th of July last, payable three months after date, and indorsed by you, became due yesterday, and is returned to me unpaid. I therefore give you notice thereof, and request you will let me have the amount thereof forthwith.

"W. J. Boulton."

Upon the trial, before Park, J., it was contended for the defendant, that the

(2) 4 Dowl. P.C. 709.

(1) 7 Bing. 259; s. c. 9 Law J. Rep. C.P. 83.

notice could not be distinguished from that which was successfully objected to in *Hartley v. Case* (1), and *Solarie v. Palmer* (2), which, upon appeal, was affirmed in D. P. (3).

A verdict was found for the plaintiff, with leave to the defendant to move to enter a nonsuit.

Thesiger having obtained a rule accordingly—

Talfourd, Serj. shewed cause, and contended, that the question was, did the defendant receive from the terms of the letter, knowledge of the dishonour of the note? He clearly did, and the letter gave him ample information upon the subject, and full and unequivocal notice of dishonour. *Hartley v. Case*, and *Solarie v. Palmer*, were inapplicable, as the letters in those cases were mere applications for money, and contained only statements that something was due, without importing that the bills had been presented; whereas, the letter here contained all that was necessary to make it a good and valid notice of dishonour, according to the doctrine of Lord Tenterden in *Solarie v. Palmer*, the language being such as conveyed notice to the party what the bill was, and that the payment had been refused.

Busby, in support of the rule, contended, that the words, "became due yesterday, and is returned," were consistent with the fact of the note never having been in the hands of the plaintiff, and of its having been negotiated elsewhere; and he referred to the words of Tindal, C.J., in delivering judgment in *Solarie v. Palmer*: "It is perfectly consistent with this notice, that the bill has never been presented at all, and that the plaintiff means to rely upon some legal excuse for the non-presentment." A notice to the indorser ought to be precise and strict, as it rendered one party liable for the default of another.

TINDAL, C.J.—It is not, in my opinion, possible to distinguish this case from those of *Hartley v. Case*, and *Solarie v. Palmer*; at least, I, for my part, cannot make any distinction between them. The very

essence of the proceedings upon occasions similar to that which is now the subject of discussion is pointed out in the 8 & 9 Will. 3. c. 17, which first allowed inland bills of exchange to be protested upon default of payment, and there the protest is in these words (4): "Know all men, that I, &c. have demanded payment of the bill which the said — did not pay; therefore, I do protest the said bill;" and the 2nd section directs that "the protest shall be sent, &c., or otherwise due notice shall be given thereof, to the party from whom the bill was received, who is to repay such bill," &c. Thus, therefore, the two important points specified by the statute are, presentment, and notice of dishonour: the latter is not found here, as required, and, therefore, the rule for entering a nonsuit must be made absolute.

PARK, J.—I should be strongly inclined to support that which has been done, but for the two decisions to which our attention has been called, and of these, we cannot, I think, get rid. We cannot make the present a legal notice, after the decision of the House of Lords, confirming that of the Exchequer Chamber.

BOSANQUET, J. of the same opinion.

COLTMAN, J.—I regret that I must come to the same conclusion, although, upon the whole, it may not be detrimental to the practice of merchants, which, in this respect, is much too loose, and differs widely from that established and acted upon in other countries.

Rule absolute, for entering a nonsuit.

1837. }
April 28. } *In re LEWIS.*

Attorney—Articles—Examination.

The examiners appointed under the General Rule of Hil. Term, 6 Will. 4, for the

(4) The 9 & 10 Will. 3. c. 17. allowed an inland bill of exchange for 5*l.* or upwards, to be protested upon non-payment, after acceptance, which acceptance should be by the underwriting of the same, under the party's hand so accepting. The 3 & 4 Ann. c. 9. s. 4. allowed the bill to be protested, if the drawee did not accept; and the 6th section makes a protest unnecessary either for non-acceptance or non-payment, unless the value be acknowledged and expressed in such bill to be received, and unless such bill is drawn for the payment of 20*l.* or upwards.

(1) 4 B. & C. 339; a. c. 3 Law J. Rep. K.B. 262.

(2) 7 Bing. 530, in error; s. c. 9 Law J. Rep. Exch. 121.

(3) 1 Bing. N.C. 194.

purpose of examining those who should desire to be admitted attornies, having refused to examine a party, on the ground of the master to whom he was articted having more than two clerks at the time, contrary to the 2 Geo. 2. c. 23. s. 15, the Court, upon motion, directed the examiners to proceed with the examination.

Wilde, Serj. applied to the Court on behalf of Lewis, an attorney's clerk, who had served his articles, and had presented himself for examination under the regulation of Hil. term, 6 Will. 4; but the examiners, before whom he appeared, refused to examine him, in consequence of his master having, at the time, more than two clerks, thereby violating the 2 Geo. 2. c. 23. s. 15. It appeared from the affidavits that the service was *bond fide* on the part of the clerk, and it would be hard to visit upon him the consequence of a breach of the law committed by his master, whom he could not controul, and for whose misconduct he should not be responsible. The provision in the statute was not attended by any prohibitory words, and it should not operate as a penalty upon an innocent person.

The Court said, that when they had looked into the affidavits and consulted the Judges, they would send their certificate, which they accordingly did, desiring the examiners to proceed with the examination of the party.

1837. } EASTHOPE v. WESTMACOTT.
May 2. }

Venue, Changing—Costs.

In an action for a libel published in a newspaper, the Court made the rule for carrying back the venue, absolute, with costs, without an undertaking on the part of the plaintiff to give material evidence in the county to which the venue was thus carried back.

This was an action for a libel published in the *Age* newspaper, in which the defendant had changed the venue from London to Middlesex.

E. Perry moved to take back the venue, upon an affidavit that the libel was circulated as well in London as in Middlesex, and he submitted, on the authority of *Clements v. Newcomb* (1), that an undertaking to give material evidence in London, was unnecessary.

Addison, contra, admitted that he could not resist the application, but trusted the defendant would not be visited with costs.

Per Curiam.—The defendant has done wrong by changing the venue, and he must pay for it.

Rule for carrying back the venue absolute, with costs.

1837. } PIERCY, DEMANDANT.
May 5. } GARDNER, TENANT.

Writ of Intrusion—Equitable Devisee—Statute of Limitations.

Quære—Can the writ of intrusion be maintained for an alleged intrusion upon the death of an equitable tenant for life?

Semble—The writ can be maintained by a demandant claiming under a devise, as well as by him who claims by descent.

The limitation as to the time of suing out the writ is fifty, not twenty, years, as such limitation is regulated by the statute 32 Hen. 8. c. 2, not by statute 21 Jac. 1. c. 16.

The demandant, in his count, demanded against Richard Gardner, one-fourth part of one messuage, forty acres of land, &c., with the appurtenances, in the parish of St. Giles, Reading, in the county of Berks, which he claims to be his right and inheritance, and into which the said R. Gardner hath not entry, but by the intrusion which he made into the same, after the death of Anna Maria Curtis, otherwise called Hyde, who survived Anne Piercy, deceased, and Mary Powney the younger, deceased: of the entirety of which tenements, Richard Curtis being seised in his demeane as of fee, gave and devised the same, amongst other tenements, to Jonathan Gardner and R. Piercy, and their heirs, in trust, to re-

(1) 1 Cr. M. & R. 776.

ceive and take the rents and profits thereof, and thereout to pay unto the said Anne Piercy, a certain annuity or yearly payment during her natural life, and to the said Mary Powney, a certain annuity or yearly payment during her natural life, and in trust to pay, as well the overplus rents and profits thereof, as also to pay the whole of the rents and profits of the said devised tenements, when and as the same several annuities should respectively end and determine, unto the said Anna Maria Curtis; and the said R. Curtis did, in and by the said devise, direct that, from and after the decease of the said A. M. Curtis, the said J. Gardner and R. Piercy, and their heirs, should stand seised of the said devised tenements, subject to the said annuities, to the use of such one child or more of the children of the said A. M. Curtis, &c., either as to the whole or on such parts, shares, or proportions, &c., either absolutely or conditionally, and with and under such restrictions, limitations, and remainders over, and in such manner and form as the said A. M. Curtis, by any deed or writing whatsoever to be by her, whether she should be covert or sole, from time to time sealed and delivered in the presence of two or more witnesses, or by her last will and testament in writing, to be by her from time to time, whether she should be covert or sole, signed, sealed, published, and declared in the presence of three or more witnesses, should limit, direct, appoint, or give; and for want of such limitation, direction, appointment, or gift, &c., then that the said Jonathan Gardner and R. Piercy, and their heirs, should stand seised of the said devised tenements, subject as aforesaid to the use of all and every the children of the body of the said A. M. Curtis to be begotten, which should survive her, whether sons or daughters, &c., and for want of such issue, that the said Jonathan Gardner and R. Piercy, and their heirs, should stand seised of the said devised tenements, subject as aforesaid, for the use of such one, or so many of the said R. Curtis's own nephews and nieces, (the children of his sisters,) and his, her, or their heirs, either as to the whole or in such parts, &c., and for such estate, either absolutely or conditionally, &c. as the said A. M. Curtis, by any deed or writing, or

last will, &c. should direct, limit, and appoint; and for want of such limitations, directions, &c., that the said Jonathan Gardner and R. Piercy, and their heirs, should, subject as aforesaid, stand seised of the said devised tenements, to the use, as to one of the undivided fourth parts thereof, of one William Piercy, since deceased, and his heirs, and which said above one-fourth part above demanded, and so devised as aforesaid, after the death of the said A. M. Curtis, who survived the said A. Piercy and Mary Powney, the said A. M. Curtis never having had issue, and never having made any limitations, appointment, or gift, of the said tenements so devised, or any part thereof, according to the form and effect of the said devise, ought by force of the said devise, and of the statute for transferring uses into possession, to come and remain to the said G. E. Piercy, the now demandant, as son and heir of one W. Piercy, the younger, who was son and heir of the said first-named W. Piercy; and whereupon the said G. E. Piercy says, that the said R. Curtis was in his lifetime, and at the time of the making of his last will and testament, and of his decease as hereinafter mentioned, seised of the entirety of the said tenements, with the appurtenances, whereof one-fourth part is above demanded in his demesne as of fee and right, in the time of peace, in the time of the Lord George 3, late king, &c., within fifty years, now last past, by taking the esplees thereof to the value, &c., and being so seised thereof, the said R. Curtis heretofore, &c., duly made and published his last will and testament.—The count then repeated the will of the testator, as already set forth; and concluded by stating, that the first-named W. Piercy survived R. Curtis, and A. M. Curtis survived A. Piercy and Mary Powney, and the first-named W. Piercy died on the 1st of January 1806, and the said A. M. Curtis never having had issue, and never having made any limitation, direction, or appointment of the tenements so devised, or any part thereof, according to the form and effect of the said devise; and thereupon by virtue of the said devise, the right to the said one and undivided fourth part above demanded, of and in the said devised premises, with the appurtenances,

came and remained to W. Piercy the younger who was son and heir of the said first-named W. Piercy; and the said G. E. Piercy further says, that afterwards, to wit, on &c., the said W. Piercy the younger died, upon whose death the right to the said one undivided fourth part above demanded of and in the said devised tenements, &c., descended and came to the said G. E. Piercy, the now demandant, as son and heir of the said W. Piercy the younger, and to which the said R. Gardner hath not entry but by the intrusion which he made into the same, after the death of the said A. M. Curtis, otherwise A. M. Hyde; and, therefore, the said G. E. Piercy, brings, &c.

The demandant demurred to the tenant's fourth plea, and upon the demurrer coming on for argument—

R. V. Richards, for the tenant, admitted that the plea could not be supported, inasmuch as it traversed a fact not averred in the count; but he made the following objections to the count: first, the demandant was not entitled to this remedy, inasmuch as A. M. Curtis, upon whose death the intrusion was said to take place, had merely an equitable estate, and was not seised, as she should have been to justify this form of action, of the legal estate. Upon this point, he referred to *Co. Litt.* 277, A, where it is said, "Intrusion first properly is, when the ancestor died seised of any estate of inheritance, expectant upon an estate for life, and then tenant for life dieth, and between the death and the entry of the heir, an estranger doth interpose himself and intrude;" and to *Fitz. Nat. Brev.* fol. 468, where a similar definition is given, which is also adopted in *Booth on Real Actions*, fol. 181. All these writers consider it an indispensable condition, for the supporting of this action, that the party upon whose death the intrusion is committed, should die seised; and such was obviously not the case here, as, according to the authorities collected in *Powell on Devises*, (edited by Jarman,) 222, 223, 225, the legal estate was, from the nature of the trusts, vested in the trustees appointed by the testator. Secondly, the writ of intrusion did not lie for a devisee. In *Romilly v. James* (1),

the point arose, but it was not decided, and there it is made a *quære* by the reporter, whether a devisee in remainder can maintain a writ of intrusion, or a writ to be framed on the Statute of Westminster 2nd, in the nature of a writ of intrusion. *Eastman v. Baker* (2) was admitted, but there the objection was not taken. Third, the demandant was, at all events, barred by the Statute of Limitations. The actual seisin of the testator is said to be within fifty years, whereas it should be within twenty years. The time is not to be computed by the 32 Hen. 8; but the 21 Jac. 1, by which the former statute is limited and restricted. The question arose in *Widdowson v. the Earl of Harrington* (3); but it cannot be said to have been decided there, as it was not the main question, nor was it that to which the attention of the Court was principally called.

Stephen, Serj., contrâ.—The first objection, that the estate is not of such a nature as will entitle the demandant to his remedy, is untenable, upon the authority of King, Chancellor, in *Jones v. Lord Say and Sele*, best reported in 8 Vin. Abr. 262. The passages cited from *Co. Litt.*, *Fitzherbert*, and *Booth*, are anything but conclusive, as, though the injury complained of may not constitute the particular forcement referred to, there is nothing to prevent the framing of a writ *in consimili casu*, under the Statute of Westminster 2nd; and the party aggrieved would be provided with a remedy required by and commensurate with the wrong—*Reeves' Hist. of Com. Law*, vol. 2, p. 202, vol. 3, p. 89. *Eastman v. Baker* is an authority in favour of the demandant, as the action there was brought under nearly similar circumstances, and the right of the devisee to sue out the writ of intrusion was not questioned. The reason evidently was, that it could not. Why should not this action be brought under the present circumstances? Why should not the right to sue as he has, belong to the demandant, as well as the right to bring a real action—*ex. gr.* a writ of entry sur abatement, belongs to the assignees of a bankrupt, by the usual words of the deed of assignment?—*Smith v. Coffin* (4).

(2) 1 Taunt. 174.

(3) 1 Jac. & Walk. 532.

(4) 2 H. Black. 444.

(1) 6 Taunt. 263.

Is anything said in the old books respecting the assignees of a bankrupt? There certainly is not, and yet the remedy is given, in order that there should be no wrong without a mode of redress, and it was with a similar view that writs in *consimili casu* are allowed to be framed. The objection founded upon the Statute of Limitations, is equally unavailing, as the writ of intrusion falls within 32 Hen. 8. c. 2, and not within 21 Jac. 1. c. 16; the former statute, in section 2, referring to those actions amongst which the writ of intrusion is to be classed, the latter referring to those where the party has a right to make an actual entry without action brought, and requiring that the entry should be made within twenty years next after the right accrued.

Richards, in reply, denied the applicability of the cases of *Jones v. Lord Say and Sele* and of *Smith v. Coffin*; in the former, the Lord Chancellor was of opinion that the use was executed in the persons entitled to take, by virtue thereof, which was not the case here, as the legal estate was outstanding in the trustees, and the latter turned upon the express words of the Bankrupt Act, by which all the rights of the bankrupt were conveyed to the assignees.

Cur. adv. vult.

TINDAL, C.J.—The plea, which was lastly pleaded, having been held bad in the course of the argument, on the ground of its traversing a fact which is not alleged in the count, the tenant then proceeded to take objections against the sufficiency of the count itself, and the objections taken have been three in number: first, that Anna Maria Curtis, upon whose death the intrusion of the tenant is alleged to have taken place, appears on the face of the count to be only an equitable tenant for life; secondly, that the demandant makes title by devise, and not by descent; and, lastly, that he has counted on a seisin of his ancestor within fifty years, whereas, as it is contended, a writ of intrusion is not maintainable, unless where the demandant can shew a seisin within twenty years next before the writ sued out. As to the first objection, it is to be observed, that, as it is not raised upon a special demurrer to

the count, pointing out any want of form in the statement of the demandant's title, it must be considered as if it were taken upon a general demurrer, in which case, by the statute 27 Eliz. c. 5, the Judges are directed "to give judgment, according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, defect, or want of form in any writ, declaration, or other pleading, except those only which the party demurring shall specially and particularly set down and express, together with his demurrer." The question, therefore, becomes this, whether the count shews, upon the face of it, a defective and insufficient title in the demandant to maintain the writ, or whether it shews a title which is good in substance, though set out informally, and without sufficient certainty; for, whilst in the former view of the question the count must be held to be bad, in the latter the objection is not maintainable, not having been pointed out as a cause of special demurrer. The objection relied on is, that A. M. Curtis, upon whose death the intrusion of the tenant is alleged to have taken place, appears to have no more than an equitable estate for life—that is, in the eye of a court of law, no estate at all; and, consequently, that no intrusion, in the legal sense of that word, can have taken place: intrusion being the wrongful act of a stranger, in taking the possession after the death of the tenant for life, to the prejudice of the reversioner or remainder-man. But, looking at the statement of the title in the count, we find no allegation, that Mrs. Curtis was the tenant for life, upon whose death the intrusion took place; and, looking at the legal construction of the devise, and the circumstances which are stated in the count to have taken place, we think the necessary inference is, that Gardner and Piercy were seised of the legal estate in the premises during the life of the said A. M. Curtis, that is, they were tenants for her life; for, as to the nature of their estate, we cannot entertain a doubt that they may be considered as tenants *pur autre vie*, notwithstanding they are directed by the will to pay the profits over to the *cestui que vie* precisely in the same manner as if they had been allowed to take such profits to

their own use. The count, therefore, appears to us to be good in substance, provided the writ of intrusion be maintainable by him in the remainder for an intrusion made after the determination of an estate *pur autre vie*: and, as to that question, it must be admitted, that no precedent can be found in the entry books of such a count. But, on the other hand, there is every reason, by analogy and strong authority, to shew that it may be maintained. The estate of tenant for term of life is defined by *Littleton*, s. 56, to be "for term of the life of the lessee, or of another man." And, it is obvious, that the remedy by the writ of intrusion would be very incomplete if it would not apply to an intrusion after the determination of each instance of an estate for life; for, if tenant for his own life assigns over to another, that other becomes directly tenant *pur autre vie*, and the remedy would fail; and the definition given of a writ of intrusion in *Finch's Law*, p. 195, a book of high authority, expressly comprehends the case in question. "Intrusion," says Finch, "is after the death of tenant for life, be it a man's own life, or another man's in dower or by courtesy," &c. with which agrees in effect the book called *Termes de la Ley*. Intrusion is a writ which lies against him who enters after the death of tenant in dower, or any other tenant for life, and holds out him in reversion or remainder. The objection, therefore, appears to us, to amount to no more than that the allegation of the determination of the legal estate for life in the trustees, upon the determination of which the intrusion took place, is not alleged with sufficient form and preciseness, and, consequently, to amount to ground of special demurrer only, so that it cannot be insisted upon in the present state of pleadings. The second objection is one which, if it is good in point of law, may undoubtedly be taken advantage of on general demurrer—viz. that a demandant who claims title under a devise, cannot maintain a writ of intrusion. No express authority has been cited for this proposition, though undoubtedly on the other hand no precedent can be found in the older books of entries of a count so framed; one reason for which may be, that, until the statutes of Devises, 32 and 34 Hen. 8, a remainder created by devise could never exist, except in cities and boroughs where a

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custom to devise prevailed, and in those cases the customary writ of *ex gravi querela* would have been the proper remedy for an injury of the nature now complained of—see *Fitz. N. B.* 459. It is clear, however, that the writ of intrusion will lie where the demandant claims as a remainder-man for the authority of *Fitz. N. B.* 470, is express, that not only he in remainder shall have it, but the assignee of the remainder also. Now, this remainder must have been created either by a deed of gift, or by devise, and an intrusion after the death of tenant for life is equally mischievous to him entitled to the remainder, whether it is created by the one mode or the other. Even admitting, therefore, that the writ in the register does not apply to the case, we cannot see any impropriety in holding the case to fall within the provision made by the Statute of West. 2. c. 24, that where a writ is granted in one case, and a thing happens *in consimili casu*, and needing a similar remedy, a writ should be made accordingly; and the case of *Eastman v. Baker* must be considered as a precedent, the writ being drawn precisely in the same form with the present; for, although the objection was never taken, yet it was apparent, on the face of the count, and no one on the part of the tenant thought proper to take it. As to the objection on the Statute of Limitations, we are of opinion, that the writ of intrusion falls within the statute of 32 Hen. 8, c. 2, and not within the statute 21 Jac. 1. c. 16. The second section of the former statute enumerates writs of entry upon disseisins done to any of his ancestors or predecessors, or any other action possessory upon the possession of any of his ancestors or predecessors, under which latter class of actions the writ of intrusion clearly falls. The statute of Jac. 1, on the other hand, does not apply to cases where the party is reduced to the necessity of bringing his real possessory action, but to cases where he has the right to make an actual entry without action brought, directing all such entries to be made within twenty years next after the right to enter has first accrued; and it is observable that, as to writs of formedon, the limitation of fifty years, which had been fixed by the same statute of Hen. 8, is reduced to twenty years by an express enactment to that effect in the statute of 21 Jac. 1, the statute being altogether silent

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as to writs of intrusion or any other possessory actions. Notwithstanding, therefore, the objections above taken against the count of the demandant, we think it good in law, and that judgment must be given in his favour upon the demurrer to the last plea.

Judgment for the demandant on the last plea.

1837. }
May 6. } M'DONNEL V. HOFFMAN.

Pauper—Action.

As a pauper cannot be made liable for costs incurred before he is dispaupered, the Court will not grant an application to dispauper him when the litigation is at an end.

In this case, the plaintiff sued *in forma pauperis*, and at the trial a verdict was found for the defendant.

Theobald applied to the Court to dispauper the plaintiff, upon the ground of his proceedings having been vexatious, and utterly without foundation.

Per Curiam.—The law upon the subject is, that a party cannot be made liable for costs incurred before he has been dispaupered. Where, therefore, would be the use of granting the application, when the litigation is at an end, and when nothing remains to be done by which the defendant can be affected? The rule should be refused.

Rule refused.

1837. }
May 6. } GREEN V. COBDEN.

Judgment—Laches.

The Court will not prevent the taxation of costs and the signing of final judgment, though more than two terms have elapsed since the judgment was pronounced, when there is no laches on the part of the plaintiff, who is entitled to such judgment, and the delay is occasioned by the difficulty of the cause, and the course and press of business in the court.

Therefore, where a verdict was found for the avowant at the Summer Assizes in 1834, subject to a case which was not set down for

argument until Hilary term 1836, and upon argument in Easter term, it was ordered that judgment should be entered for the plaintiff; and a rule was obtained in the same term, to shew cause why judgment should not be entered for the avowant, which, upon argument in Trinity term, was discharged, and an application was immediately made to enter up judgment nunc pro tunc, (defendant having died after verdict and before argument of the case,) and a copy of a bill made out for taxation, was delivered to the defendant's agent on the 11th of the succeeding March, with notice to attend the officer on the 16th,—the Court made the rule for such taxation, and for signing final judgment, absolute.

W. H. Watson obtained a rule calling on the defendant to shew cause why the Prothonotary should not be at liberty to tax the plaintiff his costs in this cause, and why the plaintiff should not sign final judgment.

The application was made under the following circumstances:—The cause was carried down for trial, at the Summer Assizes for the county of Sussex, in 1834, when a verdict was found for the avowant, subject to a special case, which was accordingly prepared, but it was not set down for argument until Hilary term, 1836. It came on for argument on the 22nd of April (last Easter term), and it was ordered that judgment should be entered for the plaintiff, with damages, 4*l.* 4*s.* A rule was afterwards obtained in the same term, on the part of the avowant, calling on the plaintiff to shew cause why the said judgment should not be entered up for the avowant, notwithstanding such verdict, which rule was argued on the 24th of May (Trinity term), when it was ordered that the said rule should be discharged, and application was immediately made to enter up judgment *nunc pro tunc*, (the defendant having died after the verdict found at the assizes, and before the argument of the special case). But the application was deemed unnecessary, the plaintiff being, in the opinion of the Court, entitled to enter up such judgment. A copy of the bill of costs, as made out for taxation, was delivered to the defendant's agents, on the 11th of March last, with notice of taxing the said costs, and the

parties attended before the Prothonotary for such purpose, on the 16th of March, when the taxation was objected to on the part of the defendant, on the ground that it ought to have taken place, and final judgment ought to have been entered up within two terms inclusive from the time of the judgment having been given by the Court. In consequence of this objection, the officer refused to proceed with the taxation, until directed by the Court. There was also an affidavit from the plaintiff's attorney, that he could not make up the bills of costs sooner.

Talbot shewed cause, and contended that the case was within the principle of *Lawrence v. Hodgson* (1), where it was held, that if the plaintiff die after verdict for him, and no judgment is entered up within two terms after verdict, the Court will not interfere and permit it to be entered *nunc pro tunc*, if laches is imputable to the party interested in the judgment.

Watson, contrà, was stopped by the Court.

TINDAL, C.J.—This case comes, I think, within the general principle often acted upon and recognized. There was a verdict in the original cause at the assizes. This, from the difficulty of the case, was set down for argument, and then stood over, in consequence of the press of business. In the interval between the verdict and the argument of the case, the defendant died; and in this state of facts, that which was once the right of the plaintiff, cannot be taken from him; more especially, as it has not appeared from the affidavits, that any injury has been done to the defendant by the delay. The rule should be made absolute.

The other Judges concurring—

Rule absolute.

1837. }
May 6. } **TOLSON v. WATSON.**

Formedon—Imparlanee—Demand of View.

Quære—In a real action, can the tenant demand a view after a general imparlanee?

Where the view is demanded after a general imparlanee, the demandant cannot treat it as a nullity, and sue out the writ of *petit cape*. He must either counterplead or demur to the demand of view.

(1) 1 You. & Jer. 368.

Stephen, Serj. obtained a rule, calling upon the demandant to shew cause why the writ of *petit cape* should not be set aside for irregularity, and why the tenant should not have a view. The application was made under the following circumstances:—The count was delivered on the 28th of April 1836; on the 4th of May, the tenant demanded an imparlanee to the first four days of Trinity term, which commenced on the 22nd of May. A summons for time was taken out by the tenant on the 25th of May 1836. An order was made on the 26th for a fortnight's time, which the tenant declined, and demanded a view. On the 7th of June the demandant issued a writ of *petit cape*, returnable on the 30th of October, treating the demand of view as a nullity. The tenant was summoned in August, and in Michaelmas term the rule was obtained, against which cause was shewn by—

Wilde, Serj. and *Manning*, who contended, that a view could not be demanded after a general imparlanee; and for the purpose of establishing this proposition, they referred to *Rastal's Entries*, fol. 376; *Bro. Abr.* tit. 'Assise,' pl. 93; *Bro. Abr.* tit. 'View et Contreple de View,' pl. 1; *Ibid.* tit. 'Continuance,' pl. 24; *Ibid.* 'Es-toppel,' pl. 24, 32, 35, 54; 2 *Saund.* fol. 45, n.; *Fitzh. Abr.* tit. 'View,' pl. 1; *Jenk. Cent.* 130; 46 *Edw. 3*, pl. 4; *Brook v. Groves* (1); *Moor*, fol. 32, 33; *Booth on Real Actions*, fol. 39. They also contended, that the present was a case in which, according to the stat. West. 2nd, c. 48, a view should not be granted (2). The object of the tenant was merely to delay the demandant. He could not have wanted the view for any purpose consistent with the justice of the cause, as he knew the lands well, being in the possession, and the claim and title of the demandant arising under circumstances and settlements identical with those in *Tolson v. Kaye* (3). They also submitted, that the proceeding of the demandant was justified, as the tenant was irregular in demanding a view before he was in court, that is, before the time for the imparlanee had expired.

Stephen, Serj. and *Peacock*, contrà, denied that the tenant had made any default

(1) Hutt. fol. 28.

(2) Upon this point the Court gave no opinion.

(3) 3 Brod. & Bing. 217.

after appearance to authorize the issuing of the *petit cape*. He was regularly in court on the 26th of May, when the view was demanded, that being the *quarto die post*, the first day of the term, which was the 22nd, having fallen on a Sunday. It may be admitted, that it was considered doubtful whether a view could be demanded after a general imparlance; the authorities, however, appear to support the affirmative of the proposition; and *Booth*, in fol. 39, says, "View may be granted as well after general imparlance as before, by the general practice;" though he admits many books are against it. At all events, the demandant should not have treated the tenant's demand as a nullity; he was bound either to counterplead or demur; upon this point they referred to the *Year Book*, 46 Edw. 3. pl. 4; 39 Edw. 3. pl. 38; *Jenk. Cent.* 7, case 82; *Bro. Abr.* 'Peremptorie,' pl. 76. And in further illustration of the doctrine they cited *Davis v. Lees* (4) and *Onslow v. Smith* (5); they also referred to *Bro. Abr.* 'Aide,' pl. 118.

Cur. adv. vult.

TINDAL, C.J.—The question which has been argued before us, arises upon a rule obtained by the tenant, calling upon the demandant to shew cause why a writ of *petit cape*, issued by him, should not be set aside for irregularity, and why the defendant should not have the view; and the irregularity complained of is, that the writ was issued at a time when the tenant was in court, and had demanded a view. The demandant, on the other hand, contends, that the tenant was in no condition to demand a view:—first, because the view is not demandable after a general imparlance;—secondly, because the view was demanded before the day of appearance given by the imparlance, and, consequently, at a time when the tenant was not in court. As to the second ground of objection, upon reference to the dates of the proceedings, it appears to be unfounded, for the imparlance was granted on the 4th of May to Trinity term, which began on the 22nd of May, so that the *quarto die post* would

be the 25th; or, as the first day of the term fell on a Sunday, supposing that day to be left out, the *quarto die post* must at latest have been the 26th, on which day the view was demanded. The only objection, therefore, which remains to the regularity of the view is, that it was demanded after a general imparlance; and we must confess, that we should have felt ourselves involved in considerable difficulty, if we were called upon, in the instance of probably the last writ of formedon which will be brought before us, to decide a point of practice, which seems to have been *vezata questio* for nearly 300 years, as it appears by *Dyer*, fol. 210, b, that when this very point was moved, the Court thought one way, and the Prothonotaries the other; and, certainly, the subsequent authorities are rather in favour of the latter. We feel ourselves, however, relieved from this difficulty, by the objection taken by the tenant, namely, that admitting the demand of view cannot be supported, yet the demandant is irregular in suing out the *petit cape*, a writ which can only be awarded where a default has been committed by the tenant, as is manifest from the authorities in *Booth*, tit. 'Default after appearance;' whereas, here, there has been no default; and upon reference to the authorities cited on the part of the tenant, we are of opinion, that if the demand of view is objected to, upon any ground arising on a matter of fact, the demandant should have put in a counter plea, or if upon any matter of law, he should have demurred, and that the judgment given upon a demurrer would not have been peremptory, but an award of *respondeat ouster* only. The authorities to which we refer, are the *Year Book*, 39 Edw. 3. pl. 38; 7 *Jenk. Cent.* case 82; *Bro. Abr.* tit. 'Peremptorie,' pl. 76, and *Bro. Abr.* tit. 'Aide,' pl. 118. On the ground, therefore, that the demandant has treated this demand of view as a nullity, and has sued out a writ of *petit cape* where he ought to have counterpleaded or demurred, we think his proceeding irregular, and that so much of the rule as calls upon us to set aside the writ of *petit cape* for irregularity, must be made absolute.

Rule absolute accordingly.

(4) Willes, 344.

(5) 2 Bos. & Pul. 384.

CASES ARGUED AND DETERMINED

IN THE

Court of Common Pleas.

TRINITY TERM, 7 WILL. IV.

1837. } QUARRINGTON v. WHITE AND
May 30. } ANOTHER.

Attorney and Client—Money had and received.

Agents of country attorneys, who finally become attorneys in a cause, and in such character receive the costs, cannot retain a certain portion above their demand upon the client, on the ground that the country attorneys were not satisfied as to their claims, and that they received the money as stakeholders for them, no demands being made by the country attorneys themselves.

The fact of the agents being attorneys in that stage of the cause when they receive the money, is sufficient to establish that privity which is necessary to enable the client to maintain an action for money had and received.

This was an action for money had and received, tried before Vaughan, B., when the following appeared to be the circumstances of the case. In consequence of some dealings with a Mr. Morris respecting the purchase of land near Cheltenham, the plaintiff was obliged to file a bill in Chancery against one Riviere in the name of Morris. A Mr. Lovsy was his country solicitor, and he employed the defendants as the

agents in town. Pending the suit in Chancery, Lovsy became embarrassed, and was arrested. Whilst he was in prison, the defendants required a guarantie from the plaintiff for the remainder of the costs which might arise in the prosecution of the Chancery suit, which was accordingly given on the 21st of May 1829. In consequence of the protracted imprisonment of Lovsy, the management of the suit was, with the consent of the plaintiff, handed over to Messrs. Pruen & Griffiths, solicitors, of Cheltenham, who retained defendants as agents, and conducted the cause from October 2, 1829, to June 16, 1830, when Lovsy was again introduced, and continued to act as solicitor until November 1831, when he ceased to take out his certificate, and, shortly after, he took the benefit of the Insolvent Debtors Act, whereby his liability to the defendants was entirely discharged. They, however, being secured as to a certain portion of the agency costs by Quarrington's guarantie, became and continued to act as solicitors in the cause. Lovsy was paid his demand by the plaintiff. The Chancery suit was terminated in June 1836, by the defendants in the cause being obliged to pay the costs, which amounted to 135*l.* 17*s.*,

which amount was handed to the defendants, who informed Lovsy of the fact. Upon the settlement between the plaintiff and defendants, they offered to pay him 10*l.* 13*s.*, setting up a claim to retain the remainder, (beyond their costs for the time in which they were actually employed, and those for which the guarantie was given by Quarrington,) on the ground of an alleged liability upon their parts to Pruen & Griffiths, who were at one time employed in the cause, and with respect to whom the defendants contended they stood in the situation of stakeholders. It was also said, that there was not that privity between the plaintiff and the defendants, which was required to support an action for money had and received. A verdict having been found for the plaintiff,

Talfourd, Serj. obtained a rule for entering a nonsuit, or reducing the verdict to the sum of 25*l.* 11*s.* 7*d.*

Wilde, Serj. and *Bompas, Serj.* shewed cause, and contended that there was no ground for the application. The parties stood in the relation of attorney and client; therefore, the existence of privity sufficient to maintain the action, could not be denied. The other objection, that they were stakeholders for Pruen & Griffiths, was equally untenable, as they were not responsible to them. These parties had, in fact, been paid by Quarrington, and they made no demand on the defendants. Neither could any stale demand which they might have against Lovsy, be imported into the discussion, inasmuch as that was discharged by the composition under the Insolvent Debtors Act, and they had renounced his responsibility altogether, by requiring a guarantie from the plaintiff, which he had given, and under which he admitted his liability to a certain extent.

Talfourd, Serj. and *R. V. Richards* were heard in support of the rule.

TINDAL, C.J.—The first objection to the plaintiff's right to recover is, that there was no privity between him and the defendants. But, from the facts, as they were proved at the trial, it appeared that Quarrington was the person who set the law in motion, and he was, of course, liable to the attorney who was first employed in the suit. This attorney was Lovsy, who

was ultimately liable to the defendants, the agents whom he employed. Now, could these defendants, who finally became the attornies of the plaintiff, maintain a right of lien upon the money which was paid into their hands at the close of the litigation, in consideration of the privity which existed between them? They clearly could. I do not mean to say, that if there were accounts between Lovsy, the attorney in the country, and the defendants, his agents in town, and between Pruen & Griffiths, the attornies, and these same agents, that the plaintiff should be allowed to overleap the heads of these parties, and claim from the defendants that to which the others had a right. If such were the case, I do not mean to say that the plaintiff would not be out of court. But, it appeared here, that Lovsy had discharged his debt to the defendants, by a composition to which they assented; it also appeared, that Pruen & Griffiths had been paid their demand. This being so, the defendants cannot set up non-existing claims on the part of these persons, for the purpose of disproving the plaintiff's right to this money. The defendants, acting as the attornies of the plaintiff, cannot resist his claim advanced under circumstances like the present, and they are consequently out of court. This is the ordinary case of money being paid to a man's attorney, which overtops that attorney's claim against him, and consequently the plaintiff is entitled to recover the difference in this form of action. The rule should be discharged.

PARK, J.—I am of the same opinion. It does not even appear that notice had been given to the defendants, by those persons whose rights are said to be maintained. I never heard in my life of a more groundless reason for retaining money. It is as if I paid money into my banker's, and, upon my wishing to draw it out, he were to say I should not, because he had heard that I was indebted in a certain sum to my bookseller.

VAUGHAN, J. concurred.

COLTMAN, J.—This, in my opinion, is a clear case. There was here a privity between the plaintiff and defendants, as between attorney and client, when money was to be received. That is the only thing to which the Court have to look. It

is not because these parties stood at one time in a different position, and were agents, that, therefore, they were to receive money for others. The opinion which we give upon the subject, is founded upon this, that the money here was received by the defendants, as attorneys for the plaintiff, and not as agents for others. It is my opinion, though my Brothers do not appear to go to the same extent, that these other parties could not support an action against the defendants for the money which they have received, and consequently that the latter had no right to appropriate such money for the satisfaction of their claims. Besides, the defendants have not shewn the existence of these rights, and they should not be allowed to make a reduction of the sum in support of unfounded claims. The rule should be discharged.

Rule discharged.

1837. } CUNLIFFE AND OTHERS v.
May 31. } WHITEHEAD.

Bill of Exchange—Pleading—Indorsement.

In an action against the acceptor of bills of exchange made payable to the order of the drawer, a declaration alleging that the drawer indorsed the bills to S. & F, who delivered them to the plaintiffs, is bad on general demurrer, inasmuch as indorsement by S. & F, as well as delivery, was necessary to entitle the plaintiffs to sue the acceptor.

Assumpsit against the defendant, the acceptor of a bill of exchange. The fourth count alleged, that whereas, one William Fraser, on the 18th of July 1833, at &c., made his bill of exchange in writing, and directed the same to the defendant, and required the said defendant to pay to the order of said W. Fraser, 1,500*l.* value received, four months after date, &c., and defendant then accepted the said bill, and the said W. Fraser then indorsed the same to Messrs. Salomonson, Fraser, & Co., and the said Messrs. Salomonson, Fraser, & Co. then delivered the same to the plaintiffs, of all which the defendant then had due notice, and then promised the plaintiffs to pay the amount thereof, &c.

Fifth count, *totidem verbis*, upon another bill of exchange.

General demurrer and joinder.

The margin of the paper-books was thus marked:—"The fourth and fifth counts are bad, in not shewing that the bills of exchange mentioned in these counts were indorsed by Salomonson & Fraser to the plaintiffs."

Crompton for the demurrer.—The question is, whether a bill made payable to order of the drawer can pass by delivery alone, and give the holder, under such circumstances, a right of action against the acceptor. It clearly cannot. It is laid down in *Bayley on Bills*, 4th edit. p. 98, "Bills and notes are assigned either by delivery only, or by indorsement and delivery. Bills and notes, whilst payable to order, are assignable by the latter mode only;" and the bill here being so payable, it cannot pass without proof of indorsement, as well as of delivery. The plaintiffs here claim title through Salomonson & Fraser, and they must do so as indorseees. For the purpose of supporting their case, the plaintiffs are bound to shew that the indorsement to Salomonson & Fraser, by the drawer, was a blank indorsement, in which case it would pass by delivery alone. Such, however, is not the case, and the defendant is entitled to judgment.

Bompas, Serj., contra.—The parties have been obliged, by the new rules of pleading, to adopt the present course, as, under these rules, they felt themselves compelled to state accurately how they came by the bills; and as they passed to them by delivery alone, they have put that fact upon the record. They felt obliged to act thus, for the purpose of enabling them to prove the consideration, if that had been disputed, such consideration having passed to Salomonson, Fraser, & Co. from the plaintiffs, and not to Fraser, the indorser; and if the allegation had been of an indorsement and delivery by him to the plaintiffs, such proof of consideration could not have been supported. The indorseees of the drawer, Salomonson, Fraser, & Co., are bill-brokers, and it is usual for such class of persons to transfer the bills lodged with them for discount, and in the way of their business, by delivery, and not by indorsement. By such mode of transfer, they do not become parties to the bill or note; whereas, if they indorse, they would

assume a responsibility, and become, according to the legal operation, new drawers.

[TINDAL, C.J.—The simple question is, whether the plaintiffs can derive title through delivery alone.]

Fraser, the drawer, indorsed the bills to Salomonson & Fraser, that is, he indorsed to his own order; and under such circumstances, his indorsement may be considered as one in blank; and consequently the bills were payable to bearer, and pass by delivery—*Peacock v. Rhodes* (1).

Crompton, in reply, denied that the indorsement by the drawer to his indorsee, could be considered as one in blank. He referred to the heading of the chapter "On the transfer of bills," by Bayley.

TINDAL, C.J.—Whatever construction may be put upon the new rules, it is, at all events, perfectly clear, that they cannot be construed, nor were they intended by the framers to be so construed, as to effect any alteration in the law-merchant of this country, and make bills of exchange, which, before the promulgation of these rules, passed by indorsement, pass by delivery only. The question now is, if the bill, as it is set forth on this record, is such as gives the party by whom the action is brought, a title to sue;—and when we look at the record, we find that Fraser drew the bill, which was accepted by the defendant, payable to his order, and then indorsed it to Salomonson, Fraser, & Co. Now, this bill, being drawn as payable to Wm. Fraser's order, required an indorsement by him to a third party, before that party could recover the amount, or enforce payment against the acceptor. The bare delivery by him without indorsement, would not, from what appears on the face of the bill, give such right, as it appears on the face of it that the bill was payable to order. There was a time when the omission of the words, "to order," in the indorsement by the drawer, was thought to tie up the bill, and make the indorsement restrictive; but *Edie v. the East India Company* (2), put an end to the question. There, a foreign bill drawn upon the East India Company, was payable to

Campbell, or order; Campbell indorsed to Ogilby, but did not insert the words, "or order," or any similar words, in the indorsement; Ogilby indorsed it to the plaintiffs. It was insisted, that under the indorsement to Ogilby, he had no authority to indorse it over, and upon that ground the jury found for the defendants. But, upon a rule to shew cause why there should not be a new trial, and cause shewn, the Court were clear, that as the bill was originally in its nature negotiable, it continued so in the hands of Ogilby, and that his indorsement was good. There, therefore, it was decided, that the omission of the words, "or order," did not preclude a subsequent indorsement, or prevent the bill from being negotiable by the hand of another. And there is nothing in the new rules, at least so far as I can discover, to interfere with these indorsements upon the transfer of the bill *toties quoties*. But, it is said, that as this bill has been indorsed by the drawer to Salomonson & Fraser, the legal inference to be drawn from the new rule is, that such indorsement by the person to whose order the bill was made payable, was sufficient to enable and give a third party title to sue, in the manner attempted here, without any other indorsement, and that the party who may be considered as the bailee of the bill, may sue without the name of the indorsee. But I deny that such is the legal inference to be deduced from the rule; it is affirmed, that its legal operation is not, under such circumstances, to give to all the world, and amongst others the plaintiffs, a title to sue. It has been also said, that the plaintiffs have been misled by following the new rules, and that the difficulty has been occasioned by their adherence to them. Now, as it appears to me, this objection cannot be sustained: the difficulty has, on the contrary, been occasioned by not following them, inasmuch as all the precedents given in these rules, for drawing the counts in declarations, state the indorsement by the payee to the plaintiff, and say, "He then and there indorsed the same to plaintiff." Upon this record, such indorsement is omitted; the bill is drawn payable to Fraser's order; he indorses to Salomonson & Fraser; and it is contended, that their interest passes to the plaintiffs by delivery

(1) Doug. 632.

(2) 1 W. Black. 295; s. c. Burr. 1216; Bayley on Bills, 4th edn. page 105.

alone: and this is clearly different from the precedents in the new rules; and the difficulty is caused by not adhering to them. Perhaps there was something in the state of facts here, which would not allow of the allegation of such indorsement. At all events, the indorsement here is equivocal in its nature; and the plaintiffs should not call upon the party to put forth such a state of facts as may take away his own right. As it appears to me, the indorsement by Fraser, the drawer, to Salomonson & Fraser, without an indorsement from the latter to the plaintiffs, does not give the plaintiffs a right to sue in this action; they do not derive title from delivery alone.

PARK, J.—Upon the subject of the declaration, I defer to my Lord's great skill and knowledge in pleading, and agree with him in all that he has laid down. I will merely add, that I never before saw a declaration in which it was attempted to give the plaintiff an interest in a bill of exchange by delivery alone, and not by indorsement. I was induced to look into the rules, in consequence of the strong manner in which my Brother Bompas affirmed that it was by the observance of them, that the plaintiffs were, if I may so express myself, brought into the scrape; but I find that such is not the case—I find, that in all the instances which bear an analogy to the present, every transfer of the bill is stated to be by indorsement. I do not understand why the Courts should vary the rules upon which they act in all cases, because there may be something behind, which prevents the parties from suing in the usual manner. The Court cannot make such deviation:—they cannot accommodate themselves to such proceedings. Our judgment should be for the defendant.

VAUGHAN, J.—I agree. The new rules have not altered the law upon that which is the subject of discussion. Their object was to save expense and diminish the costs of suitors. The argument here has been conducted in obedience and conformity to that which was the course of pleading before the new rules; and the question was, whether this has been an open or a restricted indorsement? One cannot, I think, read the declaration, without seeing that the party intended a special indorse-

NEW SERIES, VI.—C.P.

ment. It is, at all events, equivocal; there is doubt on the face of it, and he who has introduced such doubt, is bound to explain and clear it up. The plaintiffs have, in my opinion, failed in deducing their title; they have failed in shewing title through an indorsement from Fraser,—and consequently, they are not entitled to sue.

COLTMAN, J.—The question here is, as to the meaning of the allegation, that the bill was indorsed by the drawer to Salomonson & Fraser. It may mean that he simply put his name on the back of the bill, or it may mean that he wrote, "Pay to the order of Salomonson & Fraser." This, I think, rather points at a special indorsement. Of the two indorsements this is rather more appropriately within the latter, than it is within the other; but I cannot carry the matter higher than this, which is equivocal, and may be referred to one or the other. Under the old forms of pleading, the allegation would, I think, be satisfied by one or other of these indorsements. Either indorsement may follow as a consequence from proof of the matter alleged. The facts alleged in the record could be satisfied by proof of one or other. If the fact of the indorsement being either special or open, was immaterial, the allegation giving the description of indorsement, would be equally so, as in either case there would still remain in the party a good title to sue. But such is not the case. The question is, whether the bill did pass by subsequent delivery or not, and the defect is, that the meaning of the indorsement is equivocal. In reasoning thus, I go as far as I can with my Brother Bompas. The plaintiffs here have not shewn such title as would enable them to recover payment by delivery alone. The state of things is equivocal: the real state of things was, I suppose, such as would not allow the plaintiffs to allege the indorsement. I do not, however, doubt, that by pleading properly, the plaintiffs would be enabled to derive all the benefit to which they are entitled; but, in this state of the record, they are not entitled to sue as they have. The defendant is entitled to judgment.

Judgment accordingly.

2 L

1837. } BIRD, GENT., ONE & C., v.
June 9. } GAMMON.

Limitations, Statute of—Construction.

L. being embarrassed, made a bill of sale absolutely and unconditionally of his effects, stock, &c., to the defendant and another, deceased, the consideration for which was expressed to be the paying and securing of L's debts; an account of which was at the time submitted to the defendant. When the bill of sale was made, L. was indebted to the plaintiff, who had, as security, a judgment upon which he had sued out execution, which he refrained from carrying into effect, upon the promise of the defendant that he should be paid. The statement which contained the plaintiff's debt, was perused and approved of by the defendant, and the plaintiff also furnished him with his account, to which no objection was made. Much correspondence took place upon the subject, in the course of which, the defendant wrote the following letter:—"I am in receipt of yours of the 2nd. I do wish I could comply with your request, for really I am and have been very wretched on account of your account not being paid. I hear there is a prospect of an abundant harvest, which surely must turn into a goodly sum, and very considerably reduce your account; at all events, if it does not, the concern must be broken up to meet it at last." The letter concluded thus: "My hope is, that out of the present harvest you will be paid":

Held, that such letter, coupled with the other circumstances above referred to, was sufficient to take the case out of the statute, it being an unconditional, unqualified admission of liability, not depending upon or referring to the contingency of a good harvest for the creation of a fund to meet the demand.

Held also, that the sufficiency of the letter for that purpose was not affected by the omission of the amount claimed, as that may be proved by extrinsic evidence, when the existence of a debt is clearly established.

Held also, that it was for the jury to put a construction upon the letter, and determine whether it referred to the plaintiff's demand.

Assumpsit against the defendant and Thomas Acton, since deceased.

Plea — Non assumpsit, (except as to

*200*l.*, which was paid into court,) and the Statute of Limitations.*

The action was brought under the following circumstances:—In the year 1828, Francis Lloyd became embarrassed in his circumstances, and consulted with the defendant and the deceased Thomas Acton, (who were his brothers-in-law,) as to the best mode of extricating him from his difficulties. They, upon the investigation of his affairs, were of opinion that there was a sufficiency to meet all demands, and pay the creditors 20*s.* in the pound, if time were given; and they published a statement to that effect, in which they also recommended forbearance to the creditors. At this time, Lloyd was indebted to the plaintiff, his attorney, in the sum of 340*l.*, which was secured by two judgments; and the plaintiff had actually issued, on the 20th of February 1829, a *fi. fa.* on one of the judgments against the goods and effects of Lloyd, for 228*l.* 1*s.*, but did not put it in force, in consequence of the promises then made to him by the defendant, to pay the full amount of his debt. In March 1829, the defendant and Acton signed a memorandum, by which they authorized the plaintiff to pay to as many of the creditors of Lloyd, as chose to accept it, 10*s.* in the pound, as a full discharge of what might be due. On the 15th of May 1829, Lloyd executed a bill of sale to Acton and the defendant, of the stock and effects on his farm, and which was prepared by the plaintiff, at the desire of the defendant and Acton. In this instrument it was recited, that Lloyd was indebted to Acton and the defendant, upon the balance of an account, then stated and settled, for money paid, or secured to be paid, by Acton and the defendant, in the sum of 3,083*l.* 11*s.* 5*d.* The consideration was stated at the above sum; and the stock, furniture, and effects were assigned to them for their own use and benefit, and as their own estate and effects absolutely. The account referred to in the bill of sale, contained a statement of all the debts which had been paid on Lloyd's account, as well as those which were still due from him, and the plaintiff's debt was there stated at 340*l.* 6*s.* 10*d.*, independently of a law bill not included in the action. This account was signed by Lloyd, Acton, and the defendant, and was stated to have been

perused, examined, and allowed by them. It was witnessed by the plaintiff and another person. The two sums admitted to be due to the plaintiff, formed part of the consideration of the bill of sale. At the time the bill of sale was executed, it was agreed and understood that the farming business of Lloyd was in future to be carried on by Acton and the defendant, and in their names, and that Lloyd was to be considered merely as their bailiff. In consequence of this agreement, the defendant and Acton became the ostensible tenants of the farm; they received the rents, and gave receipts in their own names, and attended the landlord's audits, in such capacity; Lloyd's name, however, was, at his particular request, retained on the carts, and the sheep were still marked with his initials. It then appeared from a long correspondence respecting the affairs of Lloyd, between Acton, the defendant, and the plaintiff, that the latter was considered and recognized by them as their agent for the management of these affairs, raising money to pay the debts, &c. Then followed a letter of November 11, 1830, from the defendant and Acton, to the plaintiff, in which they remitted him 8*l.*, interest due from Lloyd, stating that they had gone over the stock, and were happy to find that there was a considerable amount available to meet the obligations, and that they had directed Lloyd to pay plaintiff at the earliest possible moment, a considerable part of his debt. Another letter from defendant and Acton, without a date, received the 13th of May 1831, in which, they expressed their regret, that, contrary to their hopes and expectations, no payment had been made to the plaintiff, and stated that they had instructed Lloyd to make out a list of his book debts, and deliver it to the plaintiff, and authorized the debtors to pay him. A letter of November 11, from defendant to plaintiff, wishing to know the amount of the interest due to the plaintiff, that it might be paid; also expressing a hope, that between that and Christmas, the concern would be enabled to pay a portion of its obligations to the plaintiff. Then a letter from the plaintiff to the defendant, in answer, stating that he was much inconvenienced by the balance remaining so long unpaid. On the 10th of May 1832,

the plaintiff sent his account to the defendant, to which no objection was made.

On the 2nd of August 1832, plaintiff wrote again to defendant, requiring an advance on account of his demand; to which, the following answer was returned:—

“Birmingham, 4th of August 1832.

“I am in receipt this day only of yours of the 2nd inst. I do wish I could comply with your request, for really I am and have been very wretched, on account of your account not being paid. I hear there is a prospect of an abundant harvest, which surely must turn into a goodly sum; and very considerably reduce your account. At all events, if it does not, the concern must be broken up to meet it at last. I have this week paid Lechmere & Co. very near 500*l.*, on account of Lloyd; not a farthing of which I ever expect again, having before paid on the same account more than the value of the security I hold. It is really a calamity to be thus connected. It is impossible any one can be more sensible than I am, of your kindness towards Lloyd's family; and my hope is, that out of the present harvest you will be paid.”

Finally, a composition was offered, which being rejected, the plaintiff brought the action.

Upon the trial, at the Worcester Assizes, before Parke, B., the learned Judge referred to the recital in the bill of sale, and put it to the jury, whether, when that deed was executed, they were satisfied that Lloyd was to be discharged from the plaintiff's debt, for if Lloyd continued liable to the plaintiff, then the defendant was not liable. He also stated, that he was of opinion that there was sufficient to take the case out of the Statute of Limitations, if the jury thought the letter of the 4th of August 1832, referred to one or other of the sums due to the plaintiff, as it imported an acknowledgment of a liability. That was his opinion, but he would ask the jury theirs. If the jury considered that the letter merely referred to the harvest as a fund for payment, he thought it was not sufficient; if it admitted a liability, and only suggested the harvest as a means, he thought it was. The other letters produced did not, as he thought, take the case out of the statute. The jury found a verdict for all sums claimed, which, when the

200*l.*, paid into court, were deducted, amounted to 488*l.* 12*s.* 7*d.*; and to a question put by the learned Baron, they said they were satisfied that the letter of the 4th of August 1832, related to the whole amount.

Maule obtained a rule *nisi* to enter a non-suit, or for a new trial, or for the reduction of the damages by the sum of 340*l.* 6*s.* 10*d.* He submitted that the statute 9 Geo. 4. c. 14. s. 1, (Lord Tenterden's Act,) was applicable, as the letter of the 4th of August 1832, did not take the case out of the Statute of Limitations, to which he cited *Whippy v. Hillary* (1). He also objected, that the letter was conditional, and the payment dependent upon the goodness of the harvest, and that no amount was specified, citing *Kennett v. Milbank* (2), and that the construction of the letter had been improperly submitted to the jury, instead of being determined by the Judge.

Wilde, Serj., Ludlow, Serj., and Godson, shewed cause.—The objection upon the Statute of Limitations, would be no ground for granting a new trial, as in May 1832 the parties met, and an account was stated and admitted; and *Smith v. Forty* (3) is an authority, that although there is no promise or acknowledgment in writing, the plaintiff may recover on the account stated, as he does not go upon the original debt, but for a new debt created by the account stated; and, upon this point, reference may also be made to *Catling v. Skoulding* (4), *Cranch v. Kirkman* (5), *Bryan v. Horseman* (6), *Beale v. Nind* (7), and the authorities collected in 2 *Saund.* 127 (A), (8). *Dodson v. Makey* (9), and *Dabbs v. Humphreys* (10), shew that the letter contains a sufficient acknowledgment, and that the promise is unconditional and absolute; and *Lechmere v. Fletcher* (11), and

Dickenson v. Hatfield (12), establish that the statute 9 Geo. 4. c. 14. s. 1. does not require that the amount should be specified, but that it may be supplied by extrinsic evidence. *Lloyd v. Maund* (13), *Frost v. Bengough* (14), and *Linsell v. Bonsor* (15), decide that the construction of the letter was properly submitted to the jury.

Talfourd, Serj. and R. V. Richards, in support of the rule.—The Court should decide this case upon the principle of adhering to the precise words of the statute 9 Geo. 4, adopted in *Hyde v. Johnson* (16), rather than upon the authority of the *Nisi Prius* cases of *Smith v. Forty* and *Dickenson v. Hatfield*. If *Smith v. Forty* is held to have been well decided, all the inconveniences against which the statute meant to provide, will be again created, inasmuch as it was held in *Highmore v. Primrose* (17), that proof of the acknowledgment of one item of a debt only is good to support a count upon an account stated. *Lechmere v. Fletcher*, on which the plaintiff relies, is in favour of the defendant, as there the party was chargeable: here the letter does not admit the character of creditor or debtor to exist at all; and if it could be supposed to be addressed to a creditor, its object is to call his attention to a fund arising from the approaching harvest, to which he is to look for payment, and the acknowledgment is of a qualified nature. *Kennett v. Milbank* is also in favour of the defendant, as it was there decided, that a promise qualified with a condition, was not sufficient to take a debt out of the Statute of Limitations; and *Bosanquet, J.* said, "No sum is specified as the amount of the plaintiff's claim; therefore, without the additional evidence in writing of that sum, there is no such acknowledgment as the statute requires." An inference favourable to the defendant may be also deduced from *Willis v. Newham* (18), where it was held that a verbal acknowledgment of the payment of part

(1) 3 B. & Ad. 399; s. c. 1 Law J. Rep. (N.S.) K.B. 272.

(2) 8 Bing. 38; s. c. 1 Law J. Rep. (N.S.) C.P. 8.

(3) 4 Car. & Pay. 126.

(4) 6 Term Rep. 189.

(5) 1 Peak. N.P. 164.

(6) 4 East, 599.

(7) 4 B. & Ald. 568.

(8) Note to Webber v. Tivill.

(9) 4 Nev. & Man. 327.

(10) 10 Bing. 446; s. c. 3 Law J. Rep. (N.S.) C.P. 139.

(11) 1 Cr. & M. 623; s. c. 2 Law J. Rep. (N.S.) Exch. 219.

(12) 5 Car. & Pay. 46.

(13) 2 Term Rep. 760.

(14) 1 Bing. 266; s. c. 1 Law J. Rep. C.P. 96.

(15) 2 Bing. N.C. 241; s. c. 5 Law J. Rep. (N.S.) C.P. 40.

(16) 3 Bing. N.C. 776; s. c. 5 Law J. Rep. (N.S.) C.P. 291.

(17) 5 Mau. & Selw. 65.

(18) 3 You. & Jer. 518.

of the debt within six years, is not sufficient to take the case out of the Statute of Limitations. Every circumstance of the case also shews that the intention of the defendant was to become a collateral security, not an original debtor, and, therefore, the engagement or promise should have been in writing. *Fairlie v. Denton* (19) is admitted; there the exception to the general rule, that a chose in action cannot be assigned, was conceded, but subject to the qualification, that there must be an ascertained debt between the party making the assignment, and him in whose favour it is made; and such, it is contended, was not the case here. Besides, it is clear that the verdict against the defendant is wrong, for if the plaintiff were to sue out execution upon his judgment against Lloyd, the latter could not protect himself. As to the construction of the letter, as it involved matter of law relating to a statute, the interpretation was for the Judge, and not for the jury.

TINDAL, C. J. — Two questions have arisen on the case which has been submitted to our consideration; one upon the Statute of Limitations, which goes in bar to the whole cause of action; the other, which goes merely to a part—namely, the sum of 340*l.*, and the question as to this part is, whether the verdict should not be reduced by that sum of 340*l.* With respect to the Statute of Limitations, it is objected, that if this was an immediate debt from the defendant to the plaintiff, as more than six years have elapsed since such debt was incurred, the action cannot be supported, as there was no promise in writing under the 9 Geo. 4. c. 14. This being so, it is necessary for us to consider whether the letter of the 4th of August 1832, on which the plaintiff relies, combined with the other circumstances, is or is not of such a nature as to take the case out of the statute: and, as to myself, when I look at the letter, the fair inference, as it appears to me, is, that it does so operate. It appears to me, to be a promise made by the defendant—an acknowledgment by him of an existing demand—and it does not amount to an en-

gagement to pay conditionally out of one particular source, from which he (the defendant) expected the fund for such payment to be produced. The engagement is not, in my opinion, confined or limited to the possibility or contingency of there being in the words of the letter, “an abundant harvest, which surely must turn into a goodly sum, and very considerably reduce the plaintiff’s account;” and, as the writer adds, “at all events, if it does not, the concern must be broken up to meet it at last.” The engagement being left thus doubtful and uncertain, cannot, I think, be confined to a particular fund. This, as it appears to me, is rather the language of a person expatiating and enlarging upon his prospects and his hopes, of being able to pay by means of a good harvest; and, if the harvest thus calculated upon is not sufficient to produce the necessary fund, the concern must be broken up to meet the demand—that is to say, if he is disappointed in his expectations from the harvest, the demand must be met, and the debt must be discharged by the sale of Lloyd’s property. Upon the question, whether the letter is within the statute, it is objected, that its construction or interpretation ought not to have been left at all to the jury. Now, with regard to this, I must observe, that there is a variety—I may indeed say, a chain of cases, from *Lloyd v. Maund* to *Frost v. Bengough*, (and others might be added,) in which this particular course and practice has been adopted as correct and proper by the Judges, who, in pronouncing their judgments, have upheld and sanctioned that which has been done; and even if such course were not deemed proper or admissible, the objection is, upon this occasion, removed and obviated, inasmuch as the learned Judge did, upon this occasion, state his opinion, that the letter was sufficient to take the case out of the statute; and, as I think, the Judge in taking this view of the subject came to a just conclusion, and was justified in the inference that the letter amounted to a recognition of an existing debt. Then comes the objection, as to the omission of the amount: and here I admit that, if this were a new question, the objection would excite considerable doubt in my mind. But the case which has been decided in the Court of

(19) 8 B. & C. 395; s. c. 6 Law J. Rep. K.B. 351.

Exchequer, and the judgment there pronounced by Mr. Baron Bayley, of whose learning and accuracy there cannot be the least doubt, preclude all hesitation, and lead to the conclusion, that if the acknowledgment is silent as to the amount, such omission can be supplied by parol evidence. Thus, therefore, the first objection is answered by the facts submitted to the jury. Now, as to the question whether the verdict should be reduced by the sum of 340*l.* let us, upon this subject, consider the facts as they appeared in evidence; and from these facts, it is evident, that Bird, the plaintiff, was, in the year 1829, a creditor of Lloyd, to the amount of 340*l.*: that for this debt he held a warrant of attorney, as security, upon which he entered up judgment, and sued out execution. There were, at the same time, other creditors armed with a similar authority;—and there was also a number of simple contract creditors waiting to see the event of that which might occur. In this state of affairs, Gammon and Acton, both of them, be it remembered, the brothers-in-law of Lloyd, entered into a negotiation with the creditors, and proposed to pay them 10*s.* in the pound. Bird, relying on his execution, which he had ready, refused to comply with the terms; and, upon the defendant ascertaining that Lloyd's debts amounted to 3,800*l.*, he entered into the arrangement, as appeared in evidence, with the defendant as to his specific debt of 340*l.*; and this agreement, as also appeared in evidence, was signed by the defendant and by Lloyd: shewing clearly that all the parties were aware of the agreement—were perfectly cognisant of it, and no one could assert that he was taken by surprise. Things being thus circumstanced, upon the 5th of April 1829, a bill of sale was executed, not for the purpose of conveying Lloyd's property in the ordinary manner to trustees for the payment of the different creditors, but the conveyance was to operate as an absolute sale to the defendants for their own use upon payment of the debts. Matters remained thus for some years, Lloyd being and continuing in the ostensible possession, his name remaining upon some carts as if they were still his. He, it is to be presumed, was acting as bailiff to the defendants, accounting with them as such, and

paying over the profits. The account was stated in May 1832. There were also other documents, which shew the real nature of the transaction. The one, to which particular allusion has been made, was drawn up by the plaintiff himself, and to this he added the very first stated item, which forms the subject of this discussion. After stating other items, one so late as the 21st of April 1831, he gives the sum total, the aggregate of all the items, in which the defendant is made his immediate debtor; and no objection was made at the time to the statement of such sums being owed to the plaintiff. To me, therefore, when I consider the situation of the parties, it appears, that the plaintiff relinquished all claim to the debt derived from the execution, with which he was ready to seize the property, which was transferred to the hands of the defendant, the plaintiff giving up his interest to the defendant, in consequence of an agreement upon the part of the defendant, that the plaintiff was to look to him for payment. There was also further evidence to shew the construction of the agreement; and it was properly left by the Judge to the jury to determine whether such was the real meaning of the agreement: they found that it was; and such finding should not be disturbed or altered as to fact, unless it is impossible to support it in law. Upon this occasion no objection arises, nor could it, on the Statute of Frauds. This is not a promise to pay the debt of a third person; but it is a new undertaking by the defendant to pay, in consequence of a certain interest then acquired, and respecting certain claims contained in items, the amount of which was then specified. An objection similar to this was advanced in *Read v. Nash* (20), but the promise there was found to be an original one, and sufficient to found an assumpsit upon against the defendant, and the difference was said to be between an original promise and a collateral one; the first is out of the statute, the latter is not. Then, it is said, that a difficulty arises from this, that if Bird were to sue Lloyd for the same debt, there is nothing to prevent him—there is nothing to protect Lloyd from such proceeding. Now, let us see whether

such difficulty as is thus stated does exist or could be supported in law. If a party waive an execution, and sue it out afterwards improperly, the party against whom it is thus sued, has his remedy by *audita querela*; and, if Bird were here so circumstanced as to be able to commence an action, or to sue out an execution upon his judgment, as it is evident he might, it would not, I think, occasion a difficulty of such nature as is inferred, for Lloyd could put a plea on the record, or could sue out his *audita querela*, and by so doing he would prevent the prosecution of the suit. He would, in such case, shew such a state of facts as would enable him to attain his object (21). He could shew, that in consequence of a good and valuable consideration passing from him to the defendant, an immediate remedy, possessed by the plaintiff, against him had been given up. He could shew, that a better security had been obtained in consequence of his giving up and transferring his property to the defendant:—that the transaction, in fact, amounted to an accord and satisfaction, to which it was then too late to object. *Good v. Cheeseman* (22), though the agreement there did not amount strictly to an accord and satisfaction, is an authority to shew, that a plea, in substance resembling this, may be framed so as to furnish an answer to the action. Thus, with regard to the 340*l.*, there is no ground for the reduction of the verdict by that sum, after the jury have found that the claim was valid, and capable of being supported, and such finding should not, in my opinion, be disturbed. The rule should be discharged.

PARK, J.—My Lord has gone so fully into the subject, that I will not occupy the public time by any protracted observations. One objection arises on the Statute of Limitations; and the question is, whether the plea is answered by that which has subsequently appeared. It is also objected, that no particular amount has been stated. As to the first objection, it is, I think, impossible to read the letter without coming to the conclusion, that it cannot be supported. The letter, it should be recollected,

was written in 1832, and it is in 1837 the action is brought. The letter, in my opinion, amounts to an acknowledgment—to an admission, that the writer was greatly indebted to the plaintiff. He then goes on, and refers to the abundance of the harvest; and it is objected that the promise was conditional, that he would pay if the harvest were good. Now, this is not so: the writer merely states his hope of being able to pay. He does not say, “If I do not find the harvest good I will not pay.”—*Whippy v. Hilary* has been referred to, but it does not apply. In that case there was a fund, and it was said to be placed in the hands and at the disposal of a trustee for certain purposes, to whom the creditor was referred. Here such was not the case—there was no trust;—but there was an absolute, final sale. Then, as to the objection, that the amount of the sum has not been specified:—there has been upon this subject, as well before as after Lord Tenterden’s act, a continued series of decisions, such as *Frost v. Bengough*, *Smith v. Forty*, to which I need not more particularly refer, in which the point has been fully considered; and it was more particularly discussed in *Lechmere v. Fletcher*, and all the decisions are uniform upon the subject. It seems to be supposed, that the decision in *Kennett v. Milbank* varies from the others; and that it has been overruled by the subsequent decision of the case in the Exchequer; but, such is not the fact. Bayley, B. distinguishes the cases: he points out the material distinction between them; and thus all the decisions on the subject tend to support that of the Court at present. There is, in truth, nothing which militates against it; and if such were the case, we, who sit here, are not so wedded—so bigoted—to our opinions as not to wish that they should be reconsidered if there should happen to be a mistake. Then, as to the case last cited, that of *Dickinson v. Hatfield*: it was, it should be recollected, tried before Lord Tenterden, the framer of the statute so much commented upon; and if the assignment were good there, so it is here. There was here a good and valuable consideration. Neither was it a trust: it was executed, and the defendants were in possession. On the face of the deed, there was therefore an assignment

(21) As to proceedings in *audita querela*, vide *Nathan v. Giles*, 5 Taunt. 558.

(22) 2 B. & Ad. 328; s. c. 9 Law J. Rep. K.B. 234.

of all the property: all parties were present at the concoction of the agreement: and it also appeared in evidence, that all were together when the deed was settled and about to be executed. True, it was not signed by the plaintiff, but it was signed by the other parties, and the plaintiff was one of the subscribing witnesses. Upon the whole, it is not, in my opinion, possible to have a stronger authority on the subject than *Good v. Cheeseman*, referred to by my Lord. The difference between the cases is, that there was an agreement to pay to a trustee one-third of the defendant's annual income, and it was not signed by the party. The present case is much stronger in favour of the assignment, and the rule should be discharged.

VAUGHAN, J.—The verdict should not be disturbed. We should not set aside the finding, unless we thought there was something erroneous in the verdict or the direction of the Judge. We should be perfectly satisfied that an erroneous conclusion had been attained. An attempt has been made to support the conclusion contended for upon two grounds. The first question is, whether the action is not altogether barred by the construction which should be put upon Lord Tenterden's Act, which contains words not to be found in the other Statute of Limitations, and which prevents the recovery of a debt by the signing of the debtor's agent. It is said also, that the construction of the letter should not be left to the jury. Upon this subject I am old enough to remember *Lloyd v. Maund*, where Lord Kenyon undertook to interpret a letter, which was certainly doubtful and ambiguous, and of such a description that it was not easy to say whether it meant one thing or another; but the other Judges, Ashurst, Buller, and Grose, were of opinion that it was a proper question for the jury; that it was for them to put an interpretation upon it, under such observations and with such directions from the Judge as he might think proper to make. Founded upon such principle was the decision in *Frost v. Bengough*. I was counsel in the case, and I struggled in vain against the conclusion, established by the Courts, that it was proper for the jury to put an interpretation and construction upon the letter; that the interpretation to be put upon the written instrument should be

uniformly left to the jury, with such observations as the Judge might think fit, and with the delivery of a strong opinion, if he entertained such, upon the subject; and, in the case which is now the subject of discussion, the learned Baron, with that caution and discretion which I had almost said were peculiar to him, left it to the jury to determine what in their opinion was the effect of the letter: and such, in my opinion, was sufficient. Hence, therefore, it follows, that, upon this particular point, the direction and summing up of the learned Baron were invulnerable. It is next asked, if the letter can be said to take the case out of the statute, as no amount is stated. This subject was much discussed in *Lechmere v. Fletcher*, and it was there held, that you may prove the amount by extrinsic evidence, if you shew clearly that something was due; and this rule can, in my opinion, bear the test of investigation. As to myself, I am of opinion, that we cannot reconcile this letter with any other state of things than that which admits of an acknowledgment of the debt, and an implied promise to pay, on which an action may be sustained. With regard to the 340*l.*, it would, I think, be the height of injustice to suppose that Lloyd would be liable to an action after what has occurred. What are the circumstances in which he is placed? He was considerably in debt, and he determined to give up a farm, in which he had property and interest. The defendant became actually the tenant, and Lloyd had nothing whatever to do with it. This shewed the intention of the defendant to exonerate this man from his debts, and the defendant proceeded to a valuation of the property. He satisfied himself. He recommended a compromise, and asserted that Lloyd could pay 20*s.* in the pound. The question is, if the party did consent to exonerate Lloyd from his debts, and pay them himself. In my opinion, all the circumstances, independently of the deed, conspire to shew, that the defendant did not intend to give a collateral security for the debt of another, but resolved to become himself an original debtor, and to release Lloyd altogether from his responsibility. This was the intention of the defendant. It was submitted to the jury, and they found it was. *Good v. Cheeseman* is

not quarrelled with ; so far from it, that it is held to be good law. What a situation, it may be asked once more, would be that of Lloyd, if he could be sued again? He gave up every portion of his property. It was impossible for the defendant to plead ignorance. He was perfectly cognisant of all that had occurred ; and, consequently, in my opinion, there is not the slightest pretence that the 340*l.* should be deducted. The rule should be discharged.

COLTMAN, J.— There can, I think, be no dispute as to the 340*l.* It is a clear established rule of law, that if there are a creditor, a debtor, and a third person, and a substitution of one for the other, such substitution will operate as a discharge to that other. *Fairlee v. Denton* establishes the general rule, that the debt cannot be established against the latter ; and such is the case here. Bird, by bringing this action, does that which will try the validity of this point of law ; and if this is so, the answer to the objection is perfectly good. *Good v. Cheeseman* is an authority upon the point. It is also said, that some difficulty would be cast upon Lloyd in the way of making his defence, if Bird were to bring an action against him. But such is not so : his remedy would, in such case, be by *audita querela* : for the giving of relief to the party under circumstances similar to those now assumed, is the certain and undoubted principle on which the *audita querela* is founded. All are familiar with the common case of coming to the Court upon motion, in the nature of an appeal to its equitable interference, when an execution is sued out after payment of the debt ; but, the proper mode is *audita querela*. Such would be the proper course if the party brought an action ; and of course the law would not be so defective as not to enable the party to give a similar answer to an execution, if it were sued out by Bird under circumstances like the present. Now, with regard to the Statute of Limitations, I say nothing : I make no observation as to whether the account originally stated brings the case within the statute. The ground on which I rely is the letter of the 4th of August 1832. To this, two objections have been advanced ; that no sum has been specified, and that the promise was conditional. As to the former, it is enough to say

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that there has been a deliberate judgment of the Court of Exchequer upon the point. But, it is said, that the question there did not fairly arise : this may be so ; but, certainly the Court came to a decision, as has been alleged, that the admission of liability, without the statement of the amount, was sufficient to maintain the action. With regard to the interpretation which should be put upon the letter, as to whether it was a conditional or absolute promise to pay out of a certain fund, this was perhaps a little equivocal, and it was for the defendant to explain it. The party had, it should be recollected, no other fund to which he could look for the payment of the debt. There was no other to which reference could be made ; at all events, there was a direct admission of the debt, from which a promise may be implied, and the rule should be discharged.

Rule discharged.

1837. }
May 29. } STEEL v. FOSTER.

Insurance—New Trial—Consolidation Rule.

In an action by the assured against the underwriter, two verdicts were found for the plaintiff: Tindal, C.J. (who expressed his disapprobation of the verdicts,) and Park, J., were of opinion, that the rule for a second new trial should be discharged, as it was contrary to the general practice to send a case to a third trial after two consistent verdicts ; Vaughan, J. and Coltman, J. contra, were of opinion, that the case should be sent to a third trial, for the purpose of remedying the injustice that had been done.

The Court (dissentiente Vaughan, J.) were also of opinion, that under such circumstances, the consolidation rule should not be opened for the purpose of allowing another action to be tried.

In this action, upon a policy of insurance from Sierra Leone, brought by the assured against the underwriter, in which the usual consolidation rule was entered into, the defence was, that the vessel, at the time of her sailing from the port abroad, was not sea-worthy.

2 M

Upon the first trial, at Guildhall, a special jury found a verdict for the plaintiff. A rule for setting aside that verdict as contrary to evidence, and for a new trial, was afterwards made absolute.

Upon the second trial, the jury, also a special one of the city of London, returned a similar verdict, and found again for the plaintiff.

Wilde, Serj. obtained a rule for setting aside the verdict, and having a new trial. —He admitted, that the application for a new trial, under circumstances like the present, where there had been two concurring verdicts, was unusual; but the authority of the Court to grant such, in the case of a perverse verdict like this, for the purpose of attaining justice, could not be denied. In *Godwin v. Gibbons* (1), where the defendant moved for a new trial, after two verdicts for the plaintiff, Lord Mansfield said, "There is no ground to say that a new trial shall not be granted after a former new trial has been once granted before. A new trial," he adds, "must depend upon answering the ends of justice." And Yates, J. expressed his clear opinion to be, "that a second new trial might be granted as well as a first, if the reasons for granting it were sufficient." He also referred to *Tindal v. Brown* (2), where a third trial was granted after two concurring verdicts for the plaintiffs; and to *Swinerton v. the Marquis of Stafford* (3), where, though conflicting evidence was left to the jury, and the Court did not think their verdict wrong, yet they granted a new trial upon payment of costs, a condition which would be willingly complied with here. There was also a particular feature in that which formed the subject of discussion, which would influence the Court in granting the application. The action was by the assured against the underwriters; and juries were, in such circumstances, apt to return verdicts under the influence of their feelings, and anxious to divide amongst many, that loss which might be ruinous to one (4).

(1) 4 Burr. 2108.

(2) 1 Term Rep. 167.

(3) 3 Taunt. 91.

(4) He also expatiated on the nature of the evidence given at the trial, and the suspicious circumstances under which the plaintiff appeared, and

Taddy, Serj. and Channell shewed cause, and contended, that the application could not be assented to, more especially in a case like the present, where the inference was to be deduced from the facts as they appeared in evidence, and which were, of course, submitted to the jury, the only tribunal to which they could be submitted, and by which they could be decided. By assenting to the motion, the Court would be invading the province of the jury, and be making the verdict, in fact and substance, that of the Court. *Swinerton v. the Marquis of Stafford*, as reported in 3 Taunt. 232, upon an application for a second new trial, after two verdicts found the same way, is decisive upon the subject: there the Court refused to grant a second new trial, although there was conflicting evidence, and although the Judge, who last tried the cause, thought the evidence against the verdict preponderated.

Wilde, Serj. was heard in support of the rule.

TINDAL, C.J.—My mind has fluctuated considerably during the discussion which has occupied the attention of the Court; and if I were to look only to the hardship of this particular case, I should feel strongly inclined to send it to a new trial. But upon occasions of this description we must have our minds influenced by a more general principle than that which affects and bears upon the subject of the discussion; and if I am not prepared to assent that the verdict is so contrary to evidence, as to be manifestly perverse,—if I am not prepared to conclude that the verdict is of such a nature, that all who heard would cry out *undâ voce* to have it set aside,—if I am not prepared to come to such conclusion, I do feel, I admit, an insurmountable difficulty in sending the cause to a third trial, more especially when

dwelt much on the necessity of maintaining rigidly the doctrine of seaworthiness, a deviation from which, it was evident, would be most dangerous to the lives and properties of those engaged in commerce. Upon this subject, he cited *Watson v. Clark*, 1 Dow, 336; *Douglas v. Scougal*, 4 Dow, 269; *Forshaw v. Chabert*, 3 Brod. & Bing. 158; *Forbes v. Wilson*, Park on Ina. 334, n. In delivering his judgment, Park, J. dissented from the doctrines laid down by Lords Eldon and Redesdale, in the cases in 1 & 4 Dow.

the verdict has been founded upon that which is deduced by inference from matter of fact. Let us consider the difficulty in which the Court would be placed by assenting to this application, and sending the cause to a new trial. Suppose a similar verdict was again found, might not the application be again made? might not the same reasons be again addressed to us? might not the same arguments be repeated? And under such circumstances I do not see why we should not send the cause to a new trial *toties quoties*, until, in fine, the verdict became that of the Judges, and not that of the jury, by whom, and whom alone, it ought to be pronounced. By adopting such line of conduct, should we not be invading the province of a jury? Would it not be better for us to bring ourselves within the observation of Hewitt, J., in *Goodwin v. Gibbons*, that "if two or three juries have determined upon the same point and the same circumstances, it may be a matter of discretion not to grant a new trial, but to leave the matter at rest"? Upon the second trial the same evidence was given, and the same circumstances appeared as on the first; there was no new effort of the understanding called out upon the second investigation; and, in such a state of things, two juries, twenty-four persons of the city of London, came to the same conclusion upon a subject which was more peculiarly within their province, and of which they were more cognizant than the Court. For my own part, if I had been a juror, I do not think that I should have agreed with the rest. I think I should have stood out against the other eleven; but sitting here in my present capacity, I am of opinion that the general principle must be observed, and consequently the rule must be discharged.

PARK, J.—I am of the same opinion. By assenting to the application we should be acting contrary to the general practice of the Court. In saying this, I am not to be understood as saying, that it is not competent to this Court, or to any other in Westminster Hall, to send a cause to a third, or even a fourth trial, if the circumstances are of such a nature as to render that the proper course; but, to justify such a proceeding, the circumstances should be most pregnant against the jury,—they

should shew most clearly, that the finding was perverse. It is said, that as the verdict here has been perverse, the cause should, upon this reasoning, go back to a new trial. Be it so; but let us remember, that not an additional tittle of evidence was given on the second trial, so as to create any difference between that and the first. To whom was the question submitted? To two special juries of the city of London, who, I doubt not, weighed maturely the question submitted to their consideration, and who agreed upon that of which they were, from practice and experience, better judges than we can pretend to be. It has been also observed, that a great unwillingness exists amongst juries to pronounce the proper verdict in cases of this nature—they, it is said, are more anxious that the amount of loss should be divided amongst many than imposed upon one; and that such feeling had its weight upon the minds of the jury. We have heard this topic urged to-day, in an able and elaborate argument by my Brother Wilde; but we should also bear in mind, that he had the opportunity of urging the same topics at the trial; and this he no doubt did, and perhaps with still greater force. He had also the advantage of the last word. For all these reasons I am indisposed to disturb the verdict. We are then pressed with the case of *Swinerton v. the Marquis of Stafford*; but when we look at the abstract of the case, we must, I think, come to a conclusion different from that contended for. There was there but a short time for the investigation of a claim to real property; the question was obscure, and the amount was large. A new trial was granted, and new evidence was given upon the second trial. In that case there was conflicting evidence, and so, as I think, there was here. As it seems to me, that case is very strong in supporting, and to its full extent, the opinion which I now give. As to the verdict itself, I do not say whether I concur in it or not. There were certainly suspicious circumstances in the case, and they were, no doubt, commented and enlarged upon, with his usual force, by the able counsel by whom the cause was conducted. As this verdict was given upon the same evidence as that by which the first was obtained;

where, if the application be granted, is the Court to stop? Suppose a verdict to be given on the same evidence for the defendant, would not the Court be placed in an awkward dilemma, in consequence of their having assumed the province of a jury of London merchants, who have decided that which they were most competent to decide? The application should, I think, be refused.

VAUGHAN, J.—In the course of my judicial experience, I never found myself in a more painful situation than at present, in consequence of my not being able to coincide in opinion with my Lord and my Brother Park. The present is an application, calling upon the Court to exercise its authority with sound discretion; calling upon us to act upon that authority with which we are vested, and, in the exercise of that sound discretion, to send this case to a new trial. Of the Court being furnished with this corrective power, there can be no doubt; and the question is, if the exercise of such power is now expedient. Some remarkable cases have occurred with regard to this authority. Amongst others, I recollect one of a claim of modus for tithes, tried before Richards, B. There were there two verdicts in favour of the clergyman, and two juries were of opinion, that there was a modus; but the evidence was strong the other way, to shew that the verdict was wrong. A third trial was granted, but the matter was settled before it took place. As, therefore, the Judge on the equity side of the Exchequer had the power of granting a new trial, when he sent such an issue for the purpose of informing his conscience, there can be no doubt of the authority of this Court—it cannot be disputed. Besides, the general justice of the country requires that there should be this controul over the verdicts of juries; and the question is, if this is a case requiring such controul. The evidence on the two trials was, it is said, the same: admitted; but the Court were of opinion that the justice of the case had miscarried on the first trial; and it is to prevent such occurrence the present application is made. The Court, it has been also said, are placed in such a situation as calls upon them to consider, whether it is not better that a private mischief should be suffered

than that a public inconvenience should be endured. I feel, I admit, the force of this argument; but as to the argument deduced from the possibility of the verdict being the other way, and of the consequent necessity of sending the case to a fourth trial, my answer is, that we should wait until such result takes place. Besides, I do not see how such event, even if it should occur, would be a reason for sending the cause to a fourth trial, or to a fifth, for the purpose of obtaining, if I may so express myself, a balance of verdicts one way. When I consider the facts of this case, I am obliged to conclude, that great and gross injustice has been done, and that all should cry with a loud voice to have it undone. In *Swinmerton v. the Marquis of Stafford*, there was conflicting evidence; in my opinion, there was none such here. This is, I repeat it, a case of gross injustice. Reference has been made to a perverse verdict: what is the meaning of the phrase? A verdict palpably against the justice of the cause. It is not necessary that it should be founded upon corrupt or improper motives. The verdict here was, I make no doubt, a conscientious one, but it was quite contrary to the evidence. In fine, the verdict has been, in my opinion, so palpably unjust, that I think the cause should be sent to a third trial. Of our authority on the subject there can be no doubt, but it should be most reluctantly exercised; and it is with much regret that I find myself obliged to come to this conclusion.

COLTMAN, J.—I also feel my situation to be one peculiarly painful, when I find myself obliged to differ in opinion from my Lord and my Brother Park. Without agreeing precisely with the reasons on which my Brother Vaughan has founded his judgment, it is, I think, quite clear that justice has not been done. The most material evidence, in cases of this kind, is, that of the captain, inasmuch as there is a pledge for his correctness, as he is controuled by the log, and this is a check from which the other witnesses are exempt. Here, his evidence was principally on the seaworthiness of the ship, as to her timber; and it also appeared, from the same source, that there was not a sufficient crew; upon this latter point there is no

great difference, if any, in the mind of the Court. We are then met by an argument, which I admit to be strong indeed, namely, that there have been two consistent verdicts found by two special juries, who decided upon a subject on which they are more competent to decide than we. This I freely admit, provided those juries duly appreciated the principles of their decisions, and those on which they were called to act. Whilst I express myself thus, I admit, to the fullest extent, the right of the Court to grant new trials without limit, under proper circumstances, for the purpose of preventing injustice. It has been said, that as the second verdict was similar to the first, the application should not be granted, more especially when the question to be decided was a mere question of fact: I should certainly feel the force of this observation, if the juries had, upon these occasions, acted with a due appreciation of the principles of law, with regard to the subject-matter of discussion. I admit, for my part, that I look not without some jealousy upon verdicts of this description, inasmuch as juries are anxious to divide amongst many that loss which might be ruinous to an individual; and in deciding under the influence of such feelings, they do not act in obedience to the principle of law. This, it should be observed, was not an insurance out and home. I take it for granted that there was an insurance out, and that this upon the home voyage was separate. The evidence given was, as to the proper state of the ship on the home voyage, and as to whether there was a sound crew. As to the difficulty of providing amply for the ship, under the circumstances, that was not for the jury; the question was, whether she was in a proper condition at the moment when the policy attached. It was, no doubt, for the jury to determine whether she was in such state at the time of her sailing; and it was thus submitted to them by the Lord Chief Justice. In fine, as I am satisfied that justice has not been done, and as I am not satisfied that the jury have acted in due appreciation of and obedience to the principles of law, I am of opinion that the application should be granted, and that the cause should go down to a third trial.

The Court being equally divided, no rule was made; consequently the verdict was to stand.

June 12.—*Wilde, Serj.* obtained a rule for opening the consolidation rule, and allowing another action to be tried.—He referred to *Cohen v. Bulkeley* (5), where Mansfield, C.J. said, "The consolidation rule is never deemed absolutely binding, unless the Court is satisfied with the event of the cause tried." It was evident, upon the present occasion, that the Court were not, and could not, be satisfied with the result, inasmuch as their sending the cause to a second trial shewed they were dissatisfied with the first verdict; and, the second verdict being the same, the dissatisfaction of the Court must, of course, remain.

Taddy, Serj. and *Channell* urged, that the application should not be granted.—They admitted *Cohen v. Bulkeley*, but alleged that the rule for opening the consolidation rule there, was made absolute because the merits of the cause had not been tried. But the merits had been tried here, and upon them the two consistent verdicts were found;—they also referred to *Doyle v. Douglas* (6).

TINDAL, C.J.—I am unable to see any sufficient distinction between the application now made to the Court, and that made on the former occasion, to which reference has been made. In this case, an application is made to the Court to open the consolidation rule, and send the cause to a new trial, after two trials have already been had, in which the juries agreed in their findings, and returned verdicts the same way in both. A consent to this application, upon our parts, would, in my opinion, go to establish a dangerous precedent indeed. Suppose we were to agree to the application, and send the cause to a new trial, and the verdict were the other way, what should there be to prevent our being applied to by all the other defendants successively for the attainment of a similar object? Would not the consequence be, that we should be called upon to open the rule again, and permit other trials

(5) 5 Taunt. 165.

(6) 4 B. & Ad. 545.

to be had? This, as it appears to me, would be the result of our acceding to the demand now made. If, indeed, the subject of discussion was not put fully to the jury, if there was a failure or defect of justice, if the usual facilities were not granted upon the investigation, or if new evidence had been discovered subsequently to the trial, in such case we might indeed be fairly called upon to open the rule; but no such circumstance has intervened here. This is a case in which there have been two verdicts the same way, and in which two juries have determined a question purely of fact, and have pronounced the same decision upon the merits. In such a state of things it is, I think, better that individual hardship should be endured, than that a general and long established rule should be violated. The rule should be discharged.

PARK, J.—I have had, as all who know me must admit, much experience in transactions of this description; but an instance similar to this has never come under my observation. During the discussion, I have appealed to my Brother Wilde, and have asked him to produce a single case in which the consolidation rule has been opened after two verdicts found the same way. If the proposition is assented to, I see no ground upon which we can deny a similar application to the other parties. I do not see why we must not grant new trials to the other defendants, until there shall be, if I may so express myself, an equality of verdicts. This, it should be recollected, was merely a commercial question of fact, upon which two full special juries formed the same opinion. I do not say, whether the verdicts are satisfactory or not; it is merely sufficient to say, that they have been found for the plaintiff. And here I cannot help observing that, as it appears to me, an attempt has been made by a side wind to do that which the Court have before refused to do. The sensible distinction has, I think, been taken by my Lord, namely, that if, on the first, or even on the second trial, anything of a certain description had occurred, if, for instance, the merits of the case were not fully submitted to the jury, under such circumstances, we might open the rule, and send the matter to be tried again. But there is

no such point in this case. Two special juries have severally found similar verdicts; twenty-four men have agreed in coming to the same results, from the facts submitted to them. As it appears to me, the sending of the cause to another trial would be attended with the most dangerous consequences, and it would, besides, be making the consolidation rule of no effect whatever. Everybody knows the anxiety of those who are concerned in insurance causes, and there would be constant applications to the Court to let parties in to try another cause. The precedent would, I repeat it, be most dangerous; and the rule should be discharged.

VAUGHAN, J.—I lament that I cannot reconcile it to myself to concur in opinion with my Lord and my Brother Park. I am bound, I think, to differ from them upon this point, if it were only for the purpose of maintaining my consistency, with regard to that conclusion at which, upon the former discussion of this case, I have arrived. The variance, however, is immaterial as to any result, as the majority of the Court are the other way. I cannot help thinking that this is an application to the sound sense and discretion of the Court; and when I am asked to point out a case in which the rule has been opened under circumstances like the present, I would answer, by asking, in my turn, was there any case in which, upon motion for a new trial, the Court was divided? The party, no doubt, has admitted that he would be bound by the verdict; but, in so admitting, his meaning certainly was, that it was to be by such verdict as should be satisfactory to the judgment of the Court; and surely it would be hard to say, that that verdict was satisfactory, on which the Court were divided. It must, I think, be admitted, in the honest expression of opinion, that the Court were dissatisfied with the verdict, in respect of which they were uncertain whether it was right or wrong. In pursuing the course which, on this occasion I feel myself called on to pursue, I wish it to be understood that I am most anxious for the termination of suits; and that I coincide perfectly in the correctness of the maxim, *interest reipublicæ ut sit finis litium*. It is said here, that the contention is at an end be-

tween the litigating parties, and that the plaintiff is entitled to and will receive the fruits of the action, namely, his damages and costs. This, no doubt, is so, but then a third party intervenes: he steps in, and says, he is interested in the cause; and he also naturally says, that when he agreed to be bound by the verdict, it was by such verdict as was sanctioned and supported by the Court. For these reasons I think the rule should be opened, especially as the plaintiff will receive no injury. It is then asked, what the consequence would be, if the verdict were the other way upon the third trial? My answer is, that I should be satisfied with such verdict, and I would not send it down again. In fine, under all the circumstances of the case, for the purpose at once of preserving my own consistency, being dissatisfied with the present result, and thinking that the justice of the case has miscarried, I am of opinion that the rule should be opened, and that the underwriters should not be concluded by the present verdict.

COLTMAN, J.—I do not see how I can be liable to the charge of inconsistency by refusing to make the rule absolute, for sending the cause to a new trial. My own opinion is, that we should not open the rule with regard to a case which has been decided upon facts. I am, and ever shall be, opposed to the attaining indirectly of that object which cannot be attained by direct means. The case has, I think, been substantially decided; and the rule should be discharged.

Rule discharged.

1837. }
June 1. } DOE d. BRAME v. MAPLE (1).

Stamp—Assumpsit—Mortgage.

Deeds which purport to be assignments of an original mortgage for the remainder of a term, and which recite such mortgage, and contain a charge for the lease and for in-

(1) Vide 6 Law J. (N.S.) C.P. 187, as Doe d. Braine v. Maple, where the rule was refused, upon the objection founded upon the alleged incompetency of the witnesses. The assignments and the objections taken are set forth with more particularity here than upon the former occasion, inasmuch as there the opinion of the Court was delivered solely upon the incompetency.

terest paid to the assignor, with interest on both sums, do not require an ad valorem stamp, under 55 Geo. 3. c. 184.

The objections taken by *Kelly*, and upon which the rule *nisi* for entering a nonsuit in this case was granted, were as follows: that a deed of the 11th of October 1815, and another to the lessor of the plaintiff in 1825, were not properly stamped. The former purported to be an assignment of property from Barthrop to Pytches, for the remainder of a term of 900 years, to secure 1,500*l.* and interest. This deed was stamped with a deed stamp, and recited the original mortgage in 1775 and a subsequent assignment to Battley, town clerk of Ipawich, in trust for the corporation, and then an assignment from Battley to Barthrop. *Doe v. Brooks* (2) was distinguished, as there there was proof of the seisin of the mortgagor, which was not so here; thus the recitals could not be considered as evidence of the original mortgage, consequently the deed itself was not a mere assignment, but a mortgage, and should be stamped with an *ad valorem* stamp. The deed to the lessor in 1825, was stamped thus:—upon the first skin, 1*l.* 15*s.*, on the second, 1*l.* 5*s.*, on the third, 1*l.* 5*s.* This deed was a transfer of the original mortgage for 1,500*l.*, and a charge not only for the lease, but for the further sum of 37*l.* 10*s.* paid to the assignor for interest, with interest on both sums. This deed, it was contended, required an *ad valorem* stamp upon the whole sum of 1,537*l.* 10*s.*, as the exemption from the transfer duty, under the 55 Geo. 3, was only where no further sum of money is added to the principal money already secured. In this case, although the 37*l.* 10*s.* paid by the lessor was for interest upon the existing mortgage, yet it was not paid in the ordinary way of interest by the corporation, but it was actually advanced by the lessor as a loan to the corporation at the time of the execution of the deed, and was added to the principal money.

Palmer shewed cause, and—

Kelly and *O'Malley* were heard in support of the rule (3).

(2) 3 Ad. & El. 513; a.c. 4 Law J. (N.S.) K.B. 222.

(3) The case was argued at much length upon the necessity of the defendant being served with a notice

TINDAL, C. J.—This case is, as it appears to me, capable of receiving a much more simple solution than the counsel who argue for the defendant appear to suppose, and it will consequently be unnecessary to enter into much of the learning which the discussion has called forth. This is an action by the assignee of a prior mortgagee against the tenant, who has been admitted into possession of the premises by the mortgagor. It is contended, on the part of the plaintiff, the assignee, that he claims, as assignee, from the year 1815, and that the defendant, the tenant in possession, was not admitted until 1818. Hence, therefore, it follows, that the assignee of the prior mortgagee is possessed of the legal estate, and his claim must prevail in a court of law, unless something appears in the course of the investigation which shall have the effect of cutting away his title. When the cause was in course of trial, a deed was produced in evidence, and it was objected for the defendant, that the deed appeared on the face of it to be improperly stamped, and, in my opinion, the question which is now the subject of discussion may be decided upon the validity or invalidity of the objection which has been thus taken. The tenant contends, that if the plaintiff means to avail himself of the grant of 900 years, the deed is to be considered as an original mortgage, and it consequently requires an *ad valorem* stamp. On the other hand, it is maintained for the plaintiff, that the deed in question is not a mortgage, but the assignment of one; that the deed is such in its operation, and its object, that, when stamped as it is with a 35s. stamp, it is stamped as it ought to be, and therefore, it is said, the defendant's objection falls to the ground. Now, when a party advances an objection to a stamp, there is no other way, at least none that I know of, of deciding whether such objection is rightly made than by looking, not at the recitals, but at the deed and its operative parts. The Judge, upon whom the duty devolves, will at once look at the deed and take the Stamp Act into his consideration, and he will then decide

to quit, and of the applicability of the doctrine of estoppel; but, as the Court gave no opinion upon that subject, deciding the case upon the sufficiency of the stamps alone, it is deemed unnecessary to do more than thus allude to the argument.

upon the question in dispute. Since, therefore, it is contended for the defendant that this is a mortgage deed, and that, consequently, there should be an *ad valorem* stamp, it becomes our duty to look at the statute 55 Geo. 3. c. 184, 'Mortgage,' for the purpose of ascertaining what sum should be affixed to this stamp. The words of the statute applicable to the subject are— "Where the same respectively shall be made as a security for the repayment of any definite or certain sum of money advanced or lent at the time, or previously due or owing, or forborne to be paid being payable," in such case, an *ad valorem* stamp is required by the statute. Now, when we look at this deed, we cannot find that any sum of money has been lent or advanced at the time,—we merely find an assignment of the mortgage to the plaintiff—we merely find that the old security has passed. What money, I ask, in the words of the statute, has been "lent or advanced at the time"? What money was there "previously due or owing or forborne to be paid being payable"? None at all: there was no previous intercourse or correspondence between these parties—they were perfect strangers to each other. When, therefore, in such a state of things, we look at the operating part of the deed, we are of necessity compelled to admit that it is an assignment, and was intended to operate as such. The deed, it is admitted, refers to, and is founded upon, a mortgage for 1,500*l.* to Pytchers, the last mortgagee, and the payment of 10*s.* to the corporation; and, in the deed, Mr. Pytchers grants and the corporation confirm. Now, if this is not a mortgage, is it not an assignment? It cannot be denied that it is; and in such case, the statute, in express words, requires the transfer or assignment, disposition or assignation, of any mortgage to be stamped with a 35*s.* stamp. This is exactly a case where a body corporate, still entitled to the right of redemption, make a bargain by a deed in which no sum of money is lent, advanced, or paid. It is then said, that the deed operates as an additional security. But there is nothing in the act of parliament which requires that the stamp contended for should be affixed to the added security; when such is thrown in, it is only upon the added sum that such security is required.

Now, if the deed was properly stamped, as in my opinion it was, it should have been received in evidence; and when we read its operative part, let us ask if it is a grant for 990 years? if it is, the defendant is out of court, as he does not advance a claim until three years after the possession of the plaintiff under such deed, and consequently such fact is an answer to this part of the case. If, on the other hand, he objects that this is not a grant, but a confirmation, such objection furnishes an answer to itself. Therefore, in either point of view, whether the possession was acquired under a new grant, or under the confirmation of an old one, the legal estate was, before the time of bringing the action, conveyed to the plaintiff, and the defendant had no right to stand against him in a court of law. The rule should be discharged.

PARK, J. and VAUGHAN, J. were of the same opinion.

COLTMAN, J.—I agree. The case is clear upon the construction of the Stamp Act. It is clear, taking the deed altogether, that this objection to the stamp cannot be supported. It is said, that as it is a contract in respect of money secured by mortgage, there should be a mortgage stamp. But he who makes an objection of this description must prove the stamp to be insufficient; and this the defendant has not done. Neither, indeed, could he attempt such proof, except by reference to the recitals of the deed, and to such reference he has himself objected altogether. There is no evidence of money lent or advanced at the time, except such evidence as might be derived from the recitals, and we must not look at them for the purpose of ascertaining the fact. We must not look, from the deed, to discover whether the money was previously due or owing. The complete answer to the objection is, that, for aught that appears, the stamp was sufficient, and it was incumbent on the objector to establish the negative. As to the other parts of the case, I will not shrink from pronouncing an opinion upon them at the proper time, but it is better to say nothing upon the subject until it comes properly before us. There is, however, one point which has, I think, been decided by the case of *Doe v. Brookes*, where it was held, that if recitals are used in one case, they must be used in

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another; and if they create difficulties, the party seeking to avail himself, for his own purposes, of such recitals, must take the consequences. The rule should be discharged.

Rule discharged.

1837. }
May 27. } HOTHAM v. HOTHAM.

Writ of Trial—New Trial.

Where a writ of trial is directed to a court of record, a copy of the Judge's notes verified by affidavit is not necessary on moving for a new trial, as the Judge of such court will send his notes to the superior court, and need not give a copy to the parties.

This case was tried before Mr. Serjeant Arabin, the Judge of the Sheriff's Court of London, under a writ of trial, pursuant to 3 & 4 Will. 4. c. 42. s. 17. A verdict having been found for the defendant, now—

Wilde, Serj. moved for a new trial. He stated, that he could not produce a copy of the Judge's notes verified by affidavits, as upon application made to the learned Serjeant for a copy, he refused, observing, that he, as a Judge of a court of record, would send his notes to the Judges of the superior court, but he would not give a copy to the party.

The Court acknowledged the propriety of the distinction, and granted the rule, without the copy of the notes being produced.

1837. }
May 27. } FINLEYSON v. M'KENZIE.

Bill of Exchange—Pleading—Payment of Money into Court.

In an action of debt on a bill of exchange, a plea of payment of a sum of money into court, and that the defendant is not indebted to a greater amount, would, it seems, be bad on demurrer, as a violation of the rule of Hilary term, 4 Will. 4. But the objection is too late after issue joined, and verdict for the defendant.

2 N

Debt. The declaration consisted of two counts, one by the plaintiff as indorsee against the defendant as acceptor of a bill of exchange at three months date for 78*l.* 13*s.* 6*d.*, of which one R. P. Gillies was the drawer; the other, for money paid by the plaintiff to the use of the defendant.

Plea—1st, that the plaintiff ought not, &c., because the defendant now brings into court the sum of 5*l.* 3*s.* 6*d.*, ready to be paid to the plaintiff: that he is *not indebted* to the said plaintiff to a greater amount than the said sum of 5*l.* 3*s.* 6*d.* in respect of the causes of action in the said declaration mentioned, and this he is ready, &c.

In his replication, the plaintiff traversed the allegation, that the defendant was not indebted in more than the sum of 5*l.* 3*s.* 6*d.* on which issue was joined. (1)

Upon the trial, which took place before Vaughan J., at the sittings at Westminster, a verdict was found for the defendant.

Wilde Serj. obtained a rule for entering judgment for the plaintiff, *non obstante veredicto*, or setting the verdict aside, or for a new trial.

Kelly (Bagley was with him.) shewed cause, and contended, that the plea of *not indebted*, used by the defendant here, was not a violation of the rule of Hilary term, 4 Will. 4, by which such plea was forbidden in actions upon bills of exchange and promissory notes; and the party was obliged to traverse some matter of fact. The peculiarity here was, that the defendant paid a certain sum into court, and there was nothing in the rule to prevent him from pleading, that he owed nothing more; at all events, if there was any well-

(1) There was a second plea, which stated, that defendant had no consideration for his acceptance; that he had given the bill to Gillies, the drawer, for the purpose of being discounted, and the drawer failing in such object, was to return the bill; that the drawer deposited the bill in the hands of a third party, as a security for the sum of 5*l.*, which sum the plaintiff paid, and thereby got possession of the bill, which he retained, under colour and pretence of a debt claimed to be due to the plaintiff from the drawer, and the plaintiff held, and now holds the bill without any other consideration or value than the payment of the said sum of 5*l.* already specified; and that the drawer never received for the said bill or the indorsement more than the said sum, &c. Replication, *de injuria*. As the Court pronounced no opinion as to this plea, and decided the case upon the first, it is unnecessary to notice the discussion which arose upon it.

founded objection to the plea, it should have been taken upon special demurrer, and was too late after issue joined and verdict.

Wilde, Serj., in support of the rule, contended, that the mode of pleading now adopted, would, if sanctioned by the Court, repeal the rule framed for the purpose of compelling the party to come to a precise issue. If this course were upheld, the defendant, by paying 1*s.* into court, would be enabled to plead the general issue as to the remainder, and thus let in all the inconvenience which it was the object of the rule to exclude.

TINDAL, C.J.—I am of opinion, that this case may be decided on the first plea, which appears upon the record. It cannot be denied, at least as I am at present advised, that this is a bad plea, and that it would, on special demurrer, be held to be a violation of the general rule, that, in actions upon bills of exchange, whether in debt or in assumpsit, this, which was the general issue, should be inadmissible in law. But, as the parties have thought proper to join issue (although the defendant by his plea has violated the general rule), and go down to trial upon a certain allegation—a proposition perfectly substantial—that is, whether there was more or less than the sum of 5*l.* due, the course pursued cannot now, I think, be disputed; just as, reasoning from analogy, in an action on a bond, the plea of *nil debet* would have been bad, as the party should have shewn, that for which he contended, upon a plea of *non est factum*. Yet, as in such case, after a trial upon the merits, the objection could not be taken; so, in the case which forms the subject of discussion, although the plea was bad, yet, as it was put forward as a substantial ground of defence, the plaintiff is now too late in his objection. He cannot now be allowed to turn round on this plea, and, by raising this objection, disturb the verdict which, as it appears to me, fits the facts of this case as closely as it is possible; and these facts, at least in my opinion, tend strongly to shew, that not more than 5*l.*, or, as it may be, nothing at all, was due. The rule should be discharged.

PARK J.—I am of the same opinion, and for the same reasons.

VAUGHAN, J.—I agree. The plaintiff could not, I think, have treated the plea as a nullity; and, as it turns out that not more than 5*l.* were due, the verdict may stand.

COLTMAN J.—I am of the same opinion. There is, perhaps, some difficulty in the construction of the 17th general rule, which requires the payment of money into court to be pleaded in all cases, when we look upon such rule as contrasted with the rules as to pleadings in particular actions, respecting the plea *non debet*, and the specified denial of some particular matter of fact, or a special plea in confession and avoidance substituted for it. The Judge at Nisi Prius has, generally speaking, little more to do than read the record: and what has appeared on the record here?—this, that the plaintiff ought not, &c., because the defendant now brings into court the sum of 5*l.* 3*s.* 6*d.*, &c.; that he is not indebted to the said plaintiff to a greater amount than the said sum, &c. It is to this allegation that the objection is now taken; but it has not been taken hitherto, and it does not lie in the plaintiff's mouth to take it now. As to the plea itself, it is, I think, clearly bad under the rule, it being the intention of those who framed such rule, that, in actions upon bills of exchange, some particular matter of fact alleged in the declaration should be specifically denied; and, when the defence is, that a part has been paid, it should be shewn how the rest was discharged. Suppose, in an action of debt on a simple contract for 100*l.*, the defendant pleaded, as he might by the rule, that he was never indebted in manner and form as in the declaration alleged: I entertain a very great doubt, whether he would be entitled to a verdict, by shewing that he had paid 95*l.*, and that only 5*l.* remained to be paid. In that case, there would be no necessity for the plaintiff to demur to the plea. Suppose an action were brought upon a simple contract debt for goods sold and delivered, and a plea like this were put upon the record, the other party need not demur, as the meaning of the plea might be, that more was never due: would it, under the plea, be competent to the defendant to prove payment? This would be leaving the course open to all matters, as it was before the

rules. There is, I think, a difficulty in the way, which, perhaps, will be best satisfied by discharging this rule.

Rule discharged.

1837. }
May 31. } PULLER v. TAYLOR.

Metropolitan Paving Act—Construction.

The 58th section of 57 Geo. 3. c. 29, entitled, 'An act for better paving, improving, and regulating the streets of the metropolis, and removing and preventing nuisances and obstructions therein,' authorized the commissioners or trustees, &c. having the controul of the pavements of the streets and public places in any parochial or other district within the jurisdiction of the act, to cause posts of wood, stone, or iron, to be set up near or adjoining to the foot pavements in such part &c. as they should judge necessary. It also authorized them to set up posts and rails near or adjoining to any vacant ground or other exposed and dangerous place abutting upon or adjoining to any of the streets or public places in such parochial or other districts, &c. for the purpose of preventing accidents and casualties. The defendant (the clerk to the Commissioners of Paving) having fixed two posts and an iron rail adjoining to a certain yard or space:—Held, that he had exceeded the authority given by the statute, inasmuch as the yard or space adjoining to which the posts and rail had been fixed, was not, from what appeared in the case submitted for the opinion of the Court, vacant ground, or an exposed and dangerous place.

Semble—that the casualties and accidents, for the prevention of which the authority was given, are such as affect the public, not such as operate as a nuisance to a private individual, and for which the law has provided the party with a remedy.

This was an action on the case to recover damages for an injury to a yard, the reversion of which belonged to the plaintiff, situate in the parish of St. Martin-in-the-Fields, within the liberty of Westminster, in the county of Middlesex, and abutting on a certain public way or passage, called the Hop Garden, also in the said parish and liberty, by fixing and set-

ting up in the said way or passage, called the Hop Garden, two strong posts of a permanent nature, and one iron bar, fastened to two other iron bars inserted in the ground, also of a permanent nature, by means whereof the frontage of the plaintiff's said yard, where it abuts upon the said way or passage, was, and still is, permanently incommoded and obstructed, and the plaintiff and his tenants, occupiers of the said yard, were, and still are, permanently prevented and hindered from passing along the said way or passage, called the Hop Garden, to and from the said yard of the said plaintiff, and from using the said yard of the said plaintiff in as beneficial a manner as the said plaintiff and his tenants and occupiers had been accustomed to use it.

Plea—not guilty.

Upon the trial, before Tindal, C. J., at the sittings after Hilary term, a verdict was found for the plaintiff for 200*l.* damages, subject to the opinion of the Court upon the following

CASE.

The Hop Garden is a court or passage running east and west, and leading from Bedfordbury into Saint Martin's-lane. The north side of this court or passage is entirely inclosed by dwelling-houses and buildings. On the south side there are buildings extending up the court or passage for a considerable distance. From the east end, about the middle there is an open space or yard, abutting on and adjoining to the said court or passage; the length of the frontage of which open space or yard is thirty-six feet four inches, and the breadth or depth inward from the said court or passage, twenty-two feet six inches. This space, or yard, is quite open to the court or passage, but inclosed by buildings on the other three sides. It belongs to two persons; that part to the east side towards Bedfordbury for ten feet four inches of the frontage towards the court or passage, and for the whole depth or breadth, is now occupied as a frontage to a cow-house by one Sparke, on a lease from Woodburn, the owner, the occupiers having always enjoyed a cartway from Bedfordbury to the premises, now occupied as a cow-house; the remaining part of the

open space or yard to the west, towards St. Martin's-lane, belongs to the plaintiff, and is occupied as a frontage to a stable and cart-house; on the west side is a flitting mill, belonging also to the plaintiff: this mill has an entrance for horses from the open space or yard. There is a public footway through the court or passage, leading between St. Martin's-lane and Bedfordbury, and from Bedfordbury there is an occupation way for carts from Bedfordbury along the eastern end of the court or passage to the open space or yard and the buildings surrounding and attached to it. Previously to the alterations herein-after mentioned as having taken place in the spring of 1835, the paving of the cart-way out of Bedfordbury (excepting a flag-stone at each of the doors of Nos. 12 and 1, the two first houses on the north side coming out of Bedfordbury) extended the whole width of the court or passage till it came in front of the door No. 2, which is the third house on the same side, and which door stands opposite the dividing point between the property of Woodburn and that of the plaintiff. In the front of the door there were two flag stones; the farthest stone from the door reached to a gutter, which ran through the middle of the court or passage. To the west of these flag stones, towards St. Martin's-lane, there was no more cart-way paving between the gutter and the houses: on the other side of the gutter, towards the open space or yard, the cart-way paving continued westward to a point midway between two iron posts, now placed across the court or passage, and, from the said point, between the two points, the cart-way having sloped off to and ended at a tank which stands against the wall on the western end of the open space or yard.

The case then stated, that, in the spring of 1815, and under the authority of the Committee of Pavements for the parish of St. Martin-in-the-Fields, duly appointed, the old paving of the cart-way, leading from Bedfordbury, was removed, and it was fresh paved, and larger and smoother stones, with grooves for wheels cut within, were laid on each side of the cart-way, turning round with a sweep immediately as it reached the east end of the open space or yard, and the remainder of the cart-way

westward, and adjoining the open yard, was altered into a foot pavement. At the same time, the two posts were set up, and the two iron bars with the iron bar fastened to them were inserted in the ground in the said court or passage. These two posts, and the two iron bars, were set up, and inserted in the ground immediately in front of the western end of the open space or yard, and extended over sixteen feet nine inches and a half of the frontage line thereof, including three intervals between the iron bars, the posts, and the walls at the western end of the yard. These posts, and the two iron bars, with the iron bar fastened to them, were fixed, set up, and inserted in the ground under the direction of the defendant, as Surveyor of the Committee of Pavements of the parish of St. Martin-in-the-Fields, the committee being duly appointed under the act 23 Geo. 3, c. 90. It was then stated, that the defendant was duly appointed Surveyor of the Committee of Pavements of the parish, and acted as such, and under the directions of the committee, in erecting such posts and iron bars; and the ground on which they were so fixed, inserted, and set up, is within the said parish of St. Martin-in-the-Fields, and within the district over which the said committee are duly appointed to act, and within the jurisdiction of the 57 Geo. 3, c. 29, entitled, 'An act for better paving, improving, and regulating the streets of the metropolis, and removing and preventing nuisances and obstructions therein;' which act, together with a certain local act, passed in the 23rd year of Geo. 3, entitled, 'An act for paving, cleansing, and lighting the parish of St. Martin-in-the-Fields,' were to be taken and read as part of this case. One of the two posts, and the said two iron bars, with the iron bar fastened to them, mentioned in the declaration, stand within the sloping line from the point midway between the two posts and the tank above mentioned, and consequently upon that part which was paved as cart-way till the alterations were made in the cart-way as above stated. The sweep, within which the cart-way paving is now confined, leads directly upon that part of the open space or yard, which belongs to Woodburn, and does not belong to the plaintiff; and, if he pursues the new grooved

cart-way pavement, he, and the tenants of his stable and cart-house, and of his portion of the yard or open space, cannot reach their stables, or cart-house, or open yard in front of them, without going on land which does not belong to the plaintiff,—which, however, they appear very commonly to have done before the alteration; and, if they do not follow the present cart-way paving, but drive on the foot pavement, in order to prevent their going on land which does not belong to the plaintiff, there is a greater difficulty in turning on and into that part of the frontage of the said open space or yard, and the buildings belonging to the plaintiff, than there used to be before the iron bar was fastened to the two iron bars above mentioned, and before the two iron bars were inserted in the ground. There is no way for carriages through the court or passage called the Hop Garden into St. Martin's-lane. The posts and iron bars are fixed, set up, and inserted upon what is now foot pavement, and near to an ancient foot pavement. The yard, or open space, near or adjoining to which the posts and iron bars are set up, fastened, and inserted, is, as before described, open to the passage or court, and is the frontage of cart-houses and stables. It is paved all over, and is level with the foot and carriage-pavement of the court, surrounded with high buildings. The posts and iron bars above mentioned do not extend along one half of the frontage of the yard or open space.

Previously to the posts and iron bars being set up and erected, fire-engines had been taken down the court or passage, and accidents had occurred, and serious injuries had been done to the fronts of the houses numbered 12, 1, 2, and 3, by the backing of carts; and loose horses had strayed therefrom down the court or passage. Since the posts and iron bars had been set up and erected, fire-engines cannot pass down the court or passage, and the house No. 3, is completely protected from accidents by the backing of carts, nor can loose horses so easily stray down the court or passage. But the setting up of the posts and iron bars affords no protection to the houses numbered 12 and 1, and very little to the house numbered 2, from accidents or injuries.

The posts and bars would be an obstacle to the erection of any buildings along the open space or yard. The notice of action was properly given, and the action commenced in due time.

If the Court should be of opinion that the acts complained of in the declaration, and above found to have been done by the defendant, were authorized by the acts of parliament above mentioned, or either of them, the verdict was to be set aside, and a verdict entered for the defendant. If the Court were of a contrary opinion, the verdict for the plaintiff was to stand, but the damages were to be reduced to 40s.

Addison, for the plaintiff.—The conduct of the defendant upon this occasion is not sanctioned by the 58th section of the statute 57 Geo. 3. c. 29, upon which he relies. By that section, the commissioners are authorized to set up posts and rails near or adjoining to any vacant ground or other exposed or dangerous place abutting upon or adjoining to any of the streets or public places, in case they shall think proper to do so, for preventing accidents or casualties. Now, the words "vacant ground, or other exposed or dangerous places," override the whole, and it is to prevent casualties or accidents being caused by such, that the authority is given. The ground in question cannot be called vacant, as it was in use every day. Nor was it, in the terms of the act, a dangerous place; for the injuries done to the houses did not arise from such quality, but were occasioned by the negligence of persons driving carts, &c. The act, therefore, of the defendant was not warranted by the section of the statute, but was suggested by his own caprice; and *Leader v. Moxon* (1) shews, that Commissioners of Paving cannot exercise an arbitrary discretion. The defendant has evidently exceeded his authority; and the only incidents to justify such excess, are, that fire-engines went through, and that certain houses were damaged by the backing of carts; and, of these houses, some, it appears from the case, have not received protection from what has been done. If it be said, that the defendant acted *bonâ fide*, and in the performance of a supposed duty, according

to the opinion of Bayley J. in *Jones v. Bird* (2), that is no answer.

Jervis, contra.—If the Commissioners of Pavements have acted, to the best of their judgment, upon the authority given by the statute, it is immaterial whether they have acted for the benefit of the party or not. *Leader v. Moxon* does not apply, as there was there clearly an excess of authority. *Jones v. Bird* is also admitted, but there it was expressly found, that the party had acted carelessly and negligently. The Court, in its decision, will be guided by the case of the *British Cast Plate Manufactory v. Meredith* (3), in which it was held, that where the acts of commissioners, appointed by a paving act, occasion damage to an individual without excess of jurisdiction on their part, the commissioners, or persons acting under them, are not liable to an action; and the doctrine is further corroborated by *Sutton v. Clarke* (4), *Boulton v. Cromther* (5), and *The Warden of the Grocers' Company v. Donne* (6). The defendant here has acted in strict conformity with the letter and spirit of the statute. The posts and bars were erected as the section required; and the case has found that the place was dangerous, and likely to be the cause of casualties from the facility it afforded of having fire-engines carried that way, and from its being easy of access to loose horses and to carts, by the backing of which much damage had been done to the houses.

Addison was heard in reply.

TINDAL, C. J.—The only question here is, if the commissioners have brought themselves within the jurisdiction given them by the 58th section of the statute, which authorizes them to cause posts of wood, stone, or iron, to be set up near or adjoining to the foot pavement in such part or parts, &c., and also posts and rails near or adjoining to any vacant ground, or other exposed or dangerous place abutting upon or adjoining to any of the streets or public places, &c. Now, the act of the defendant here is not confined to the setting up of

(2) 5 B. & Ald. 857.

(3) 4 Term Rep. 794.

(4) 6 Taunt. 29.

(5) 2 B. & C. 703; s.c. 2 Law J. Rep. K.B. 139.

(6) 3 Bing. N.C. 34; s.c. 5 Law J. Rep. (N.S.) C.P. 307.

(1) 2 W. Bl. 924; s.c. 3 Wils. 461.

posts:—he has also placed a rail across the space; and, I think that I have seen enough to induce me to believe, that the defendant went beyond the jurisdiction; and I am also of opinion, that if the case were submitted to a jury, they would come to the same conclusion. Let us attend to the words of the section, upon which the defendant relies, and let us see whether the ground in question is vacant, or an exposed or dangerous place, for it is near to such place that he is to fix *posts* and *rails*; and, as it appears to me, a place so small as this, bounded by a stable and a tank, cannot, with any propriety of language, be called a vacant space; neither can it, I think, within the meaning of the statute, be taken to be dangerous or exposed. It should be also recollected, that the defendant did not fix posts and rails for the purpose of inclosing the ground; but he has set up a single rail on posts for the purpose of preventing loose horses or carts from doing injury to the houses. How can he be said by this conduct to guard against the accidents and casualties intended by the act? The statute is declared to be a public one; it speaks of the streets of the metropolis—it does not refer to a private nuisance for which, when it does occur, the owner has a remedy by law. I think the defendant, under these circumstances, had not a right to put down a double post, with a rail over it, and our judgment should be for the plaintiff.

PARK, J.—I agree with the cases which have been cited by Mr. Jervis, and with the conclusions which have been deduced from them. The subjects there, in regard to which the commissioners acted, were within their jurisdiction. With regard to the present discussion, I agree with my Lord, and for the reasons which he has properly given. I found my opinion upon this: posts, with rails, were intended to be fixed near those places which were vacant, and were likely to cause danger; and it was the intention of the legislature, by the regulation, to prevent the occurrence of accidents and casualties. Now, as the place here was not such as is described by the statute, the defendant exceeded his authority in doing that which he has done, and, therefore, our judgment must be against him.

VAUGHAN, J.—I am of the same opinion. *Reddendo singula singulis*, the posts and rails were to be fixed near or adjoining to any vacant ground or other exposed or dangerous place, for the purpose of preventing those accidents which were likely to occur to the public.

COLTMAN, J.—I agree. The case might be very different if the place were, in our judgment, dangerous. I think it has been satisfactorily made out, that the defendant, by doing what he has, has gone beyond the authority given by the statute. The judgment should be for the plaintiff.

Damages reduced to 40s.

1887. } D'OYLEY, GENT., ONE, &C.
June 6. } V. ROBERTS.

Slander—Special Damage—Attorney.

In an action for slander, the words used were, "He has defrauded his creditors, and was horsewhipped off the course at Doncaster," and they were laid in the declaration as affecting and concerning the plaintiff in his profession of an attorney. Upon the trial, the jury found that the words were not spoken of the plaintiff in relation to, or in the exercise of his profession as attorney; and they also negatived the special damage: but, they found that the words had a natural tendency to injure the plaintiff morally and professionally. After verdict for the plaintiff, with leave to the defendant to move to enter a nonsuit,—Held, that the judgment should be arrested, as the words, though words of gross abuse, did not touch the plaintiff in his profession of an attorney.

Where the Judge at Nisi Prius improperly gives leave to the defendant to move to enter a nonsuit, the Court, to prevent the party being deprived of the benefit intended for him will allow him to move to arrest the judgment, if such appears to them the course which should be pursued.

The declaration, after the usual statement, that the plaintiff was a good and faithful subject, &c., alleged, that before and at the time, &c., the plaintiff had been, and was, and still is, an attorney of the court of our Lord the King, before his Majesty's Justices of the Bench at Westminster, and

hath always used, exercised, and carried on, and still doth use, exercise, and carry on the profession and business of an attorney, with honesty, integrity, credit, and reputation, and hath not ever been guilty, or, until the time of committing the said grievance by the defendant as hereinafter mentioned, been suspected to have been guilty of the fraud, dishonesty, or misconduct as hereinafter mentioned to have been charged or imputed to him by the defendant; by means of which said premises, the plaintiff, before the committing of said grievance by the defendant as hereinafter mentioned, had acquired the esteem and good opinion of his clients and neighbours, and of other good and worthy subjects of this realm, to whom he was in anywise known, and also by reason of the aforesaid premises, the plaintiff, in the way of his said profession and business, was daily and honestly acquiring great gain and profit therein; yet the defendant, well knowing the premises, but greatly envying, &c., and contriving, and falsely, and maliciously intending to injure the plaintiff in his said good fame and credit, and to bring him into public scandal, infamy, and disgrace, with and amongst his clients and neighbours, and other good and worthy subjects of the realm, and to injure the plaintiff in his said profession and business of an attorney as aforesaid, and to cause it to be suspected and believed by those clients, neighbours, and subjects, that plaintiff had conducted himself improperly, fraudulently, and dishonestly, and to vex, harass, and oppress, impoverish, and wholly ruin the plaintiff, heretofore, to wit, on the 26th of July 1886, in a certain discourse which defendant then had of and concerning the plaintiff, and of and concerning him in his said profession and business of attorney, in the hearing and presence of several, &c., falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning him in the way of his said business and profession, the false, scandalous, malicious, and defamatory words following, that is to say, "He (meaning the plaintiff) has defrauded his (meaning the plaintiff's) creditors, and he (meaning the plaintiff) has been horsewhipped off the course at Doncaster;" by means of the committing of which several grievances by the defendant

as aforesaid, the plaintiff hath been and is greatly injured in his aforesaid good name, fame, and credit, and also greatly injured in his said profession and business, and brought into public scandal, infamy, and disgrace with and amongst his clients and neighbours, and other good and lawful subjects of this realm, insomuch that divers of these clients, neighbours, and subjects, to whom the innocence and integrity of the plaintiff in the premises were unknown, have, on account of the committing of the said grievances by the defendant as aforesaid, from thence hitherto suspected and believed, and still do suspect and believe, the plaintiff to have been and to be a person guilty of fraud and dishonesty, and to have acted improperly and dishonestly in his said profession and business as aforesaid, and have, by reason of the said grievances by defendant as aforesaid, thence hitherto wholly refused, and do still refuse, to have any acquaintance or discourse with plaintiff, or to employ, or have any transaction with the plaintiff in the way of his business or profession, as they were accustomed before to have, and otherwise would have had; and, in particular, by means of the premises, one Henry Gyde, who, before the committing of the said grievances, had been accustomed to retain and employ the plaintiff in his said profession and business, and who would otherwise have continued to retain and employ him in his said profession and business for profit and reward to the plaintiff in that behalf, hath thence hitherto ceased to retain and employ, and will not hereafter retain and employ the plaintiff in his said profession and business; and by reason of the premises, the plaintiff has been greatly injured, harassed, vexed, &c., and has been, and still is deprived of certain great gains and profits, which otherwise would have arisen and accrued to the plaintiff in the way of his profession and business, and otherwise; by means of which he has been much injured, &c.

Plea—Not guilty; and issue joined.

Upon the trial, before Parke, B., the jury, in answer to certain questions put to them by the learned Judge, found that the words were not spoken of the plaintiff in relation to; or in the exercise of his profession of an attorney. They also negatived the

special damage, but they found that the words had a natural tendency to injure the plaintiff morally and professionally, upon which a verdict was entered for the plaintiff, with 50*l.* damages, with leave to the defendant to move to enter a nonsuit.

Godson obtained a rule accordingly.

Telford Serj. and *Busby* shewed cause. —There is no ground for this application, the jury having, in point of fact, found, that though the words were not spoken of the plaintiff in his character of attorney, yet they had a natural tendency to injure him professionally and morally. Now, the imputations cast upon the plaintiff are divisible, and the finding was correct. The case in this respect resembles *Wyatt v. Harrison* (1), where a declaration stated, that A was lawfully possessed of a dwelling-house adjoining to a dwelling-house of B, and that B dug into the soil and foundation of the last-mentioned house, so negligently and so near to the plaintiff's house that the wall of the latter house gave way. On demurrer to so much of the declaration as alleged the digging so near, &c., the defendant had judgment. The question might have been raised here, as it was in the case referred to, by demurrer to that part of the complaint which is supposed not to affect the plaintiff in his profession; but the plaintiff cannot now be nonsuited after evidence has been given to the jury. It was, perhaps, competent to the defendant to move to arrest the judgment: this, however, he has not done. The case may be also said to resemble *May v. Browne* (2), where a declaration for libel imputed misconduct to the plaintiff in misappropriating certain funds in the course of certain proceedings, and in the bringing of them to a successful issue. Upon the production of the libel, the imputation was found to be the misappropriating of the funds after the termination of the proceedings, and this was held to be no variance, as the character of the libel was not altered, the fraud being the same, whether the money was misapplied before or after the termination of the proceedings. So, in the present case, the character of the libel is the same, whether it is injurious to the party as

an attorney, or as an individual. The finding of the jury, that the words had a natural tendency to injure the plaintiff in his profession, brings the case within the rule laid down in *Onslow v. Horne* (3), and qualified by *Bayley, B.* in *Lumley v. Alday* (4). The distinction is admitted between words applied to a man living by his private means, and to one who lives by his professional exertions: as applied to the one, the words may have no injurious tendency; applied to the other, they may have the effect of cutting off his resources and means of livelihood. The finding of the jury also brings the case within the doctrine laid down in 1 *Vin. Abr.* tit. 'Action for Words,' S, a, 2, and same title, p. 479. To the same effect is *Whittington v. Gladwin* (5), where words imputing insolvency to an innkeeper were held to be actionable, though, at the time they were spoken, the innkeeper was not liable to the bankrupt laws. A similar principle is also to be extracted from *Stanton v. Smith* (6), where it was said, that the words were not actionable, as there was no colloquium laid of the plaintiff's trade; but the Court were all of opinion, that such words spoken of a tradesman must greatly lessen his credit, and be very prejudicial to him, and therefore they were actionable, and judgment was given for the plaintiff. These authorities, therefore, are sufficient to shew that words like the present, which are found to have a natural tendency to injure the plaintiff professionally, are actionable; and the verdict should not be disturbed. At all events if the defendant used them in any other sense, he should shew it—*Tomlinson v. Brittlebank* (7).

Godson and *G. Alexander*, in support of the rule.—*Ayre v. Craven* (8) is decisive of the present case. The declaration there was for slander, in alleging that defendant used words imputing adultery to the plaintiff, a physician, and the words were said to have been spoken of him in his profession; no special damage was laid. After

(3) 2 W. Bl. 750; a. c. 3 Wils. 177.

(4) 1 Tyr. 217; s. c. 9 Law J. Rep. Exch. 62.

(5) 5 B. & C. 180; s. c. 4 Law J. Rep. K.B. 125, as *Whittaker v. Bradley*.

(6) 2 Lord Raym. 1480; s. c. 2 Str. 763.

(7) 4 B. & Ad. 630; s. c. 2 Law J. Rep. (N.S.) K.B. 105.

(8) 2 Ad. & El. 2; s. c. 4 Law J. Rep. (N.S.) K.B. 35.

(1) 3 B. & Ad. 871; s. c. 1 Law J. Rep. (N.S.) K.B. 237.

(2) 3 B. & C. 117; s. c. 2 Law J. Rep. K.B. 212.

verdict for plaintiff, judgment was arrested, because such words merely laid to be spoken of a physician, are not actionable without special damage; and, if they were so spoken as to convey an imputation upon his conduct in his profession, the declaration ought to have shewn how the speaker connected the imputation with the professional conduct. The fallacy of the argument on the opposite side is to suppose that the words affected the plaintiff (as they should according to *Lumly v. Alday*) in his profession of an attorney, whereas they did not refer to him in such character or capacity. The case might perhaps be different if the words were, that he defrauded his *clients*, instead of his *creditors*; and the opposite party attempt to consider *clients* and *creditors* as synonymous. *Stanton v. Smith* does not apply: the words there, "He compounded his debts for 5s. in the pound," are saying in paraphrase that he was a bankrupt. So in *Reeve v. Holgate* (9), where it was objected that there was no colloquium as to the trade, it was held, that the words themselves supplied one. *Whittington v. Gladwin* is equally inapplicable, as the words there evidently affected the party in his trade. Here, they did not affect the plaintiff in his profession as an attorney, although they might in his pursuit as a sportsman. At all events, the substantial ends of justice will not be defeated in consequence of the motion being to enter a nonsuit, instead of to arrest the judgment; for, in *Lumly v. Alday*, when the rule for entering a nonsuit was discharged, an opportunity was reserved to the party, notwithstanding the lapse of time, to move to arrest the judgment.

TINDAL, C. J.—We should consider this case as if the rule had been in the alternative, for a nonsuit, or for arresting the judgment, assuming, at the same time, that the verdict was properly entered up. There is no ground for entering a nonsuit, as the learned Judge had allowed evidence to go to the jury before the difficulty arose, and such evidence warranted the jury in finding a verdict. *Rebus sic stantibus*, the plaintiff's case went to the jury, and a verdict was found for him, with leave to the de-

fendant to move to enter a nonsuit; and; as I think we should not deprive him of that which has been allowed him, we shall give him permission to move to arrest the judgment. The circumstances of the case, as set forth in the declaration, are these:—the plaintiff alleges, that he has been and is an attorney of the Court of Common Pleas at Westminster, and hath always used, exercised, and doth still carry on the profession, &c., and that the defendant falsely, maliciously, &c. spoke and published of and concerning the plaintiff, and of and concerning him in the way of his said business and profession, the false scandalous, malicious, and defamatory words following: "He has defrauded his creditors, and he has been horsewhipped off the course at Doncaster." Now, the law upon the subject is laid down correctly in *Com. Dig.* 'Action on the case for defamation,' and numerous instances in support of the doctrine are brought together. The words of the learned writer under the title above referred to, letter D, 26, are, "But words not actionable in themselves are not actionable when spoken of one in an office, profession, or trade, unless they touch him in his office, profession," &c., and he refers to *Sir Thomas Raymond*, p. 75. Now, when we consider the words used, "he has defrauded his creditors," we must, I think, come to the conclusion, that they do not refer to the plaintiff as an attorney—they do not touch him in such profession or state—they do not affect him in the character of an attorney more than they would touch him in any other character, for instance, that of a surgeon, clergyman, or physician. There is not, in any reasonable point of view, a reference to him as an attorney, nor are the words that follow, "he has been horsewhipped off the course at Doncaster," referable to such profession. It is said for the plaintiff, that the words had a natural tendency to injure him in his individual character; and so said the jury; and consequently they had a tendency to injure him as an attorney. This, no doubt, is very true; and it may be also said, with equal truth, that nothing can be affirmed—nothing can be predicated of a man which is injurious to him in his social or moral character, or as a good member of society,

(9) 2 Lev. 62.

which may not also be said to be injurious to him (and that not remotely) in his professional capacity. But, still this reasoning would, if acted upon, be opening the door to all the inconveniences which it is the object to avoid. The late case of *Ayre v. Craven*, is conclusive upon the subject. It does not differ in principle from this, and the judgment must be arrested.

PARK, J.—It has always appeared to me, as well as to those engaged for a considerable time in the exercise of the profession, that the principle by which actions of this description are governed, is correctly laid down in the passage in *Com. Dig.* referred to by my Lord. Now, here it is alleged in the declaration, that the words have been spoken of the plaintiff in regard to his profession or trade. This has been expressly negatived by the jury. The point was put to them expressly, and they said the words were not so used. This, no doubt, was a case of gross abuse, but it does not press so heavily upon the plaintiff as those cases which are referred to by Lord Denman in the short and neat judgment delivered by him in *Ayre v. Craven*. In those cases, charges were made which inflicted grievous injury upon persons in very respectable situations,—clergymen and others,—and yet they had no redress, though the imputations must have been injurious indeed to them in the exercise of their professions. In the case cited, my Lord Chief Justice expresses himself thus: "Some of the cases have proceeded to a length which can hardly fail to excite surprise; a clergyman having failed to obtain redress for the imputation of adultery—*Cro. Eliz.* 502; and a schoolmistress having been declared incompetent to maintain an action for a charge of prostitution—1 *Vent.* 21; such words were undeniably calculated to injure the success of the plaintiffs in their several professions, but not being applicable to their conduct therein, no action lay." Well might his Lordship say, that the words were injurious in their professions to those to whom they were applied—well might he say that the imputations pressed heavily on those upon whom they were cast. It is, I think, impossible to distinguish this from the case referred to, and our proper course is to arrest the judgment.

VAUGHAN, J.—I am of the same opinion. When the jury negatived the fact of the words being spoken of the party in the exercise of his profession, and found that the words were words of general abuse, and did not touch him therein, the Judge, I think, should have either directed a verdict for the defendant, or nonsuited the plaintiff.

COLTMAN, J.—The only case cited in argument, which bears materially on the subject, in favour of the plaintiff, is *Stanton v. Smith*; and this, as I understand it, certainly goes the length contended for: but it is a solitary case, and at variance with the doctrine applicable to words which are actionable, as spoken of persons in respect of their professions. The doctrine may occasionally lead to results not perhaps to be commended or approved; but the question is not what the law ought to be, but what it is. The judgment should be arrested.

Rule for entering a nonsuit discharged.

Rule for arresting the judgment absolute.

1837. } BEALE AND ANOTHER v. SANDERS AND ANOTHER.
June 7. }

Lease—Covenant—Assumpsit.

A lessee, holding under a void lease, which has been considered and treated, to the expiration of the term, as valid and binding, is liable in assumpsit for a breach of the covenants contained therein.

But this liability does not extend beyond the term to a period when strangers have committed injury to the premises.

Such a lessee is also liable for use and occupation until the end of the term, having himself received rent from his under-tenants until such time.

This was an action of assumpsit, brought by the plaintiffs against the defendants upon an alleged implied agreement of the latter to repair, and keep in repair, a certain brewery and premises situate in Cartwright Street, Rosemary Lane, in the county of Middlesex, called the Wheat-sheaf Brewery.

The first count of the declaration stated,

that the defendants had become and were tenants to the plaintiffs of a certain brewery, messuage, stables, &c., situate, &c.; and in consideration thereof, they undertook and promised that they, the said defendants, should and would, at their proper costs and charges, from time to time, and at all times thereafter, during the said tenancy, well and sufficiently repair, uphold, support, and maintain and keep in repair, the said brewery, messuage, stables, &c., and all and singular the erections and buildings then erected and built, and thereafter to be thereon erected and built, in, by, and with all manner of needful and necessary reparations and amendments whatsoever, when, where, and as often as need or occasion should be and require; fire, which might happen to destroy the said premises or any part thereof, only excepted. It was then alleged, as a breach, that the defendants, after the making of their said promise and undertaking, and during the continuance of the said tenancy, wrongfully and unjustly *suffered and permitted the said brewery, &c. to be ruinous*, broken down, prostrate, and destroyed, and the same to remain and continue so ruinous, broken down, prostrate, and destroyed. There was a second count for use and occupation of the same premises, and a count upon an account stated.

The defendants pleaded the general issue to the whole declaration, and three other pleas, traversing the allegations in the first count; but as no question arose upon those pleas, they are not here stated.

The cause was tried, before Tindal, C.J. at the sittings after Hilary term, 1836, when a verdict passed for the plaintiffs, subject to the following

CASE.

Theophilus Salway, seised in fee of the premises in question, on the 12th of August 1756, by will of that date devised them and other estates to his brother Richard Salway for life, remainder to his first and other sons in tail, remainder to the Rev. Dr. Thomas Salway for life, remainder to John Salway, son of the said Thomas, and then a minor, for life, remainder to the first and other sons of the said John, with remainder over, and which said devise contained the following power of leasing:—"And I do hereby

declare, that it shall be lawful for the said several tenants for life, when and as they shall respectively come into possession of my said estates, hereby devised, by virtue of the limitations aforesaid, to make leases thereof, for any term or number of years, not exceeding twenty-one years, at the best improved rents that can be gotten, without taking any fine for making the same, so as such leases be made to take place in possession, and to contain usual covenants according to the nature of the estates, and so as the tenants do execute counterparts of their respective leases; and I further empower the said tenants for life, when and as they shall respectively come into possession of my said estates as aforesaid, to make leases of such part thereof, as courts of houses, or ground in London or Middlesex, for any term or number of years, not exceeding sixty-one years, for the purpose of building, rebuilding, or substantially repairing the said estates, without taking any fine for the granting of such leases, and so as there be received thereon the best rent that can be reasonably gotten, according to the nature and circumstances of the case, and so as such leases do contain all proper and reasonable covenants, and so as the tenants do execute counterparts of their respective leases."

Theophilus Salway, after thus making his will, on the 1st of May 1760 died, without revoking the same, and Richard Salway his brother, the first devisee for life as aforesaid, became possessed of the premises in question, and other devised estates, under and by virtue of the said devise.

On the 19th of July 1763, by indenture of lease of that date, the said Richard Salway demised the premises in question to one J. Whalley, for the term of twenty-one years, at the yearly rent of 5*l.*; and afterwards, by indenture of lease, dated the 6th of July 1769, made between the said R. Salway, of the one part, and G. Uppon and Thomas Main, of the other part, after reciting, that by indenture of lease, bearing date the 19th of July 1763, made, or mentioned to be made, between the said R. Salway and J. Whalley, the former lease of the 19th of July 1763 from Salway to Whalley, and that, by se-

veral mesne assignments, the term thereby granted became vested in one G. Wheeler, who had died, and that it was then the property of J. Johnson and R. Campbell, his executors, and Faith Wheeler, his executrix, and that they, the said executors and executrix, had, by indenture, bearing date the 29th of January 1768, demised the premises, &c., with all erections, &c., to the said Uppon and Main, for the residue of the said term of years, at the yearly rent, covenants, and agreements in the under-lease last mentioned; also reciting, that said Uppon and Main, since the granting of the lease to them, had erected and built several erections, &c. for the better carrying on of their trade and business of soap-boilers, and that they intended to erect and build several other erections, &c., it was witnessed, that the said R. Salway did demise and let the said premises to the said Uppon and Main, their executors, administrators, and assigns, to have and to hold the same to them, their executors, &c., from the end and expiration of the term of twenty-one years, mentioned in the said hereinbefore recited indenture of lease, granted by the said R. Salway to the said J. Whalley, for and during and until the full end and term of forty-six years from thence next ensuing, and fully to be complete and ended, yielding and paying therefore, yearly &c. during the said term of forty-six years, thereby granted unto the said R. Salway, his executors, &c., the yearly rent or sum of 10*l.* free of all deductions whatever, by half-yearly payments, &c., the first payment to begin and be made on the 29th of September next following the end and expiration of the said term of twenty-one years, granted by the said Salway to the said Whalley; and the said Uppon and Main, for themselves, executors, &c. did covenant with the said Salway, his executors, &c., that they would, at their proper cost and charges, from time to time, and at all times thereafter, during the said term, well and sufficiently repair, uphold, support, pave, purge, scour, cleanse, &c., and keep the parcel of land, and all and singular the erections and buildings then erected and built, or thereafter to be erected and built on the said premises, in all manner of needful and necessary reparation, paving, scouring,

cleansing, &c., and said piece of land, with all erections, &c., so well and sufficiently repaired, &c. at the end of the said term, or other sooner determination of that demise, unto the said R. Salway, his executors, administrators, should and would peaceably and quietly leave, surrender, and yield up,—fire, which might happen to destroy the said premises or any part thereof, only excepted.

R. Salway, the said lessor, died on the 25th of July 1775; and John Salway, the son of the Rev. Dr. Salway, the said Doctor having died on the 10th of October 1759, in the lifetime of said Theophilus Salway, the testator, became seised of the said premises, under and by virtue of the said devise, as tenant for life, remainder to his heirs and other sons in tail as aforesaid. The said J. Salway, who was married on the 4th of July 1768, and in 1773 had issue by his said marriage, Richard Salway his son, joined with his said son, in May 1795, in suffering a common recovery of the said premises and his other estates; and by indenture, bearing date the 15th of May 1795, it was declared, that such recovery should enure to the use of the said J. Salway for life, remainder to the said Richard Salway, his son, in fee. On the 10th of June 1803, said J. Salway died, and the said R. Salway then became seised in fee of the said premises and estates, and continued so until his death. On the 14th of January 1825, the said R. Salway, being so seised of the said premises, &c., by his will devised the same to the plaintiffs, Beale and Baugh, and to H. Lloyd, since deceased, upon certain trusts in the said will mentioned, and nominated them his executors; and afterwards, on the 10th of February 1825, died without revoking his will. Lloyd renounced probate, and executed a deed of disclaimer.

By indenture of the 28th of September 1795, which recited the lease from said Sanders to J. Haig, John Haig, and J. White, of the premises in question, from Michaelmas next, for the term of fourteen years, for the consideration of 150*l.*, at and under the yearly rent of 76*l.*, payable quarterly, it was agreed, that said Sanders, on being paid a sum proportionate to the said sum of 150*l.* for their term, would grant a lease

for a further term; and further reciting, that all benefit in the premises, and right of renewal therein, had become absolutely vested in Oxley and Teash, who requested said Sanders to grant them a lease for the term of forty years, to be computed from the day of the said indenture of lease, which said Sanders had agreed to do, and also to grant them a further term of eight years and three quarters upon being paid the sum of 37*l.* The said indenture of the 28th of September 1795, then witnessed, that, in consideration of the said sum of 37*l.* to the said Sanders paid by the said Oxley and Teash, said Sanders did demise to said Oxley and Teash the premises in question, the lease of 1763 aforesaid, and the term of twenty-one years thereby created, and the indenture of 1769 aforesaid, and the term alleged to have been thereby created afterwards vested in Sanders by assignment, for the term of thirty-four years and three quarters, from Michaelmas then next, at the annual rent of 76*l.*, which last-mentioned indenture contained, amongst others, the following covenant, that is to say, that said Oxley and Teash did, for themselves, their executors, &c., covenant that they would, at all times during the said term, at their own cost and charges, well and sufficiently repair and keep the said premises in all needful and necessary reparations and amendments; and the said premises, &c. at the expiration or sooner determination of the said indenture would peaceably and quietly leave, surrender, and yield up unto the said Sanders, his executors, &c., with the several fixtures and things written and contained in the schedule thereunder written—reasonable use and wear, and damage by fire, excepted; and that it should and might be lawful for said Sanders, his executors, &c., with workmen or without, twice or oftener in every year, during the said term, to enter upon the said premises, there to view the state and condition of the same; and of all defects and wants of reparation then and there found, to give or leave notice in writing, upon the said premises, for the said Oxley and Teash, their executors, &c. to repair the same within three months after such notice; and said Oxley and Teash, and their executors, &c. did cove-

nant to repair the same; and in the last-mentioned lease is contained a proviso, by which it is declared, that if any of the covenants, therein contained, should not be kept by the said Oxley and Teash, their executors, &c., it should be lawful for the said Sanders, his executors, &c. to re-enter upon the premises, and to repossess the same. The said Sanders, since deceased, received the said rent of 76*l.*, reserved by the said last-mentioned lease, annually, until his death, which happened on the 16th of July 1815. The defendants received the said rent of 76*l.* from that period until Lady-day, 1830. The said S. Sanders, deceased, paid the rent of 10*l.*, reserved by the hereinbefore mentioned indenture of lease of the 6th of July 1769, from the year 1794, until his, the said S. Sanders's, death, and the said defendants afterwards paid the annual rent of 10*l.* to the said R. Salway, in 1825, from that period until Christmas, 1827, since which time they have not paid any rent for the said premises. In 1828, one Ayres, who was then in possession of the said premises, began to pull down and destroy the buildings thereon erected. In February 1829, one Barstow got possession of the premises and all the materials, and the said buildings have since been totally annihilated and destroyed, and the place is now in the same state.

The question for the opinion of the Court was, whether the plaintiffs were or were not entitled to recover upon both or either of the counts of the said declaration; and if the Court should be of opinion, that the plaintiffs were so entitled, then, inasmuch as the amount of damages was to be settled and determined by an arbitrator named by the parties, another question for their opinion would be, upon what principle the said damages should be calculated (1).

(1) The following points were marked on the margin of the special case:—

Plaintiffs—Points—Upon the first count of the declaration two questions arise, namely, whether the plaintiffs are entitled to recover in this form of action; and secondly, upon what principle the damages are to be calculated. First, the plaintiffs say that they are entitled to recover in this form of action. The lease of 1769 was not a good execution of the power of leasing contained in the will of R. Salway; that a lease made in 1769, the term

Archbold, for the plaintiffs.—It is admitted, that the lease of the 6th of July 1769, from Salway, the first devisee for life, to Uppon and Main, is void against the remainder-man, inasmuch as it was not in conformity to the leasing power, which required the leases to be made to take place in possession, &c.—*Doe v. Lady Kavan* (2). But, nevertheless, as the parties interested continued to hold as under such lease, they were bound by its conditions and covenants, as if it had been to all intents and purposes a good and

not to commence until 1784, cannot be said to be a good execution of a power of leasing, which required the lessor to receive the best rent that could reasonably be got for the premises. The lease was therefore void, and covenant could not be maintained upon it. But although the lease be void, the law holds that the defendants held under the terms of it, and raises an implied assumpsit to the effect of the covenant in the lease to repair. Second, as to the principle upon which the damages are to be calculated: the plaintiffs say, that they are entitled to the same measure of damages as if there had been an express agreement to the same effect as the covenant in the lease to repair. The defendants held the premises under these terms uninterruptedly to the end of the term, let them at a large profit rent, and received large sums for renewal fines, and as they held these premises under the same stipulations, they ought to perform them; nor is it any hardship upon them, as they have bound their under-tenants, Oxley and Teash, in the same covenants, by a lease, which is good and valid on the face of it; and whatever damages the plaintiffs recover against the defendants, they (defendants) can recover against Oxley and Teash. Upon the second count the plaintiffs are entitled to recover rent for the premises from Christmas, 1827, when the defendants last paid rent, until the commencement of the action, at the rate of 10*l.* a year, from that time until the 19th of July 1830, when the supposed term expired, and at such a sum per annum, from that time, until the commencement of this action, as the premises would reasonably have let for if they had been delivered up to the plaintiffs in July 1830, in the condition they ought then to have been, according to the covenant.

Defendants say, that plaintiffs are not entitled to recover on the first count, by reason that it does not aver, or shew any sufficient consideration for the alleged promise; secondly, but should the Court be of opinion that the plaintiffs are entitled to recover on this count, then the defendants submit they are not liable for damage consequent on fire, nor for damage accrued after the expiration of the term mentioned in the lease of 1769. As to the second count, defendants submit that the plaintiffs are not entitled to recover rent subsequent to the half-yearly payment, which, by the terms of the lease of 1769, became due on the 25th of March 1830.

(2) 5 Term Rep. 567.

valid lease—*Doe v. Bell* (3), *Richardson v. Giffard* (4). Thus the defendants became tenants from year to year, and as such they became liable for waste, permissive as well as commissive; and it is immaterial whether the buildings were pulled down and prostrated by their own hands or by those of their tenants. In confirmation of this doctrine, reference may be made to 1 *Saund.* 323, b, n. 7, where the authorities are collected; and it is said, "It is held that a tenant at will is not punishable for permissive waste, *Litt.* s. 71, *Co. Litt.* 57, a; but this means a tenant at will, in the strict sense of the word, and not tenant from year to year, for he is within the statute—2 *Inst.* 302, *Co. Litt.* 546." The proposition may be amplified; and it may be safely asserted, that even the tenant at will, strictly so called, is liable for permissive waste, inasmuch as the law implies a promise on the part of the tenant that he will perform a duty; and it is clearly a duty, and one of an important nature, that he will not permit or commit waste. *Heron v. Benbow* (5) is admitted; there, it was held, that case for permissive waste did not lie against a tenant by lease; but there the tenant did not covenant to repair. As to the principle upon which the damages are to be calculated, it is obvious that the calculation should be made from the year 1783, when the defendants got the possession; they underleased in 1796, having received a sum of money and a considerable increase of rent; and as their tenants are bound by the covenants of the lease, which was treated by all as valid, the defendants have the same remedy over against them. Neither can there be any doubt as to the amount of the claim for use and occupation. The parties paid the 10*l.* per annum up to the year 1827, but thenceforward they paid nothing, and they were liable for the interval between 1827 and the commencement of this action.

Wightman, contra.—The question here does not depend upon the dry fact of whether the defendants may or may not be considered as tenants from year to year;

(3) 5 Term Rep. 471.

(4) 1 Ad. & El. 52; s. c. 3 Law J. Rep. (N.S.) K.B. 122.

(5) 4 Taunt. 764.

but the real question is, whether the declaration is so framed as to bring the defendants within that mischief which is complained of. The first count states, that the defendants, during the continuance of the tenancy, wrongfully and unjustly suffered and permitted the said brewery to be ruinous, broken down, prostrated, &c. Thus, therefore, the plaintiff seeks his remedy for permissive waste, and in his declaration, according to the note in 2 *Chit. on Pleading*, 4th ed. 785, it was necessary for him to state the nature and kind of waste of which he complained; and the mere relation of landlord and tenant, which alone could be said to exist here, (as the original lease, with its covenants and conditions, is admitted upon all hands to be void,) did not imply such special covenants to repair as are contended for. In *Brown v. Crump* (6), a declaration, that in consideration that the defendant had become tenant to the plaintiff of a farm, defendant undertook to make a certain quantity of fallow, and to spend 60*l.* in manure every year thereon, and to keep the buildings in repair, was held bad on general demurrer, these obligations not arising out of the bare relation of landlord and tenant. Besides, the covenant to repair was on a bygone consideration, the lease containing such covenant being void. All the authorities are adverse at once to the mode adopted by the plaintiffs, and to the principle upon which they have chosen to rely. Besides the case of *Heron v. Benbow*, it was held, in *Gibson v. Wells* (7), that an action on the case did not lie for permissive waste, Mansfield, C.J. saying, it was an innovation, and he was not prepared to encourage it. So in *Torriano v. Young* (8), it was ruled, that a tenant from year to year was not liable for permissive waste; also that if the assignee of a lease commit waste, the remedy against him was covenant or a special action on the case, not *assumpsit*. So in *Auworth v. Johnson* (9), a tenant, who had covenanted to repair, was held bound to sustain and uphold the premises; but not so with a tenant from year to year; and *Horse-*

fall v. Mather (10) leads to the same conclusion as to a tenant at will. All the acts imputed in the case are of permissive, not of commissive waste, viz. that certain persons entered upon the premises, and removed and annihilated, &c.; and for such annihilation by the hands of others, the defendants cannot be charged.

Archbold, in reply, contended, that objections could not now be made to the declaration, as this was not a motion in arrest of judgment; but the question was, whether the plaintiffs were entitled to recover: nor could covenant be supported against the defendants, as the original lease in which the covenants were contained, was void.

TINDAL, C.J.—This is an action of *assumpsit* brought by the plaintiffs, possessed of the reversion, against the defendants, said to have been possessed for a certain term of the premises in question. The defendants were in possession of the premises under a lease, which, from certain circumstances connected with it, was void. Now, when I take into consideration the circumstances of the case, as they appear before us,—when I find that the defendants held for the very term created by the lease,—when I find that they paid the rent stipulated by such lease, that their term of years commenced and terminated at the time specified in such lease,—when, in fine, I find that the defendants held the premises upon all the conditions contained in the lease admitted to be void,—when such turns out to be the case, we get rid, I think, of the difficulty arising from the argument, that the defendants were not liable for permissive waste. Let us look to the terms of the lease. It was granted in 1768, and was void, as it did not comply with the leasing powers, and was for a term of forty-six years from the expiration of the then existing lease of twenty-one years, at the yearly rent of 10*l.* Sanders and the other defendant got into possession in 1793, and they paid the annual rent of 10*l.* down to the year 1827, having under-leased, in 1795, for a rent of 76*l.* per annum; and they continued to receive this rent down to the year 1830, when the lease

(6) 1 Marab. 567.

(7) 1 New Rep. 290.

(8) 6 Car. & Pay. 8.

(9) 5 Car. & Pay. 239.

(10) Holt, N.P.C. 7.

for forty-six years from the termination of the first lease for twenty-one years, would have expired. When we put these facts together, they are, I think, strong in leading to a fair inference, that the parties held under that lease, which, from certain circumstances, was void. This being so, it should be borne in mind that the first count in the declaration states, that the parties covenanted to repair; and suppose these circumstances had been given in evidence, and that in consequence a verdict had been found for the plaintiffs, why should not *Powley v. Walker* (11), and the doctrine there established, apply? In that case it was held, that the mere relation of landlord and tenant was sufficient consideration for the tenant's promise to manage a farm in a husbandlike manner. But it is said, that the mere relation between landlord and tenant is not, in itself simply, sufficient to support an action for want of such repairs as are here set forth. Now, upon this I am not prepared to decide; but I do not see why the repairs should not be kept up according to the covenant. It is clear that the defendants are not liable to the repairs for a period longer than the continuance of their lease, at a time when strangers injured and took away the property. I am of opinion, therefore, that the parties should get some one to assess damages, in respect to the want of repairs, to the year 1830, when the term expired, without any reference to what was done or to what took place afterwards. As to the count for use and occupation, I am perfectly clear, that as the parties continued to hold until the year 1830, they were bound to pay to that time, to which there was a continuance of their possession; and as they only paid to the year 1827, they are liable for use and occupation to the amount of 30*l.*, that is, for the annual rent of 10*l.* for three years, from 1827 to 1830, when their term expired. I am also of opinion, that the objections made to the declaration cannot prevail, as the plaintiffs are presumed to have a verdict in their favour.

PARK, J.—I think this decision will satisfy the justice of the case. There are

cases sufficient to shew, without any doubt, that they who hold under a void lease to the end of the term, are liable to and bound by its covenants, as to building, repairs, &c., as though the lease were good. The present is like the ordinary case of a tenant holding over after the expiration of the lease, where, if nothing is said to the contrary, he is bound by the covenants of the lease under which he held. So here, the parties are liable to the repairs under the covenant, and to the payment of the rent down to 1830. Beyond that, I do not see how they are liable; and as to the amount, the parties should agree, as recommended by my Lord.

VAUGHAN, J.—*Doe v. Bell* is a very strong authority upon the subject. In that case there was a parol agreement that the tenant should occupy for seven years; it was also agreed, that he should enter at Lady-day and quit at Candlemas. It was held that, though the lease was void, as to duration, by the Statute of Frauds, yet that the tenant held under the terms of the agreement in other respects, and therefore the landlord could only put an end to the tenancy at Candlemas. The present is like the ordinary case referred to by my Brother Park, where a party holds under a valid lease which expires, and where, nothing being said on the subject, he continues to occupy: in such case, all the clauses in the lease which has expired, are still valid and binding.

COLTMAN, J.—In my opinion, also, there is a substantial ground of action, and the plaintiff is entitled to recover. The defendants appear to me as assignees under a lease, which, though void, was, by the agreement of all, treated as valid and binding. It may be conceded, for argument sake, that the plaintiffs could not sue in covenant; but, as the defendants continued to occupy to the end of the term, they were bound to leave the premises in such a state of repair as was required by the lease, and the amount of the money to be paid is that which would have put them in a state of repair at that time. As to the further question, which has arisen upon the declaration, it is not material, as undoubtedly the parties are to be considered here as after verdict,

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and the objection is not capable of being sustained. The other objection seems to be founded upon this presumption, that the mere relation of landlord and tenant does not imply a covenant as to repairs of this description: that such relation is confined merely to cultivation or treatment of the premises in a husbandlike manner; whereas, the covenant here is more extensive in its nature, for repairs, &c. It is also said, that it is a bygone consideration. Now, the answer to this is, that this consideration, whether express or implied, upon which the right of action arises, is not a bygone consideration. It was a valuable consideration, and not one absolutely past. The parties were to be tenants for a certain term, continuing and to be continued. That such was the intention appears on the face of the declaration; therefore the case is not within the rule, applicable to those where there is no consideration, as here a consideration of sufficient value has been raised by implication; and, upon the whole, our judgment should be for the plaintiffs.

Judgment accordingly.

1837. }
May 26. } GOULD v. OLIVER.

Paper Books—Special Case.

Where the points, on which a party meant to rely, were not marked in the demurrer-books, nor notice left at the chambers of the Lord Chief Justice, according to the rule of Trinity term, 11 Geo. 4, the Court ordered the argument to be postponed until the next special-paper day, the offending party to pay the costs of the postponement, if any should be incurred.

When this case, which stood in the special paper, was called on for argument, it was found, that the point, on which one party meant to rely, was not marked in the demurrer-books, nor was there notice left at the chambers of the Lord Chief Justice, as required by the rule of Trinity term, 11 Geo. 4.

Their Lordships expressed their dissatisfaction at the neglect, and referred to

Grottick v. Phillips (1), where the Court expressed, in pointed terms, their displeasure at a similar omission; and, finally, they ordered the case to stand over until the next special-paper day, the offending party to pay the costs incurred by the postponement, if there should be any.

1837. }
June 6. } LACEY v. WALROND.

Executor and Administrator—Funeral Expenses—Payment of Money into Court.

Upon the death of the defendant's mother, a testamentary paper was found, intimating her wishes as to the mode of her interment, directing that she should be buried at the church next to the place where she might die; that there should be neither coach nor hearse employed, but that her remains should be borne by twelve respectable labourers, who should receive not less than a guinea each; and that no mourning should be worn by her friends. The brother of the deceased deemed it advisable, under all the circumstances, to deviate from the wishes of the deceased, and directed the plaintiff, an undertaker, to conduct the funeral, and convey the remains to the family vault, which was distant from the church nearest to the place where the party died, ten or eleven miles. After the funeral had been performed, the defendant, who was abroad at the time, wrote a letter to his aunt, in answer to one received from her, in which he thanked his uncle for what he had done, and admitted that what was done was for the best, and all that could be done. He also intimated his intention of going to the house where his mother died, breaking seals, valuing property, and performing a sad duty. In an action by the plaintiff against the defendant as administrator, for the expenses of the funeral:—Held, that such letter amounted to a ratification of all that had been done with regard to the funeral, in the absence of the defendant; that the plaintiff was entitled to recover the reasonable and suitable expenses of such funeral; and that the question of such ratification was properly put by the Judge to the jury.

(1) 9 Bing. 721; s.c. 2 Law J. Rep. (N.S.) C.P. 121.

Held also, that there is no difference as to the extent of an admission by the payment of money into court under the old practice, with a plea of non assumpsit as to the remainder, and a payment of money into court, as pleaded under the new rule, with a denial that the plaintiff suffered damage beyond the sum so paid in, and concluding with a verification.

Held also, that under the circumstances of the case, that which was done by the defendant before the letters of administration were taken out, and which amounted to a ratification, was binding upon him by relation after administration had been taken out.

This action was brought to recover 76*l.* 7*s.* 1*d.*

The declaration alleged, that the defendant, as administrator, was indebted to the plaintiff in a large sum, &c., for the work and labour, care, diligence, &c. of plaintiff as undertaker of funerals before that time done, performed, &c. by plaintiff and his servants in and about the funeral of Caroline Walrond, deceased, at the request of the defendant, as administrator, and for divers hearses, coaches, horses, materials, &c., and other necessary things used and applied in and about the furnishing and conducting of the said funeral by the plaintiff at the like request of said defendant. There were also counts for money laid out, expended, &c. by plaintiff for defendant, as administrator, and on an account stated with him in the same capacity.

Plea—That the plaintiff ought not further to maintain &c., because the defendant now brings into court the sum of 53*l.*, ready to be paid to the plaintiff; and the defendant further says, that the plaintiff has not sustained damages to a greater amount than the said sum of 53*l.* in respect of the *causes* of action in the declaration alleged; concluding with a verification.

This allegation was traversed by the plaintiff in his replication, and upon this traverse issue was joined.

The circumstances which led to the litigation were as follows:—In the month of October 1833, Mrs. Caroline Walrond, a lady of respectability and fortune, the defendant's mother, met with an accident from fire, which caused her death. Amongst her testamentary papers, one was found, which gave the

following directions as to the mode in which she intended her interment to be conducted:—"I wish to be buried in the nearest churchyard to the place in which I may die, with as little expense as possible; neither hearse nor carriage, but to be carried by twelve respectable labourers, who shall receive not less than a guinea each. I wish no friend or relation to mourn for me, that is, to wear mourning." At the time of his mother's death, the defendant was abroad, and the brother of the deceased, Sir Bethell Codrington, who was on the spot, deemed it, under all the circumstances, advisable to deviate in some respects from the plan laid down as to her funeral by the deceased; and, at his desire, the plaintiff, an undertaker, conducted the funeral, supplied the materials, &c., and removed the lady's remains from Lasborough, where she died, to Doddington, a distance of eleven miles, where the family vault was, and she was buried there. Shortly after, on November 11, the defendant wrote a letter from Paris to Lady Codrington, in answer to one received from her; in which, referring to the accident by which his mother was deprived of life, he said, "I fear, even before I heard of it, the last melancholy offices must have been paid to her remains." In answer to another letter from the same party, the defendant wrote a letter, containing the following passages:—

"Clifford-street, Saturday.

"We arrived in London on Tuesday evening, and I found your kind letter, and one from my uncle, inclosing a copy of my poor mother's will. I delayed writing until I could, with some certainty, say when I could leave London. I have been kept here from day to day by circumstances of which I will tell you when we meet. I now hope to get away on Monday or Tuesday next, and I will avail myself of your and my uncle's kind invitation to come to Doddington.

"The next day I will ask you or Sir Bethell to be so good as to accompany me to Lasborough, to break the seals, and commence our sad duty. I am much obliged to you and to him for all you have done, which was certainly the best, and all that could be done. * *

"Would you or Sir Bethell have the

kindness to do what I am told must be done sooner or later. Send some one to the house to take a list of all property whatever, in and out of doors, which is not sealed up, with a view to its future valuation. This will shorten my melancholy task."

"To Lady Codrington."

Upon the 27th of November, he went to Doddington, and upon the following day to Lasborough, where he held a communication with the steward of Sir B. Codrington, and urged him to be as expeditious as possible in making the valuation of his mother's effects. After a reasonable time had elapsed, the plaintiff sent in his bill for the funeral expenses, amounting to 76*l.* 7*s.* 1*d.*, which the defendant refused to pay, on the ground that the order for the funeral was not given by him, or any agent authorized for the purpose. He gave, as another reason for not discharging the demand, that the funeral was conducted in a manner contrary to the wishes and directions of the deceased, and that if he had been consulted upon the subject (as he ought to have been) he would, as a matter of duty, have seen his mother interred in a different manner, and in conformity with her own wishes. Upon the 16th of July 1836, the defendant took out letters of administration, with the will annexed, and upon his being again applied to for payment, and proceedings being commenced, he brought, as before stated, the sum of 53*l.* into court.

The cause was tried, before Parke, B., at the Gloucester Spring Assizes. In his summing up, the learned Judge left it to the jury to say, whether the letter from the defendant to Lady Codrington amounted to a ratification of what had been done as to the funeral. This, they found in the affirmative, and a verdict passed for the plaintiff, damages 16*l.* 8*s.*, with leave to the defendant to move to enter a nonsuit if the Judge was wrong in leaving the case to the jury upon the point of ratification.

Maule, upon obtaining the rule, contended, that the defendant was not originally liable, as the directions for the funeral were not given by him or his agent, and that the letter from the defendant to Lady Codrington did not amount to a ratification of what had been done in contra-

diction to the directions of the deceased. The principle, he said, upon which the action was brought, must mainly depend upon *Rogers v. Price* (1), where it was held, that an executor, who has assets sufficient for the purpose, is liable upon an implied promise to pay for a funeral, suitable to the degree of the testator, furnished by the directions of a third person. But, the authority of this case should be considered as shaken, and when referred to upon the trial, it was doubted by the learned Baron, before whom the discussion took place. He also obtained a rule for a new trial, on the ground of surprise, as to the production of the letter from the defendant to Lady Codrington; also objecting that the letter to which it was an answer, was not given in evidence.

Talfourd, Serj. and *Lumley* shewed cause.—The important question, raised by the defendant, is, whether the letter written by him amounted to a ratification of what had been done with respect to the funeral. The form of pleading, and the payment of the money into court, preclude the defendant from denying that the work has been done, and that a funeral with coaches, horses, hearses, &c. has been performed; and he can only dispute the amount for which he is responsible. It may be admitted, that he might not have entered personally into the contract with the plaintiff, or have been personally cognizant of it when it was made, but the general law implies a liability upon the part of the defendant to fulfil the engagement for a funeral, made with the undertaker by the nearest relation of the deceased on the spot, provided such engagement is for a funeral consistent with and according to the rank and station of the deceased. Thus, it was ruled in *Tugwell v. Heyman* (2), that if executors neglect to give orders for the funeral of the testator, and have sufficient assets for the purpose, they are liable upon an implied promise to the person who furnishes the funeral in a manner suitable to the testator's degree and circumstances. Of the sufficiency of the assets upon this occasion, in the hands of the defendant, there cannot be the slightest doubt. The doctrine above

(1) 3 Y. & Jer. 28.

(2) 3 Campb. 298.

referred to is further confirmed in *Rogers v. Price*, the authority of which has not been shaken; and *Hancock v. Podmore* (3) and *Brice v. Wilson* (4) are to the same effect. The observance of decency, and the general policy of law, require that an executor should be thus liable; and even, in case of necessity, a stranger may direct the funeral and defray the expense out of the deceased's effects, without rendering himself liable as executor *de son tort*—*Vin. Abr.* 'Executor,' B, a, 24. The case in this respect resembles those, sufficiently numerous, where the law implies a promise of payment for the act done, as in *Lamb v. Bunce* (5), where a surgeon attended a pauper who had met with an accident, and the overseer's knowledge of such attendance, without a repudiation of it upon his part, was considered as equivalent to a request. Thus, if these cases, and the principle to be deduced from them, are good law, the plaintiff's demand cannot be defeated upon the discovery by the defendant of the particular intention of the deceased, as to the mode in which her funeral was to be conducted; and thus it is evident, that no ratification of what had been done was necessary upon the part of the defendant, as the law would imply the liability without it. If however a ratification by the defendant was required, his letter to Lady Codrington, in which he approves of all that had been done, has that effect. It is said, that when the letter was written the defendant did not know what had occurred, nor was he aware of the contents of the codicil, by which a particular mode of interment was directed; but it was the business and duty of the defendant to make himself acquainted with these circumstances. He should have made inquiries; and the plaintiff is not to suffer in consequence of his not having done so. The defendant cannot pretend to be surprised by the production of this letter, as he must have known that it would be produced on the trial; neither is it a valid objection, that the letter to which it was an answer was not given in

evidence; for in *Lord Barrymore v. Taylor* (6), it was ruled, that letters of a party are of themselves evidence to prove a promise, without producing those to which they are an answer. Neither can any obstacle be thrown in the plaintiff's way, from the defendant's not being an executor, but an administrator, as, though distinctions may be conceded to exist in some respects, there are none between those characters on an occasion like the present. The modes of redress, against the parties placed in such situations, and the remedies to be pursued by them, are, under circumstances similar to the present, precisely the same.

Maule and R. V. Richards, in support of the rule.—It is plain, that if the learned Baron, before whom the cause was tried, had considered *Rogers v. Price* to be good law, he would not have called the attention of the jury to the fact of the ratification by the defendant, and have desired them to consider whether the defendant's letter to Lady Codrington amounted to such ratification. It is said, however, in the argument, that ratification was altogether unnecessary, and the jury, without that, were justified in finding for the plaintiff, confining and limiting the charge of the funeral to the condition and station of the deceased. As to the assertion, that the defendant is precluded from denying the contract by the payment of money into court, and is confined merely to an objection to the amount, such is not the case. The declaration is for work and labour, care, &c. of plaintiff, in and about the funeral of the said Caroline, &c., at the request of defendant as administrator, and for divers coaches, hearse, horses, materials, &c. The defendant brings into court the sum of 53*l.*, and denies that the plaintiff suffered damages to a greater amount in respect of the causes of action in the declaration mentioned; and though the defendant may, by the payment, admit one cause of action against him as administrator to the extent of the 53*l.* upon a certain contract, it does not thence follow that he admits the other causes alleged, such as the expense of a funeral, with coaches, horses, hearse, &c., against him in such capacity. Upon this point it may be affirmed, that there is a

(3) 1 B. & Ad. 260; s. c. 8 Law J. Rep. K.B. 403.

(4) 3 N. & M. 512; s. c. 3 Law J. Rep. (N.S.) K.B. 93.

(5) 4 Mau. & Selw. 275.

(6) 1 Esp. 326.

difference as to the extent of the admission by the defendant, by his payment of money into court under the old practice, as it is explained and commented upon in *Rucker v. Palsgrave* (7), where Sir J. Mansfield, C.J. said, "he remembered the time when paying money into court was not an admission of anything;" and *Blackburn v. Scholes* (8), and *Seaton v. Benedict* (9); and payment into court in the mode adopted by the defendant under the new rule, which requires the fact to be pleaded in all cases. By putting this plea upon the record, it may be admitted that the defendant ordered a funeral; but the plea does not go to an admission of everything, as alleged; it does not admit that he was liable as administrator to all the causes of action.

[TINDAL, C.J.—Is it meant to be contended, that, after this plea, the plaintiff will be put upon proof of everything alleged?]

It is contended, that the plea, thus put upon the record, is not absolutely and conclusively binding upon the defendant, as to all the claims advanced against him, in a character admitted by him only as to one contract: and if the plaintiff prove breaches of contract different from those alleged in the declaration, such proof will not avail him. The counts in the declaration are for work and labour done for the defendant, as administrator, &c. in regard to a funeral, with coaches, hearse, and horses; but he was not administrator at the time, nor did he take out the letters of administration until some years after. To support a claim like this, some evidence should be given of the party being administrator at the time of the act, from the performance of which liability was to attach. Such is obviously necessary here, as the office of an administrator is different from that of an executor, the latter being the creature of the testator, and owing his authority to the will; whilst the former is not designated, is uncertain, and derives his authority from the Ordinary. This difference is strongly exemplified in *Murray v. the East India Company* (10), where it was held, that

the Statute of Limitations was to run from the time of granting the letters of administration, not from the time the bills became due, there being no cause of action until there was a party capable of suing. The proposition is also supported by *Williams on Executors*, vol. 1, p. 395. As to the ratification, the letter ought not to have that effect, as it was written at a time when the defendant did not know what had been done, and was unacquainted with the restrictions imposed by the codicil.

TINDAL, C.J.—If this case was properly left to the jury, I see no ground for disturbing the verdict; the sum in dispute being only 16*l*. Now, whether the finding were said to be in consequence of surprise, or of the want of ratification by the defendant, it would, in either event, be inconsistent with our rules of practice to send the case to a new trial, for the purpose of allowing the defendant to furnish himself with additional evidence, and submit the case once more to a jury. This is an action for work and labour, in and about the funeral, &c. against the defendant, as administrator. The defendant is charged in his character of administrator, and he, by way of answer, puts in a plea, in which he states that he is liable for 53*l*., which he is ready to pay; and he further says, that the plaintiff has not suffered damages to a greater amount than the said sum of 53*l*., in respect of the causes of action in the declaration mentioned. I confess, when I look at the circumstances of the case, I am unable to see or understand what material difference is made as to the subject of admission, by the payment of money into court, under the rule, which requires a plea, and under the old practice: the difference is merely, that in the latter there was a plea of non assumpsit, except as to the sum paid in; and as it appears to me, the case is not carried further here, as there is an averment that the defendant is not indebted in a greater sum, concluding with a verification. This leaves the party in the same situation in which he was placed under the old plea of non assumpsit, with the plea of payment into court; and if there is any distinction at all, it is more favourable to the defendant, as, under the new rule, no rule or

(7) 1 Campb. 537.

(8) 2 Campb. 341.

(9) 5 Bing. 28; a. c. 6 Law J. Rep. C.P. 208.

(10) 5 B. & Ald. 204.

Judge's order to pay money into court, is necessary, except under 3 & 4 Will. 4. c. 42. s. 21, but the money may be paid to the proper officer of the court, who is to give a receipt in the margin of the plea; whereas, under the old practice, the rule was required, and the payment could only be proved by the production of the rule itself—*Israel v. Benjamin* (11). But this makes, so far as I can see, no material distinction. I am most ready to admit that the defendant is not bound beyond the admission of 53*l.*, and that he has a right to dispute and advance objections to any claim beyond that sum, as freely as if he had paid no money at all. But whilst I admit this, I cannot avoid saying, that the action is brought against him, in his character of administrator; and it cannot be disputed, that in such character he has paid the 53*l.* into court. He is not prevented by this admission, from disputing the further amount, if the funeral was carried ten miles beyond the prescribed place, with hearses and horses; but, there is no ground upon which he should be discharged from his character of administrator, as there was but one contract and but one funeral; and it would be not a little singular, if a person was liable for the sum of 53*l.* in one character, that he should be liable in another character for anything beyond it.

We are now to look at the letter which was put in evidence, for the purpose of ascertaining whether it amounts to a ratification of what had been done, and whether, consequently, the defendant is liable for the work. Upon this part of the case, two objections have been advanced: in the first place, it is said, that the defendant did not know the course that matters had taken, and the mode in which the funeral had been performed; in the second place, it is asserted that he was not administrator at the time, nor did he assume the character for two or three years after the period when the transaction occurred. Now, as to the first objection, what, I ask, is the fair inference to be drawn from the letter? It is dated on the Saturday, and it states that the writer had arrived in London on the Tuesday evening; he did not go to the country seat for three

weeks after the death of the lady, in respect of whose funeral this discussion has arisen. In the meantime, the funeral was performed; and it is not to be supposed, without evidence to the contrary, that the writer of this letter was not told, in the letter to which this was an answer, of what had been done in respect of his mother's funeral. He then goes on to say, that he will accept the invitation kindly given, and go to Doddington; and he returns his thanks, and expresses his acknowledgments for what had been done, which, under the circumstances, was the best. Now, without the letter, to which this was an answer, and in the absence of evidence leading to a contrary belief, can we come to any other conclusion, than that an account was given to him of the manner in which the funeral was conducted? The letter also contains expressions tending to shew that he was, shortly, or at least that he thought he was, to be invested with the authority of a personal representative, for he says, he will break the seals, and proceed to a valuation of the property. Now this he would not have said—he would not have given utterance to such intention, if he did not think at the time that he was about to assume the representative character. It is true, that he did not take out letters of administration until nearly three years after. He was, it is said, prevented by disputes from so doing. But do not the expressions used in the letter lead to the conclusion, that he thought he was about to assume the character at the time? It is then alleged, that he did not actually fill the character until three years after: as to this the question is, what is the effect given by law to an administration under such circumstances; and it is laid down broadly in the books, that for particular purposes the letters of administration relate back to the time of the death of the intestate, and not to the time of granting them. This is laid down in 2 *Roll. Abr.* tit. 'Trespass by Relation,' fol. 554; and thus it was held, in *Whitchall v. Squire* (12), (though certainly Holt, C.J. was of a different opinion,) "that an administrator cannot bring trover for a chattel, after his consent to the

(11) 3 Camp. 40.

(12) 1 Salk. 296.

defendant's having it before administration granted, but that he was bound by such consent, although it was given before he had taken out the letters." Why, therefore, should the letter of the administrator here, written before the party had taken out administration, have the effect of varying the expenses of the funeral, which had been performed? Why should it have the effect of altering the person to whom such expenses should attach, and of substituting another in his place? The question is, if this letter amounts to a ratification; and the fair inference is, when the defendant pleads the payment of 53*l.* into court, in a certain character, and there is no direct reason for coming to a contrary conclusion, that such letter does amount to a ratification as to the rest in the same character. There is no necessity for considering the decision in *Rogers v. Price*, as it does not govern the present case. In fine, the letter is, in my opinion, a ratification, and the rule should be discharged.

PARK, J.—Upon this occasion, one is almost tempted to go into the pious feelings of the son, so much has been said upon the subject by his counsel, and such complaints have been made of those feelings being violated and set at nought by the mode in which the funeral has been conducted. The case, however, is to be decided upon quite different grounds. Neither is there any necessity for entering into a discussion upon the case of *Rogers v. Price*. I am glad that this is so. It is much better that there should be no discussion upon a matter, in regard to which there does not appear to be a perfect unanimity. Mr. Baron Parke has, it is said, some doubt as to the propriety of the decision in that case. If this is so—if, as it has been alleged, he does entertain such doubt, I do not agree with him, as the opinions of the Judges, one of whom (my Brother Vaughan) is now present, were delivered one after the other, and were, as I think, founded in extremely good sense. Upon the present occasion, I agree entirely with my Lord, that the defendant having been sued in the character of administrator, and in such character having paid a cer-

tain sum into court, is not at liberty to assume a character of a different kind. When I reflect upon the sentiment repeatedly expressed by a great man, (Lord Mansfield,) that the *quicquid agunt homines* is the business of courts of law, I do protest against the doctrine of Judges being called upon to shut their eyes upon the transactions of mankind. I protest against being called upon to read papers, and put a construction upon them different from that which is applied by the rest of the world. Who, in the present case, can deny the effect of the letter that was written by the defendant to Lady Codrington? It was dated Saturday; he says he will accept the kind invitation, and go to Doddington, and he approves of what had been done. He did not go for three weeks afterwards. He had just come from abroad. Who can believe, that when Sir B. Codrington, the brother of the deceased, wrote to the defendant, he did not tell him where his mother was buried? This, I repeat it, cannot be believed, as it would be contrary to the sense of mankind. What is the conduct of the defendant upon the occasion? When he does write, does he say that he was surprised at his mother's being buried at such place? He does no such thing; but he speaks of breaking the seals, of valuing the property, and of the performance of a sad duty. What right had he to say this? What duty had he to perform, if the law did not clothe him with authority as representative? After this, it is, I think, too much to speak of the defendant's feelings. It is, I think, too much to say that the funeral was not according to the intentions of the defendant's mother. Now, as I asked during the discussion, I ask again, what was this to the undertaker? What had he to do with this? How was the question to interfere with his right to remuneration? It has been also said, that there is a great difference between an executor and an administrator: this is admitted; the former receives his authority from the will itself, whilst the latter is appointed by the Ecclesiastical Court. But, it appears from the case cited by my Lord, from 1 *Salk.*, that for some purposes, though not for all, the authority of the administrator relates back to a time

prior to the taking out of the letters of administration. The same conclusion may be attained from a reference to the cases collected with great industry, in his work upon *The Law of Executors and Administrators*, by Mr. Williams, vol. 1, p. 396, a work to which Mr. Maule has referred in the discussion, and which he has justly eulogized for the ability which it exhibits. As it appears to me, the entire matter was left most properly to the jury; and they decided rightly as to the sum sued for. My Brother Parke is not dissatisfied with the verdict. At first, indeed, he appeared rather adverse to the plaintiff, but finally he was not dissatisfied; and for my part, I am perfectly contented with the verdict; and if it had been the other way, I should have thought it wrong.

VAUGHAN, J.—I too agree that this verdict should not be disturbed. This is an application to the sound discretion of the Court; and it is satisfactory to those who administer the law of the country, to find that law and justice go hand in hand; and I should much regret being obliged to grant the application for a nonsuit, and thereby put the parties to so great an expense. The first question is, as to the effect of paying money into court; I do not think there is any foundation for the doctrine contended for. When I attend to the form of the declaration, I see no difference between the effect of paying money into court under the old rule, and that by which a plea is required. Here there are not many causes of action; there is but one contract, but one funeral, but one question to be discussed. The defendant is not at liberty to dispute the amount of that which has been paid in, but he is at liberty to dispute anything beyond. Then comes the question of his liability in other respects. Upon this subject, there is no necessity for discussing *Rogers v. Price*. Very pointed observations have been made, and, I think, properly made, by my Brother Park, as to the mode in which this case has been referred to. I am one of the Judges who decided that case, and I gave my reasons for so doing. It decided no more than this, that the undertaker had a right to sue him who was directly liable.

NEW SERIES, VI.—C.P.

It is therefore unnecessary to raise a discussion upon this point. The real question is reducible to this, did my Brother Parke submit the question rightly and properly to the jury? and if he did, did they find properly, or did they come to a wrong conclusion? In my opinion, the question was properly left; and the conclusion at which the jury arrived, was equally so. With respect to the letter which has been produced, it is unnecessary to make many observations upon it. The writer alluded to the breaking of the seals, the taking of possession, and the valuation of the property. These allusions were, it should be recollected, made by the son of the deceased; and in such state of things, it is impossible for me not to see that the party contemplated the assumption of the representative character. It is impossible for me not to see that he was satisfied that he should shortly be clothed with such character, either as executor or as administrator with the will annexed. Can it be doubted that he had cognizance of the transactions as they really existed? Can it be doubted that he received intimation of the mode in which the interment took place? As to the production of the letter, it was impossible for the defendant to say that he did not think it would be produced, as an application had been made, for the purpose of ascertaining the hand-writing. Upon the whole, the jury came to a right conclusion; and if I had been one of them, I should have acted as they have; and, consequently, in my opinion, the verdict should not be disturbed.

COLTMAN, J.—The argument, here, has been conducted as if the action was misconceived, and it was proposed to proceed against the defendant, not as administrator, but in his personal capacity. If such was the case, the course taken by the defendant was a very strange one; for he should in such case, for the purpose of defending himself, have pleaded non assumpsit, as a good answer to the action. It might, perhaps, be possible, but not in the present case, that both parties should mistake their right of action; but as the record is framed here, the defendant by his admission has clearly bound himself to a certain extent, by a

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plea already adverted to, but not for more than 53*l*. I was, at one time, a little impressed with the idea, that the admission might not be co-extensive with all the *causes* of action as alleged; that the liability of the defendant should be construed as if admitted, to be confined to one demand: but I do not think so now. This is not, as I now think, the true result of the allegation—everything is admitted which is not denied. The plea, in fact, admits, that the promises in the counts, which constitute the causes of action, have been broken in each count, but to an amount not exceeding 53*l*. in the whole. I cannot see what difference in result there is, between the payment of money into court under the new rule, and under the old practice. In my mind, the effect of the payment is in both cases the same; the difference is, that instead of proving the payment by the production of the rule, the fact now appears upon the face of the record. The plaintiff is, I think, entitled to retain his rights of suit upon each count of the declaration: if this is so, the defendant admits his character of administrator, and thus disposes of the observations made in respect of any particular contract. The conclusion which I have attained, may, I think, be strengthened by referring to that which was said by Mr. Baron Parke, upon the effect of the payment of money into court, in *Meager v. Smith* (13); his Lordship there expresses himself thus: "There is no doubt but that, if such payment is made on a count alleging a special contract, it operates as an admission of that contract. If on a general *indebitatus* count, for work and labour, or the like, on which the plaintiff might recover for one or more distinct contracts, it operates as an admission of a liability to that amount, on some or on more of such contracts, its effect is in both cases the same, as if a payment had been made by the defendant to the plaintiff of a like sum, before action brought." Under all the circumstances, as it appears to me, the admission of the party, against whom the action is brought as administrator, that the funeral was performed, cou-

pled with the fact of the letter written by him to Lady Codrington, amounts to a recognition to the extent required, that is, to a ratification of the authority by which everything had been done. It is unnecessary to comment at any length upon the contents of this letter, which refer to those of another, to which it was an answer, and which was not produced. This was of course open to the observations which were made as to the effect of the evidence. The whole was submitted to the consideration of the jury, who found that the expressions of the defendant, (the son,) in which he stated his sense of obligation for what had been done, and that what had been done was for the best, amounted to a ratification of the whole. As to myself, if the jury had found a qualified verdict, I should not have quarrelled with it; for, perhaps, it may be said, that they decided a little out of their province, upon that which was a mere matter of taste; however, if I had been one of them, I should, perhaps, have done the same, and have come to the same conclusion. At all events, the deviation, if it can be called one, is so small as not to be material; and, upon the whole, the verdict appears to me to be proper; and the rule should be discharged.

Rule discharged.

1837. { THE EAST INDIA COMPANY v.
June 7. { BAKER, SECRETARY OF THE
EAST INDIA DOCK COMPANY.

Ship and Shipping—East India Trade.

The 39 Geo. 3. c. 89. prohibited the East India Company from employing in their regular service any ships except those which were contracted for six voyages, at the expiration of which it was usual to break up the vessels, and at that time the regular number of voyages to be performed by a ship in the East India trade was supposed to be six. The 43 Geo. 3. c. 63. allowed the East India Directors, under certain conditions, to hire and take up vessels for additional voyages, after the completion of the sixth. The 43 Geo. 3. c. cxxvi, by which the East India Dock Company were constituted, in clause 5 enacts, "that in case such ship or vessel should have

(13) 4 B. & Ad. 673; s. c. 2 Law J. Rep. (N.S.) K.B. 108.

completed her regular number of voyages, or should not be continued in the East India trade, there should be allowed or returned in respect thereof for the last voyage of such ship or vessel, in such East India trade, the sum of 4s. out of every 14s. or 12s. respectively per ton, &c." A ship of the plaintiffs' arrived at the docks, upon her sixth voyage from India, after the 43 Geo. 3. c. 63; and it was held, that the plaintiffs were not entitled to the drawback of 4s., as, since the enactment, six voyages, and the regular number to be performed by the ship, were not synonymous; for after that period, it did not follow that her sixth voyage was to be her last.

The following CASE was submitted under the statute for the opinion of the Court:—

This action is brought to recover from the East India Dock Company, the several sums of money hereinafter mentioned, which the plaintiffs contend ought to be returned and repaid to them, by virtue of the statute 43 Geo. 3. c. cxxvi. s. 126, upon the ships following: *Thomas Grenville*—(others were named; but as the decision on the claim, in regard to the above-named vessel, was conclusive as to the others, it is deemed unnecessary to refer to them in a particular manner.) The East India Dock Company was constituted by the 43 Geo. 3, (public and private act,) and they were thereby empowered to make docks and basins, with the necessary accommodations and requisites for the reception of East India ships.

By section 91, it was enacted, "that there should be payable and paid to the East India Dock Company, or to their collectors, receivers or agents, for the use of the said East India Dock Company, for every ship or vessel entering into and using any dock or docks, basin or basins, or other work to be made by virtue of that act, by the master or other person having the charge or command of such ship or vessel, or by the owner or owners thereof, the several and respective rates following—that is to say, first, for every such ship or vessel, except country ships or vessels hereinafter described, entering inwards, and unloading her cargo in the said docks, and loading her cargo outwards in the rate or sum of 14s. per ton, accord-

ing to the regular tonnage of such ship or vessel, to be paid within ten days after such ship or vessel should be cleared inwards;—secondly, for every such ship or vessel built in the East Indies, called country ships, and navigated by Lascars, not less than two-thirds of the crew being Lascars, entering inwards, and unloading her cargo in the said docks, and loading her cargo outwards in the said docks, the rate or sum of 12s. per ton, register tonnage as aforesaid, to be paid within ten days after such ship or vessel should be cleared inwards; the last-mentioned rate being 2s. per ton less than the rate on other ships or vessels, in consideration of the expenses of, and in the maintenance of the Lascars, whilst such country ships or vessels are unloading;—thirdly, for every ship or vessel loading outwards in the said docks, being a new ship, or not having upon her last arrival unloaded inwards therein, the rate or sum of 4s. per ton register tonnage as aforesaid, to be paid before such ship or vessel should depart from the docks;—fourthly, that in case any such British, or country, or other ship or vessel having unloaded her cargo in the said docks, should remove from the said docks before loading any cargo outwards, and should not load any cargo outwards in the said docks, there should be allowed and returned in respect thereof the sum of 2s. out of such 14s. or 12s. respectively, to be repaid before such ship or vessel should sail from the said port of London;—fifthly, and that in case such ship or vessel should have completed her regular number of voyages, or should not be continued in the East India trade, there should be allowed and returned in respect thereof, for the last voyage of such ship or vessel in such East India trade, the sum of 4s. out of every such 14s. or 12s. respectively, to be repaid within one calendar month after such ship or vessel should be removed from the dock.

By the 99th section, power was given to reduce or discontinue all or any of the rates thereby granted and made payable to the said East India Dock Company, and also to advance or revive the same again, in such manner as to the East India Dock Company should from time to time seem meet

and expedient, so as the said rates, when so advanced or revived again, did not exceed the rates thereinbefore granted.

By section 63, all ships in the East India trade were required to unload at the docks, with certain exceptions, which privileges and restrictions, it was enacted, by section 110, should not continue for a longer time than the term of twenty-one years, to commence on the day that any rate granted or made payable by this act, for or in respect of any ship or vessel entering the said docks or basins, should have been demanded or taken.

These exclusive privileges expired on the 2nd of October 1827. In pursuance of the power above mentioned, an abatement was made in 1818, of 2s. per ton, in the rates payable under the 1st clause of section 91, from which time the rates were received with that abatement, until the expiration of the exclusive privileges as above mentioned, when an arrangement was made between the two companies, by which the East India Dock Company were to load and unload all the East India Company's own or chartered ships, and to perform certain other services for the said East India Company, in consideration of an annual payment of 36,000*l.* for the term of years, from the 3rd of October 1827. No mention or allusion is made by this agreement, to the return of any rate. This agreement was always subsequently acted upon.

The statute 9 Geo. 4. c. xciv, (public and private,) passed June 19, 1828, entitled, 'An Act to consolidate and amend several acts, for the further improvement of the port of London, by making docks and other works at Blackwall, for the accommodation of East India shipping,' recites and repeals the 43 Geo. 3. c. cxxvi; but continues the East India Dock Company; and by sections 7 & 8 enacts, "that all contracts, covenants, agreements, engagements, and securities, which, at the time of the passing of this act, shall have been entered into, or given to or by the directors of the said company, or any of them, or any person or persons duly authorized by them, or any of them, under the authority of the said recited acts, or any of them, shall continue and may be en-

forced, in the same manner as if the said recited acts had not been repealed; and that all debts, rates, damages, and other monies, which at the time of the passing of this act shall have been owing to, from, or by the said company, or the directors thereof, or any of them, under the authority of the said recited acts, or any of them, shall continue to be owing to, from, or by, and shall and may be sued for, recovered, and received in the same manner as if the said recited acts had not been repealed." By section 118, the East India Dock Company are authorized to receive other rates, to be appointed by them, not exceeding 10s. per ton.

In explanation of the phrase, "regular number of voyages," mentioned in the clause, on which the plaintiffs' claim is founded, it is requisite to state, that by section 1 of 39 Geo. 3. c. 89, (public act,) entitled 'An Act for regulating the manner in which the united company of merchants of England trading to the East Indies shall hire and take up ships for their regular service,' it is enacted, "that after the passing of that act, the said company shall employ in their regular service, no ships but such as shall be contracted for to serve the said company, as they shall have occasion to employ them in trade and warfare, or any other service, for six voyages, to and from India or China, or elsewhere, within the limit of the said united company's exclusive trade." At the time of the passing of this act, the usual period of a vessel lasting in that trade, was the expiration of the voyages last mentioned, when it was usually broken up; and the phrase, "regular number of voyages," has from that time meant six voyages, between England and India, or China, and back again.

By the 43 Geo. 3. c. 63, (a public act,) passed to explain and amend the last-mentioned act, by section 2, after reciting that it had been found that ships might be repaired and made fit to perform more than six voyages to and from the East Indies, in the service of the East India Company, it is enacted, "that it shall and may be lawful to and for the Court of Directors of the said united company, on a public advertisement, with four weeks' notice, to receive tenders, for any ship or ships which

have been or may be engaged in the service of the said united company, and to hire and take up such ship or ships for one or more voyage or voyages, to and from the East Indies, in the service of the said company, beyond and after the performance of the number of voyages for which any such ship or ships respectively had been or shall be contracted to serve the said company."

This statute received the royal assent in the same session as the 43 Geo. 3. c. cxxvi, (which constituted the East India Dock Company); but at a prior part of it.

The facts and questions for the decision of the Court are as follows: The *Thomas Grenville* arrived from her sixth voyage, at the docks, in 1818, before the abatement of 2*s.* per ton was made, and then and previously paid under clause 1. She afterwards paid the reduced rate of 12*s.* per ton, until the agreement above mentioned was entered into. This ship and all the others continued in the trade until the time of the passing of the act, 3 & 4 Will. 4. c. 85, which put the company's right to trade in abeyance for twenty years. (See sec. 2 & 3.) The questions for the opinion of the Court as to her, are, first, whether the East India Dock Company ought not to have returned and repaid 4*s.* per ton under clause 5, on the expiration of her sixth voyage;—secondly, whether, in addition to such returns, she had not a right to a loading on her next subsequent voyage, free of dock charges, or if not loaded outwards, again to a further return of 2*s.* per ton under clause 4;—thirdly, if she had no such additional right, whether the East India Dock Company had a right to 4*s.* per ton, or 2*s.* per ton, or what other sum, for her loading in the docks, for that next subsequent voyage. The amount in question on the return rate of 4*s.* per ton, and the loading rate of 2*s.* per ton, is as follows:—

The *Thomas Grenville* registered tons 894.

	£.	s.	d.
4 <i>s.</i> per ton	184	12	0
2 <i>s.</i> per ton	92	6	0

Spankie, Serj., for the plaintiffs, contended, that they were entitled to the return of the 4*s.*, out of the sum paid per ton on the *Thomas Grenville*, as she had in

1818 complied with the condition required; she had completed her sixth voyage—that is to say, her regular number of voyages there, and six voyages, being synonymous. The opposite party would, perhaps, rely on the 2nd section of the 43 Geo. 3. c. 63, which allowed the Court of Directors to hire ships according to circumstances, for other voyages, after the performance of the sixth; and they would, perhaps, say, that thenceforward the six voyages ceased to be the regular number. But such reasoning was erroneous, as these, which may be considered supplemental voyages, did not interfere with that which was ever treated by those conversant with the East India trade, as the regular number of voyages. The best interpretation to be put upon statutes, especially those connected with commerce, is that which gives to the language, in which those statutes are framed, its popular and general sense and meaning; and it cannot be doubted, that in popular signification the regular number of voyages to be performed by a vessel in the East India trade was six.

Sir W. W. Follett, contra, denied that since the enactment of 43 Geo. 3. c. 63, the regular number of voyages to be performed by the vessel and six, were synonymous. This might be admitted to be so before the passing of the latter statute, as then the seventh voyage would have been illegal; but, as the statute allowed the directors to hire vessels for a continuance, it did not now follow, that the sixth voyage of the vessel was to be her last. From the terms which had been superadded to the time of service, the vessel might now complete a seventh or eighth voyage, and as this vessel had done so, was the repayment to be made again?—was the demand to be repeated upon the performance of that voyage, which should actually turn out to be her last? Such construction would manifestly be unreasonable; and was of itself sufficient to shew, that the plaintiffs are not entitled to that which they demanded.

TINDAL, C.J.—The main and important question in this case, arises on the first point submitted to our consideration; and this being answered by the construction

put upon the law in its present state, the conclusion will be equally applicable as to the others; and it will follow as a corollary, by natural and necessary consequence. The point to which I refer is, whether the sum of 4*s.* out of every 12*s.* or 14*s.* per ton should be returned to the East India Company, in respect of the *Thomas Grenville*, under the 5th clause: the words of which are, "and that in case such ship or vessel should have completed her regular number of voyages, or should not be continued in the East India trade, there should be allowed and returned in respect thereof, for the last voyage of such ship or vessel in such East India trade, the sum of 4*s.* out of every 14*s.* or 12*s.* respectively;" and the question is, what is the meaning of the phrase "regular number of voyages"? There was, it appears, an act, 39 Geo. 3. cap. 89, entitled, 'An Act for regulating the manner in which the united company of merchants of England trading to India shall hire and take up ships for their regular service,' which enacted, "that the company should not employ any ships except those which should be contracted for to serve for six voyages, to or from India, or China," &c. Then came the 43 Geo. 3. c. 63, for explaining and amending the 39 Geo. 3. c. 89, the 2nd section of which, after reciting that it had been found, that ships might be repaired, and made fit to perform more than six voyages, to and from the East Indies, allows the Court of Directors, under certain conditions, to receive tenders for any ship or ships which may have been engaged in their service, and to hire them for one or more voyages to and from the East Indies, beyond and after the performance of the number of voyages for which any such ship or ships respectively had been or shall be contracted to serve the said company. Before this enactment, there could be no doubt as to the meaning of the ship's "regular number of voyages;" it must have been six, by the 39 Geo. 3. c. 89; and if no alteration had taken place at the time the East India Dock Act, 43 Geo. 3. c. cxxvi, received the royal assent, the same meaning should have been attached to the words in that enactment, and the regular number of the ship's voyages should

be considered six; but the 43 Geo. 3. c. 63, altered the period of regular service, and imposed other limits upon it, by giving it a certain extent, and superadding other conditions. Now, if the words of the 39 Geo. 3. c. 89, making the regular number of voyages six, and the words of the 43 Geo. 3. c. 63, allowing the additional number, were found in the same statute, who could doubt that the latter would not operate as a repeal of the former? It was in such state of things the East India Dock Act passed, and it is said for the defendant, that the meaning of the words "regular number of voyages," in the 5th clause, is not limited to six; but it extends to such number as the East India Company may, under existing circumstances, contract for, under the 43 Geo. 3. c. 63; and as it appears to me, this construction of the law and common reason go hand in hand, for whether the ship completed her sixth, her seventh, or her eighth voyage, her expenses when she lay in the dock, whether she unloaded for the voyage in, or loaded for the voyage out, were the same, and the company received the same portion of benefit and advantage by her loading or unloading there, on all her voyages except her last. Another difficulty arising from the construction contended for would be, that we could not know how to dispose of the seventh or eighth voyage, which the vessel is allowed to make. If the parties were now entitled to the return of the money, might it not be claimed again under the terms of the clause, when the vessel ceased to be continued in the trade, and made her last voyage? This, I need scarcely say, would be unreasonable; and, consequently, I hold that the East India Company are not entitled to the repayment or return of the 4*s.*, with respect to the *Thomas Grenville*. As to the other questions, it is, as I said before, unnecessary to give them any answer in detail, in consequence of our decision upon the first; and our judgment is in favour of the defendant.

PARK, J.—The question has arisen on the meaning of the words "regular number of voyages;" and whether such number should not be considered as extended beyond six. I am happy to think, that

equity and the justice of the case go together.

VAUGHAN, J.—I agree. The words of the 5th clause are, “in case such ship should have completed her regular number of voyages, or should not be continued in the East India trade, there should be allowed and returned for the last voyage;” but her sixth voyage need not now be her last; and by the words “should not be continued in the East India trade,” it is meant the ship should leave it; but, here, she was continued in the trade.

COLTMAN, J.—The case is, in my opinion, clear, as it is undoubtedly necessary, that when a party wishes to establish a tax upon the subject, he shall shew clearly that the case is within the statute. The only difficulty here, arises upon the construction to be put upon the words, “regular number of voyages;” and the construction is, I think, to be found in the case itself. It is said, that as, from a particular time, the regular number of voyages to be performed by the ship was six, we should put the popular construction upon the words, and understand them as they are understood by those conversant in the East India trade, and such understanding should, it is said, be binding upon us. But when we are to put a construction upon these words, in reference to other acts of parliament, we should not be bound by such sense of the words, if it is inconsistent with these acts. The construction contended for by my Brother Spankie is neither reasonable nor natural. There were two concurrent acts of parliament; the one which extended the number of voyages beyond six, was passed earlier in the session than the act which gave powers to the East India Dock Company; and by the former enactment it is clear, that the regular number of voyages performed by a vessel may be continued up to that in which she discontinues trading altogether; consequently, the plaintiffs’ demand is not supported under the 5th clause; and our judgment should be for the defendant.

Judgment for the defendant.

1837. }
June 9. } DOE d. GELDART v. TABRAM.

Staying Proceedings — Concurrent Actions.

The Court will not stay the proceedings in an action of ejectment, commenced in this court, until those in an action of trespass commenced in the Court of King’s Bench, in which the same question is raised, are terminated.

Kelly moved that the proceedings in an action of ejectment commenced in this court should be stayed, until those in an action of trespass, in which the same question was raised, should be terminated in the Court of King’s Bench. There had been a trial, and the party against whom the verdict in trespass was found, had obtained a rule for a new trial in that court. Pending this rule, the action in ejectment was brought here; and thus, if the Court did not interfere, there would be two actions at one and the same time, respecting the assertion of one and the same right.

Per Curiam.—If two actions in ejectment were pending at the same time, we might suspend the proceedings in one until the other was decided. But, where is the authority to shew that we can interfere, as required in the case of the pendency of two actions, different in their forms, and leading to different results? The object of the party here in one action, is, the recovery of the property; in the other, it is the obtaining of damages, and the effect of our interference in a case like this, might be, to interfere with damages, to which it may be found that a party is entitled.

Rule refused.

1837. }
June 12. } BROGGREF v. HAWKE.

Costs—Reduced Scale—Judge’s Certificate.

Where a cause (in assumpsit) has been partly heard before a Judge in one of the

superior courts, and a verdict has been taken for the plaintiff, subject to a reference, and the arbitrator has awarded damages less than 20l., the Judge has power to certify upon the postea, that the cause was proper to be tried before him, and not before a sheriff or Judge of an inferior court, for the purpose of having the plaintiff's costs taxed on the ordinary, not the reduced scale.

The plaintiff in this action declared in assumpsit, for goods sold and delivered, work, labour, and materials, for money lent and advanced, and on an account stated, and in his particulars of demand claimed a balance of 119l. 2s. 4d. The defendant pleaded the general issue; secondly, part payment of 73l.; and thirdly, a set-off for the residue of the demand.

On the cause coming on for trial, before Tindal, C.J., a verdict for 300l. was taken for the plaintiff, subject to a reference of the cause and all matters in dispute, the costs as taxed to abide the event of the certificate or award. The arbitrator certified, that the verdict should stand for the plaintiff on the first and last issues, and that the damages should be reduced to 8l. 5s. 8d.; that there should be a verdict for the defendant on the second issue; that each party should pay his own costs of the reference, and that the plaintiff should pay the expense of the certificate, and the defendant, on demand, repay him a moiety thereof.

Upon the taxation, the officer would only allow costs to the plaintiff on the reduced scale, inasmuch as he had recovered a verdict in assumpsit for less than 20l. Upon this, an application was made to the Lord Chief Justice for a summons, returnable before him, calling on the defendant to shew cause why his Lordship should not certify on the postea, that the above cause was proper to be tried before him, and not before a sheriff or Judge of an inferior court, in order that the costs of the cause might be taxed on the usual scale. The Lord Chief Justice refused the application, conceiving that he had no power to give such certificate, as the case could not be said to have been tried

before him. Upon this, the taxation was adjourned, for the purpose of allowing the matter to be submitted to the decision of the Court.

James obtained a rule for the taxation in the ordinary way. He contended, that there was no ground for the officer's objection, as the postea was *prima facie* evidence of the cause being tried before a Judge of the superior court, and the arbitrator might be considered as substituted for a jury. His award might be compared to their verdict, and was to be attended with the result and consequences of a verdict, found before the Judge by whom the cause was supposed to be tried. *Notes v. Fraser* (1) was precisely in point. It was held there, that, under the directions to taxing officers, promulgated in Hilary term, 4 Will. 4, it is not necessary for the Judge who certifies, to enable a plaintiff to obtain full costs, to hear the cause throughout. Patteson, J. was in that case of opinion, that the words of the rule were satisfied, by having the cause brought on for trial.

Ellis shewed cause, and contended, that the case was within the words of the rule, and that the taxation should consequently be on the reduced rule.

TINDAL, C.J., after consulting with the other Judges, said, that at the time the application was made, he doubted whether he had the power of certifying as required, inasmuch as the cause had not been tried by him, but had been, shortly after its opening, referred to an arbitrator. However, upon conferring with his Brothers, and taking into consideration the case decided by Patteson, J., he found he had the authority, and he would certify accordingly. The rule, therefore, should be made absolute for the officer to tax in the ordinary manner.

Rule absolute.

(1) 3 Dowl. P.C. 339.

1837. } MOON v. THE GUARDIANS OF
May 23. } THE WITNEY UNION.

Principal and Agent—Contract—Work and Labour.

The guardians of a union employed an architect to furnish them with plans, specifications, &c. of a workhouse which they intended to build. He submitted certain advertisements and instructions for such builders as might wish to be employed to their legal adviser and clerk; and, without their express directions, he employed a surveyor, for the purpose of taking out the quantities, according to his plans. Finally, the guardians, disapproving of the architect, rejected his plans, refused to accept any tender for the performance of the work according to those plans, and acted upon plans submitted by another person. In an action brought against them by the surveyor, for refusing to pay him for taking out the quantities, the jury having found that the architect, in employing the plaintiff for such purpose, acted within the scope of his authority, as their recognized agent, in such respect, and only did that which was sanctioned by the usage and course of his business,—the Court refused to disturb the verdict.

Held also, that defendants could derive no advantage from a condition of the advertisement, that the surveyor was to be paid for taking out the quantities by the successful competitor, inasmuch as the fact of there being no successful competitor was occasioned by their own conduct, in rejecting the architect's plans, and suspending the operations under them.

The declaration consisted of the usual counts for the price and value of work done, and materials for the same, provided by the plaintiff for the defendants at their request, for money paid, laid out, and expended, and on an account stated. The defendants pleaded the general issue, whereupon issue was joined. The plaintiff's bill of particulars was as follows:—

May, 1835.	£.	s.	d.
Making out bill of quantities ..	40	0	0
June—Making out renewed bill of quantities, in consequence of alterations made by the guardians	25	0	0
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	65	0	0

The transactions in which the litigation originated, were as follows:—In March 1835, several parishes were formed into a union, under the Poor Law Amendment Act, called, "The Witney Union," and shortly afterwards, the guardians were advised by the assistant Poor Law Commissioner, to erect a workhouse for the Union. They employed a Mr. Kempthorne, an architect, for the purpose, and they desired him to submit a plan to their inspection. They also gave him instructions to prepare the necessary drawings and specification. On the 30th of April 1835, Kempthorne wrote to Mr. Leake, the clerk of the guardians, inclosing the form of an advertisement, as follows:—"To builders—The Board of Guardians of the Witney Union are desirous of receiving tenders for the erection of the new workhouse at Witney. The plans and specification may be seen at the office of Mr. Kempthorne, architect, Carlton Chambers, 12, Regent Street, or of Mr. Leake, clerk to the board, Witney. After the 18th of May, sealed tenders must be sent to Mr. Leake, Witney, before the 4th of June." Kempthorne also wrote to Leake, sending him the drawing of the workhouse, requesting that no tracings should be made, telling him that copies of the quantities for the use of the builders would be duly forwarded to him for such as might wish to tender and pay the fee named. The writer also directed that the accompanying instructions should be shewn to the builders.

"Copy of instructions, May 14, 1835.—The builders desirous of contracting for the execution of the Witney workhouse, are informed that the quantities of the works are now in course of being taken out for their use, and will be ready on the 28th instant. Builders requiring a copy of the same, are requested to leave their names, with the sum of 2l 2s., at Mr. Kempthorne's office, or at Mr. Leake's clerk to the Union, Witney, before the 26th instant. The successful competitor will have to defray the expense of taking out the quantities, the charge for which will be stated at the foot of the bill of quantities, when delivered. No tracings or copies of drawings will be allowed." Some other correspondence passed, from which it appeared that the builders in

the country, who were anxious to become competitors, and paid the required fees for the drawings, specification, &c., objected to the proposed mode of taking out the quantities, that is to say, of making out an account of the quantities of the different materials and work which would be required for the erection of the workhouse, and that they were making out the quantities themselves. Upon this latter subject, Kempthorne stated, that as the quantities were taken out for the workmen, and as the successful competitor was to pay, it was useless to take them out again. Finally, the Union being dissatisfied with the conduct of Kempthorne, refused to receive or open the tenders submitted to their inspection, rejected his plans altogether, and adopted those of another architect. Afterwards, on the 15th of July, Kempthorne sent in to the Union his account of professional charges, for the working drawings and specification of the workhouse, together with the surveyor's bill, for the making out of the quantities of the same, for the use of the builders. His own account was for 113*l.* 8*s.* 8*d.*, and at the commencement of the third page, distinct and separate from this account, was that of Mr. James Moon, the plaintiff, No. 9, New Ormond Street, as follows:—"Charge for making out the quantities of the new workhouse at Witney, for the use of the builders, according to the instructions of the architect, delivered to them, which charge is stated in the original bill of quantities, 40*l.* The drawings having been altered according to the direction of the board, made out an altered bill of quantities accordingly, 25*l.*" Subsequently Kempthorne and the defendants entered into a compromise, by which, the sum of 80*l.* was given in satisfaction of his demand, and all controversy upon the subject between these parties ceased. The Union, however, refused to pay Moon his demand, alleging that they never employed or knew anything about him: upon which the action was brought.

At the trial, which took place before Tindal, C.J., at the Sittings after last Michaelmas term, in Middlesex, a verdict was found for the plaintiff.

Talfourd, Serj. obtained a rule for setting it aside and entering a nonsuit, or for a new trial.

Wilde, Serj. and *Wilmore* shewed cause, and contended, that there was no ground for the application. Independently of the advertisement and notification given by the architect to the agent of the defendants, which precluded all idea of ignorance or surprise upon their part, it was proved on the trial, that it was the usage of trade for the architect, who was employed to direct a surveyor to take quantities corresponding with his plans. It may be admitted that there was no direct authority given to Kempthorne, the architect, to employ Moon. But such course was so usual, that the non-employment of a surveyor by the architect, under circumstances like the present, formed the exception to the general rule. The mode in which Moon's bill was made up by the architect, distinct and separate from his own, was conclusive as to what the understanding of the parties was. Neither can the defendants avail themselves of the condition that the expense of taking out the quantities was to be defrayed by the successful competitor, as the circumstance that there was no successful competitor was caused by the conduct of the defendants themselves, who put an end to competition altogether, by suspending the operations, and rejecting Kempthorne's plans. They cited *Webb v. Rhodes* (1), as an authority that there was a sufficient privity between the plaintiff and the defendants to support the action.

Talfourd and *Chilton*, in support of the rule, denied that any inference in favour of the plaintiff was to be drawn from the peculiar mode in which Kempthorne thought proper to make up his accounts, (which were not the subject of litigation,) and append to them the demand of the plaintiff. If such proposition were assented to, the Court would be drawing, from the mode in which certain sheets of paper were arranged, conclusions which should be attained from facts alone. The true criterion by which the case should be decided, is, would Kempthorne be liable in an action to Moon? He clearly would. The case resembles that of *Rigley v. Daykin* (2), where it was held, that there was no privity between the parties, and that

(1) 3 Bing. N.C. 732; s.c. 6 Law J. Rep. (N.S.) C.P. 212.

(2) 2 You. & Jer. 83.

no usage was established; and it is distinguishable from those of *Webb v. Rhodes* and *Grissel v. Robinson* (3), where the party had been actually retained. But there was no retainer here, at least from the guardians; if there was one at all, it was from Kempthorne, and it was to him the plaintiff should look for redress. The evidence upon the trial did not, as is contended for, establish the usage. It appeared that there was sometimes a surveyor employed by the architect, and another employed by the builder, to check the former. If such had been the case here, if two surveyors had been employed, and the operations had been suspended, would the defendants be liable to pay the two surveyors, their own and the one employed by the architect? This was a speculation upon the part of the plaintiff; he took the chance of a successful competitor, by whom he was sure to be paid; and, as there was none, he has failed in his speculation, and has no just claim against the defendants.

TINDAL, C.J.—This question returns at last to the very point at which it has been left by my Brother Talfourd, namely, whether Moon, the plaintiff, was employed by the defendants, and whether a contract for work and labour was entered into. It is not contended that an immediate contract had been formed between these parties—it is not said, that they came into contact, or had been introduced one to the other; but the subject for consideration was, whether Kempthorne, acting within the usual scope of his authority as an architect, an authority recognized and acknowledged, had not employed the plaintiff, a surveyor, to take out the quantities according to his plans and specifications. This was the question submitted to the jury, for their decision: and here I admit that the evidence upon the occasion did not go very far back, nor was it very strong; but still it was left to the jury, after a speech addressed to them by my Brother Talfourd, full of just observations, and which, no doubt, if they were found to possess sufficient weight, would have

induced the jury to find for the defendants. They, however, did not find thus; they have found for the plaintiff, influenced, it is to be presumed, by that which is the maxim of the civil as well as of our law: *contractibus tacite insunt quæ sunt moris et consuetudinis*. And, in my opinion, there is no just reason for disturbing the decision. All parties have agreed, that the mode of tender adopted upon the occasion was beneficial to those who intended to have the buildings erected. If the matter had been left at large; if it had been uncertain what quantities were to be taken out, under the specified plans, the operation would have been found to be on a different footing, and of a different form from that which was intended by the defendants, as guardians; and they who sent in tenders at a low estimate would not have been able to fulfil them at the rate proposed, in consequence of the mistakes which might be committed from there being a larger quantity of work to be taken out, than that contracted for. The present transaction stands upon the same footing, and is to be considered in the same light. Besides, for the purpose of establishing the fact of there being a contract for work and labour, it should be recollected, that in the instructions for the builders there was an intimation, or something like an intimation, sent to Mr. Leake, who, as I understand, was the legal officer of the Union. The intimation was, that the contract was to be an open one, and Leake also declared, that the successful competitor was to defray the expenses of taking out the quantities. How then, can it be said, that when this party had the plans, specifications, advertisements, &c. before him—how can it be said, that he was not to be paid, because there was no successful competitor, when these defendants, by changing their intentions, by, perhaps, adopting another plan, have prevented and put an end to any competition at all? The defendants should, I think, nevertheless, be liable for the amount of those charges, for that which had been done for them by the person employed by their agent, and who had authority for the purpose. It should be also borne in mind, that this person, employed as their architect, upon the 15th of July sent in to the defendants

(3) 3 Bing. N.C. 10; a. c. 5 Law J. Rep. (N.S.) C.P. 313.

an account of his professional charges, specifications, and drawings, together with the demand of the surveyor, whom he, within the scope of the practice and rules amongst builders, had employed. Thus, therefore, there were two subject-matters contained in these accounts, to which the attention of the defendants was called; and when, afterwards, the architect, Kempthorne, entered into an agreement with the defendants, under which, he received a sum far short of that which he claimed, such agreement must, in reason, be assumed to refer to his own bill, and not to comprehend or extend to that of another. It was incumbent upon the defendants at that time to put the surveyor upon his guard, and tell him it was not their intention to pay him; and it appears like a recognition of his claim, when they paid the architect without settling with him. It has been said, that in point of law a contract cannot be supported, the object of which is to impose a liability upon two persons, when there is but one demand for one and the same subject-matter. This may be very true: I do not say that there may be a contract by which two persons may be affected at the same time. But we should consider the different modes of conduct which have been pursued as to this contract. It was understood by all, that if there were a successful competitor, Moon was to be paid by him; and now there is no successful competitor, to whom he can apply for payment, as, in point of fact, there was no competitor at all. If there had been such competitor, and if Moon had not applied to him within a reasonable time for payment, he could not have been remitted to the defendants, as he did not avail himself of the condition upon which he himself acted. In fine, I agree in opinion with the jury, who found that the plaintiff had a claim against the defendants, who set him in motion. I also think, that a contract for work and labour has been established, and that the plaintiff was entitled to recover.

PARK, J.—The real question for our consideration is, whether Moon is to be paid at all. It may be admitted, that there has not been an express contract upon this occasion between these parties. But there are circumstances from which a

contract may be implied, and consequently they who derived benefit from the work of a person employed by an authorized agent, must make compensation for the advantage which they have received. It is certain, that Kempthorne had the authority to employ Moon. It has been said, the plaintiff was to be paid by a successful competitor, and as there was none, he was not to be paid at all. This is outrageous, and is impossible to be supposed. Let us also consider what followed, when Leake, the agent of the defendants, entered into a compromise with Kempthorne for his demand. He must be the most singular of all beings, if he could think of compromising the whole for 80*l.*, without giving notice to Moon.

BOBANQUET, J.—I am of the same opinion. The jury have found that the architect here acted according to the known practice and usage of the trade, and the verdict should be clearly and unquestionably wrong, before it should be disturbed. The architect was directed to submit his plans and specifications; but he was not to take out his own quantities. He has done as he was directed. He has not charged for the tenders. True, the quantities were to be taken out by somebody; the defendants gave notice before the tenders were made, that the successful competitor was to pay for taking out the quantities. The architect, then the servant of the defendants, employed Moon to take them out. Did he, in so doing, demean himself according to the course and usage of business? the jury found he did. Was not Kempthorne also their servant? the jury found he was. Now, suppose the defendants had, through their agent, employed Moon to take out the quantities, and stopped; suppose they, for very good reasons, changed their minds, and refused to accept any tenders, and consequently there was no successful competitor, who then was to pay Moon? No one? It was left as a question for the jury, whether the architect, in employing the plaintiff, acted as a principal or as agent to the defendants; the latter has been found, and they are bound to pay. It is consistent with law and justice, that the guardians should pay Moon for that which he has done for them.

COLTMAN, J.—It is contended in the case now before us, on the part of the plaintiff, that if there was a successful competitor, he was to pay Moon for taking out the quantities; but, if there was none such, he was to be paid by the Union. The defendants, on the other hand, affirm, that if there was no successful competitor, he, Moon, was not to be paid at all. It was, they say, a speculation on his part, into which Moon entered. Now, such undoubtedly might be the bargain; but it is not very probable; and such is not to be inferred without evidence, and none has been given; consequently, the general rule must take place, that when work has been done for the benefit of a party, he by whom it has been done must be paid by somebody. This rule, say the defendants, is also admitted; the plaintiff, say they, should be paid, but not by us, as he never contracted with us, or with our authorized agent. Then the question comes to this, did the architect act as an agent, or did he act for himself? As to that, it has been found, that by employing Moon for the defendants, he acted according to the course and nature of the architect's business. This is sufficiently clear to those who are conversant with the mode in which the architect's trade is carried on in late times. It is not usual for the architect to be under advances; he merely certifies the bills. Money of his principals may occasionally pass through his hands, but still it is not usual for him to advance, and his common practice is to employ surveyors to take out the quantities. This was duly notified to Leake, the officer of the defendants. Upon this, however, I lay no great stress, as the architect, in what he had done, had merely acted in discharge of his duty. The circumstances were, in fine, sufficient to lead the jury, and the Court, to the inference, that the architect acted under the authority of the defendants. There was also a recognition of his bill, and if it was the intention of the defendants to include in the payment, which they made to Kempthorne, the payment of the plaintiff, they were bound, acting with honesty as between man and man, to give him distinct notice. This, however, they have not done. If, upon the other hand, their intention was not to pay Moon,

such intention was dishonest, and the verdict was right. The rule should be discharged.

Rule discharged.

1837. }
June 9. } BAYLEY v. HOMAN.

Covenant—Accord and Satisfaction—Pleading—Consideration.

In an action against the defendant, for breach of covenant, in not repairing and leaving in repair, he pleaded, that, after the expiration of the term, and before commencement of the suit, and whilst the premises were ruinous, prostrate, &c., an agreement had taken place between the parties, that in consideration that the defendant, at the request of the plaintiff, had become and then was the occupier of the premises, at a certain rent; and had also, at the request of the said plaintiff, promised the plaintiff to repair and amend the said premises, on or before a certain day, he, the said plaintiff, would forbear and give time to the defendant until the said day, for the due reparation, &c., without, in the meantime, commencing or prosecuting any action, in respect of the breaches of covenant; and, in case the said tenement should be so well repaired upon the said day, he, the plaintiff, would relinquish and forego all claim upon him, the defendant. The plea then alleged, that, though the defendant still and during the time continued tenant to the premises, and was ready to repair, so that the premises should be in a good state by and on the said day, whereof the plaintiff had notice; yet the plaintiff wrongfully commenced his suit before the said day:—Held to be ill, as it amounted to a plea of accord not executed; also, because there was no good consideration, either for the defendant's promise to the plaintiff to repair the premises before a certain day, or for the plaintiff's promise to the defendant to forbear to sue until that day.

Declaration, by the reversioner, against the assignee of a lease, on a covenant to keep and leave the demised premises in repair, averring as a breach, that, the defendant did not, nor would, after the assignment, and during the continuance of the demise, and whilst he continued such as-

signee as aforesaid, at his own costs and charges, or otherwise, from time to time, and at all times during the said term, well and sufficiently repair, amend, maintain, support, uphold, fence, glaze, scour, &c., said premises in the said indenture demised, and did not, nor would, at the end and expiration of the said term, peaceably and quietly leave, surrender, and yield up unto the plaintiff, so entitled to the reversion thereof, and inheritance of and in the said demised tenements as aforesaid, the said messuage, &c., and all improvements therein being so well and sufficiently repaired, amended, supported, upheld, fenced, paved, glazed, &c.; but wholly neglected so to do; and, on the contrary thereof, the defendant, after the making of the said indenture of lease, and of the said assignment, and during the continuance of the said demise, and whilst he was such assignee as aforesaid, to wit, on the 1st of January 1835, and thence for a long space of time, to wit, until the end and expiration of the said term, suffered and permitted the said messuage and premises to be and continue, and the same were, for and during all that time, ruinous, prostrate, fallen down, dilapidated, and in great decay, for want of well and sufficiently repairing, amending, maintaining, &c.; and the defendant, at the end and expiration of the said term, left, surrendered, and yielded up the said premises unto the said plaintiff, and divers improvements thereon, so badly and insufficiently repaired, amended, &c.

Plea—That, after the expiration of the said term, in the said declaration mentioned, and long before the commencement of this suit, to wit, on the 25th of December 1835, the said messuage, or tenement and premises, being so ruinous, prostrate, fallen down, dilapidated, and in decay, as in the said declaration alleged, it was agreed, by and between the said plaintiff and the said defendant, and the said plaintiff then promised the said defendant, that, in consideration the said defendant, at the request of said plaintiff, had become and then was the occupier of the said messuage or tenement and premises, with the appurtenances, to hold the same as tenant thereof to the said plaintiff, to wit, as tenant thereof from year to year, at and under a certain yearly

rent, &c.; and had also, at the like request of said plaintiff, promised the said plaintiff well and sufficiently to repair and amend the said messuage or tenement in the manner required by the said indenture, in said declaration mentioned, on or before the 12th of April 1836, he, the said plaintiff, would forbear and give time to the said defendant, until the said 12th of April 1836, for the due reparation and amendment of the said messuage or tenement, &c. in the manner required by the said indenture as aforesaid, without, in the mean time, commencing or prosecuting any action or suit against the said defendant, in respect of the said breaches of covenant in the said declaration mentioned, or any part thereof; and that, in case the said messuage or tenement and premises should be so well and sufficiently repaired and amended as aforesaid, on the said 12th of April 1836, he, the said plaintiff, would then relinquish and forego all claim and demand whatsoever of him, the said plaintiff, upon or against the said defendant, in respect of the said breaches of covenant, or any part thereof; and although, from the time of the making of the said agreement, and thence until, and at the time of the commencement of this suit, the said defendant, who, during all that time, remained and continued tenant of the said messuage or tenement and premises to the plaintiff as aforesaid, was always ready and willing to perform and fulfil the said agreement on his part, and well and sufficiently to repair and amend the said messuage or tenement and premises in the manner required by the said indenture as aforesaid, so that the same should be so well and sufficiently repaired and amended as aforesaid, by and on the said 12th day of April 1836; whereof the said plaintiff continually had notice; yet the defendant, in fact, says, that the said plaintiff, not regarding his said agreement and promise, wrongfully commenced his suit in this behalf against the said defendant before the said 12th of April 1836, to wit, on 6th of April 1836, and this the defendant is ready, &c.

In his replication, the plaintiff denied the agreement and promise set forth in the plea, concluding to the country. *Similiter*.

A verdict having passed for the defendant—

Stephen, Serj. obtained a rule for entering judgment for the plaintiff *non obstante veredicto*. The application was made on the ground of the plea being clearly bad, inasmuch as it amounted to one of an accord not executed. He cited *Onely v. Earl of Kent* (1).

Talfourd, Serj., and *Gurney*, shewed cause.—The supposition, that the plea furnishes no answer to the action, inasmuch as it is merely that of an accord, without satisfaction, is incorrect. The case may be compared to that of *Good v. Cheeseman* (2), which was held to be not an accord and satisfaction strictly and properly so called; but a new agreement, substituted for the original contract with the debtor; and thus it differed from *Cartwright v. Cooke* (3); and it was within the doctrine laid down in *Com. Dig. tit. 'Accord,'* (B) 4: "so an accord, with mutual promises to perform, is good, though the thing be not performed at the time of action, for the party has a remedy to compel the performance;" and to the same effect is *Case v. Barber* (4). They also referred to *Alden v. Blague* (5).

Stephen, Serj., in support of the rule.—The plea is clearly pleaded as an accord and satisfaction, and no satisfaction is shewn. If, however, the Court were to interpret it as the substitution of one agreement for another, in consequence of which the plaintiff's right to sue should be suspended, such interpretation would not avail the defendant, as, in such case, the substituted agreement should be under seal. The doctrine contended for is established beyond dispute, by a variety of cases—by *Adams v. Taplin* (6), where judgment was stayed, because the satisfaction was uncertain, viz. to employ a man to work three or four days—by *Peytoe's case* (7), where it is laid down, "that every accord ought to be perfect and complete; for if divers things are to be performed by the accord, the performance of part is not sufficient, but all ought to be performed;

also, if the thing be performed at a day to come, tender and refusal are not sufficient, without actual satisfaction and acceptance;" neither can an accord, executory even in part, be pleaded in answer to the action—*Payne v. Orton* (8); and, in *Allen v. Harris* (9), it was said by the Court, "The books are so numerous that an accord ought to be executed, that it is now impossible to overthrow all the books." *Lynn v. Brace* (10), and *James v. David* (11), confirm the doctrine, and lead irresistibly to the same conclusion. The current of authorities upon the subject is too strong to be affected by the decision of the Court in *Case v. Barber*. *Good v. Cheeseman* is not to be understood in the point of view contended for, nor does it apply to the present case; it stands upon its own peculiar grounds. If the plea there was considered as an accord and satisfaction, it would be open to exception. But it is not to be so considered; it is to be viewed as an agreement between creditors and debtors, by which a fund is supplied; and such agreements are allowed to operate, provided they furnish an immediate cause of action.

Cur. adv. vult.

TINDAL, C.J.—The motion which has been made by the plaintiff, for judgment *non obstante veredicto*, raises the question, whether the plea is a legal bar to the action. The plea alleges, that, after the covenant for repairing and leaving in repair had been broken by the defendant, and damages for such breach had been incurred, an agreement was entered into between the defendant and the plaintiff, that, in consideration that the defendant, at the request of the plaintiff, had become tenant of the premises from year to year, under a certain rent, and had, also, at the like request of the plaintiff, promised the plaintiff to repair the demised premises before the 12th of April then next, he, the plaintiff, would forbear and give time to the said defendant, until the said 12th of April, for the reparation, without bringing an action in the meantime; and that, in case the premises should be well and sufficiently re-

(1) *Dyer*, 355, b.

(2) 2 B. & Ad. 328; s. c. 9 Law J. Rep. K.B. 234.

(3) 3 B. & Ad. 701; s. c. 10 Law J. Rep. K.B. 261.

(4) *Sir T. Jones*, 158; s. c. *Sir T. Raym.* 452.

(5) *Cro. Jac.* 99.

(6) 4 *Mod.* 88.

(7) 9 *Rep.* 78.

(8) *Cro. Eliz.* 305.

(9) 1 *Lord Raym.* 122.

(10) 2 *H. Bl.* 317.

(11) 5 *Term Rep.* 141.

paired on the said 12th of April, then, that he, the plaintiff, would relinquish all claim and demand, in respect of the said breaches of covenant. If the defendant had been able to aver in the plea, that the premises had been well and sufficiently repaired before the 12th of April, and the action had not been commenced until after that day, there would have been no doubt but that the plea would have been good, as a plea of accord executed and satisfaction. But the plea, as it stands, stating it the most favourably for the defendant, is the plea of an accord which is executory only, and not executed. It appears, by a long train of authorities, commencing with that in *Dyer*, 356, that a plea of accord, to be a good plea, must shew an accord which is not executory at a future day, but which ought to be executed, and has been executed before the action brought. The same law is laid down in *Roll. Abr.* 129, 'Accord,' pl. 11, 12, 13: again, in *Peytoe's case*, where it is broadly stated by the Court, that, in an accord, if the thing is to be performed at a day to come, an averment of tender and refusal is not sufficient, without actual satisfaction and acceptance. In *Allen v. Harris*, the Court say, "the books are so numerous that an accord ought to be executed, that it is now impossible to overthrow all the books; but if it had been a new point, it had been worthy of consideration." In the next case in order of time, *Lynn v. Brace*, the same principle is upheld by Eyre, C. J. and the Court of Common Pleas; and, in *James v. David*, by Lord Kenyon and the Court of King's Bench; and we think this current of authority is too strong to be met by the doubts expressed in the case of *Case v. Barber*; "that, though, in former times, the pleading upon accord, without execution in the whole, is not good, according to *Peytoe's case*, yet now, the law being taken that mutual actions lie on such agreements, such plea shall be allowed;" independently of the circumstance, that the plea of accord, in that case, was not held to be good, for want of consideration for the defendant's promise. But, as to the case of *Good v. Cheeseman*, in which evidence of an accord, though not executed, was held to be a good answer to the action, it may be considered as stand-

ing upon its own peculiar ground; the agreement in that case amounting to a valid new contract, between the other creditors and the debtor, capable of being immediately enforced. We think, therefore, if this plea amounted to a plea of an accord, made upon mutual promises, it must, upon the authorities above referred to, be held to be bad. But the plea appears to be open to another objection, namely, that there is no good consideration laid, either for the defendant's promise to the plaintiff, to repair the premises before the 12th of April, or for the plaintiff's promise to the defendant, to forbear to sue until that day. The defendant was liable to damages, under the covenant immediately, for not repairing; and therefore the promise by him to repair before the 12th of April, can be no consideration for the plaintiff's promise to forbear; and the defendant's promise to forbear by the 12th of April, is not made until after the new tenancy is actually contracted; and, therefore, such tenancy is no consideration for his subsequent promise. Upon this ground, therefore, independently of the former, we think the plea bad; for no action could be supported, either against the plaintiff or the defendant, upon the substituted contract stated by way of accord.

Judgment for plaintiff, non obstante veredicto.

1837. }
June 12. } ERNEST V. BROWNE.

Costs—Pleading.

In an action of debt, the plaintiff declared in one count for work and labour, and in another for goods sold and delivered. To the latter count, the defendant pleaded that he was never indebted, except in a certain sum, and as to that, a payment into court. Upon the first count, a verdict was found for the defendant, and the plaintiff had a verdict upon the second, with nominal damages, as it appeared to the jury that the defendant was, at some time, indebted to the plaintiff in a larger sum than that which he paid into court. Upon the taxation, the officer allowed the defendant the general

costs of the cause, deducting those of the count on which the verdict was found against him, under the impression that the charge for work and labour, on the count for which the defendant had a verdict, was the important question in the cause:—Held, that he was wrong in so doing, and a rule for the review of his taxation was made absolute.

In this action of debt for work and labour, and goods sold and delivered, the defendant pleaded to the count for goods sold and delivered, that except as to 3*l.* 7*s.* parcel, &c., he was never indebted; and second, as to that sum of 3*l.* 7*s.*, payment into court. To this plea, the plaintiff replied, that the defendant was indebted to a greater amount than the sum of 3*l.* 7*s.*, in respect of the cause of action in the said count mentioned; and, upon this, issue was joined. A verdict was found for the defendant, upon the issue joined on the count for work and labour, and for the plaintiff, on the count for goods sold and delivered, with nominal damages (1).

Upon the taxation, the Prothonotary, conceiving that the real matter in dispute was the charge for work and labour, (on the count for which the defendant had a verdict,) and that the verdict upon the count for goods sold and delivered, with nominal damages, was found for the plaintiff merely on account of an informality in the defendant's pleading, allowed the defendant the general costs of the cause, deducting from his briefs a proportionable part, applicable to the count for goods sold and delivered. The sum allowed to the parties by the officer, amounted to 68*l.* 7*s.* 2*d.* for the defendant's costs, and 27*l.* 14*s.* for those of the plaintiff, leaving a balance in favour of the defendant of 40*l.* 13*s.* 2*d.* The plaintiff was dissatisfied with this result; and

Wilde, Serj. obtained a rule for the review of the taxation. He urged that the officer had taken an erroneous view of the proceedings, inasmuch as the plea of never indebted except as to 3*l.* 7*s.*, was not, as he supposed, confined to the count for goods sold and delivered, but was appli-

cable to that for work and labour; consequently, no answer at all was given to the count for goods sold and delivered; and the verdict with nominal damages, found for the plaintiff, should extend to all the counts.

Alexander and Bayley shewed cause, and contended, that the mode of taxation adopted by the officer was that which was required, at once, by law and the justice of the case. The plea of never indebted except as to 3*l.* 7*s.*, did not, as was said, apply to the count for work and labour, the demand for which was the principal cause of action. The plea was confined to the count for goods sold and delivered, and the verdict, with nominal damages, was found for the plaintiff upon that count, in consequence of the mistake of the defendant in pleading that he was never indebted in a larger sum than that of 3*l.* 7*s.*, whereas, it appeared that he was at one time indebted to the amount of 5*l.*

Wilde, Serj. was heard in support of the rule.

TINDAL, C.J.—Suppose the question for trial were, whether the party was ever indebted or not, and the verdict passed for the plaintiff, the only damages he could obtain would be, the costs of coming to try the cause; and when the parties were before the officer, it was these, the general costs in the cause, which were claimed. This, as it appears to me, is the ordinary case of a plaintiff, who makes distinct separate demands, and obtains a verdict on one and loses it on another. In such case, he is, under circumstances like the present, entitled to the general costs of the cause, subject to the deduction of the costs in respect to the matters found against him. When the jury gave a shilling damages, they must have thought that the defendant was at one time indebted to the plaintiff in a larger sum than that which he alleged in his plea of never indebted except, &c. In fine, in my opinion, the defendant misconceived his defence, and the rule for the review of this taxation by the officer must be made absolute.

The other Judges concurring—

Rule absolute.

(1) Vide 3 Bing. N.C. 674; s.c. 6 Law J. Rep. (N.S.) C.P. 211, where the case was before the Court, upon a motion to enter up the verdict for the defendant, on the count for goods sold and delivered.

1837. }
May 23. } SCOTT v. MILLER.

Money had and received—Ship and Shipping—Bill of Exchange.

The captain of a ship drew when abroad, a bill upon the owner's agent for value received in stores for the ship. The bill being duly honoured,—Held, in an action by the owner against the captain, for money had and received, that, as there was no evidence of the money reaching the defendant, as he was only authorized to raise money so as to make the owner liable for the necessary repairs of the ship, and as it appeared that some repairs had been done, the drawing of the bill was not evidence sufficient to maintain the action.

This was an action for money had and received by the defendant to the plaintiff's use. The facts of the case appeared to be as follows:—The defendant, who was captain of the plaintiff's vessel (the *Countess of Dunmore*) drew, whilst at Rio de Janeiro, a bill for 137*l.*, at ten days after sight, upon Halkit, the plaintiff's agent. The bill was expressed to be for value received in stores per barque *Countess of Dunmore*, as per advice, and was drawn in favour of Hudson, Weguellen & Co., ship-brokers at Rio, or their order.

Upon the trial, at Guildhall, before Tindal, C. J., the facts of the payment of the bill, and of the agency of Halkit, upon whom the bill was drawn, were proved; but there was no proof of any part of the sum coming into the defendant's hands, neither did the plaintiff put in evidence the letter of advice relating to the repairs. It was objected for the defendant, that the drawing of the bill for the purpose therein specified, the repairs of the ship, was not evidence to support the action for money had and received; but, it having also appeared, from the evidence of the defendant's witness, that the cost of the repairs, which had been effected, might have amounted to a less sum than that for which the bill was drawn, and that the port charges would also amount to a certain sum, the learned Chief Justice was of opinion, that the bill furnished some evidence in support of the plaintiff's claim, and the jury returned a verdict for him for 125*l.*

Wilde, Serj. obtained a rule for setting it aside, and having a new trial, on the ground, that the bill of exchange furnished no ground for supporting the conclusion at which the jury had arrived (1).

Whately shewed cause, and admitted the liability of the owner for money expended for the repairs of his ship. This could not be denied, as it was well established by a variety of cases and authorities—*Rocher v. Busher* (2), *Palmer v. Gooch* (3), *Evans v. Williams* (4), *Bogle v. Atty* (5), *Thacker v. Moates* (6). But then it is decided in these cases, and it is to be inferred from these authorities, that the repairs for which the owner is made liable were actually necessary, and that the money was expended in the expenses of such; and in *Bogle v. Atty*, it was said by Dallas, C. J., "It is not sufficient to prove a loan of money merely to the captain; it must be shewn that the money was lent for necessities, and that it was applied in discharge of the expense of those necessities." In the absence of all proof of the advance of money being for that which was actually necessary for the ship, it should be inferred, that the proceeds of the bill were for the captain's own use, and consequently the verdict should not be disturbed.

Wilde, Serj., Bompas, Serj., and Cleasby, in support of the rule. It is admitted, that the defendant could not charge the plaintiff for money taken up, if it was not actually necessary for the use of the ship, and also expended as such necessity required—*Abbott on Shipping*, 5th edit. p. 100; *Carey v. White* (7). In such case the consent of the owner is not necessary to establish his responsibility—*Robinson v. Lyall* (8). But, as all the authorities sanction the doctrine, that money could not be

(1) There was also a claim made by the plaintiff for a certain sum, retained by the defendant as prime, to which it was said he was not entitled; but, as to this, no opinion was given by the Court. Upon moving, the learned Serjeant referred, in reference to this part of the case, to *Charlton v. Colesworth*, 1 Ry. & Mo. 175; and to *Best v. Saunders*, 1 Moo. & Malk. 208.

(2) 1 Stark. 27.

(3) 2 Stark. 428.

(4) Note to *Abbott on Shipping*, 5th edit. p. 103; 7 Term Rep. 431, n.

(5) Gow. 50.

(6) 1 Moo. & Rob. 79.

(7) 1 Bro. P.C. 284.

(8) 7 Price, 592.

raised by the captain so as to charge the owners, unless it was wanted for necessary repairs, and expended for the procuring of such—it follows that the raising of money by the captain with any other intention or object, would be a breach of his duty, which the Court will not, in the absence of evidence, presume that he has been guilty of. On the contrary, they will conclude, that the money has been raised for and applied to the only legitimate purpose for which it could be raised, or to which it could be applied. Neither is the drawing of the bill *per se* conclusive evidence of money being had by the defendant to the use of the plaintiff. The case may be compared in principle to that of *Case v. Roberts* (9), where it was held, that an action for money had and received will not lie, to recover a sum paid upon trust for a specific purpose, unless it be shewn that the trust is closed, and that a balance remains in the hands of the trustee; or to *Cary v. Gerrish* (10), where the receiving of cash by the defendant for a draft or cheque, drawn by the testator upon his banker, and payable to him by name out of money of the testator, then in the bank, was ruled not to be evidence of itself to establish a loan of money by the testator to the defendant; or to *Edden v. Read* (11), where it was held, that a receipt is not evidence to support an action for money had and received, to recover back the money. Besides, it appeared upon the trial, that some money had been expended upon the repairs of the ship, and the plaintiff gave no evidence of the particular sum which he was entitled to recover, which, according to the opinion of Lord Tenterden in *Harvey v. Archbold* (12), he was bound to do; the defendant's case is still further strengthened by *Nightingale v. Devisme* (13), where Lord Mansfield said, "We do not say, that an action cannot be framed so as to come at justice in this case. But, we are all of opinion, that this action for money had and received to the use of the plaintiff, will not lie in the present case, where no money was received."

- (9) Holt, N.P. 500.
- (10) 4 Esp. N.P. 9.
- (11) 3 Campb. 358.
- (12) 3 B. & C. 626.
- (13) 5 Burr. 2589.

TINDAL, C. J.—I am, I own, of opinion, that the justice of this case cannot be satisfied, unless it shall be submitted to the consideration of another jury. The bill, from its form, appears to be drawn for necessities for the vessel, for which it is agreed upon all hands that the owner is liable if the money has been really expended for such purpose; and there is no evidence to shew that any portion of the sum advanced has reached the defendant, or has been appropriated by him. Besides, the plaintiff will not lose his remedy against the defendant for fraud or negligence (if he has been guilty of either) by the determination of the Court to send the case to a new trial. The rule should be made absolute.

The other Judges concurring—

Rule for a new trial, absolute.

1837. }
June 8. } JACKSON V. JACOB.

Goods sold and delivered—Tender—Principal and Agent.

In an action to recover the difference in the market value of certain shares in a railway, sold, but not delivered to the plaintiff by the defendant, the plaintiff alleged a readiness, upon his part, to comply with the conditions of the contract, and a tender of the money to the brokers from whom he had made the purchase:—Held, that inasmuch as the defendant, in a letter to the plaintiff's attornies, in answer to one from them, informing him that a tender had been made by the plaintiff to the brokers, had not repudiated the brokers as his agents, or denied their authority to receive the money, but evinced a wish to come into certain terms; such conduct amounted to a recognition by him that the brokers were authorized, and the tender was good and valid; and consequently a verdict found for the plaintiff should not be disturbed.

Quære—whether a tender of the price of articles purchased is necessary, where the vendor admits that he has them not in his possession, and cannot deliver them.

This was an action of assumpsit to recover the difference in value between the

price of certain shares in the Great Western Railway, sold, but not delivered by the defendant to the plaintiff, upon the 1st of December 1836, when the purchase was made, and at the market value on the 10th of January of the present year.

The plaintiff in his declaration alleged, that he was ready and willing to accept the shares, and a tender of the price to the defendant; which allegations were traversed by the defendant in his second plea, and issue joined thereon.

At the trial, before Patteson, J., at the Liverpool Assizes, it appeared that the contract for the purchase of the shares was made by G. Batley, the broker of the plaintiff, with the defendant's brokers, Atkinson and Townley; and the following correspondence was given in evidence:—

"Liverpool, January 10, 1837.

"Mr. Henry Jacob.—Sir, on the 1st of December, ult., I purchased, on behalf of my friend Mr. John Jackson, fifty shares Great Western Railway, and which were sold to me, and for your account, by your brokers, Messrs. Atkinson & Townley. After making repeated applications to those gentlemen, by whom I have been put off from time to time, they now refer me to you, and I beg to say, that unless the shares are delivered to-morrow, I shall instruct my solicitor to proceed against you for the amount of the difference in value, between the price at which I purchased the fifty shares, and the market value of this day. Yours, &c.

"G. Batley."

Letter from the defendant in reply.

"Liverpool, January 12.

"Mr. G. Batley.—I should have replied to your letter per return, but that I expected to be in Liverpool, but was unavoidably detained in Manchester, and, since my arrival here, have been engaged with my solicitors, respecting a quantity of Westerns, bought by me from a party in Bristol at a low price. With regard to the fifty shares sold to you on my account by Messrs. Atkinson & Townley, the reason they have not been delivered has arisen from the defalcation of the party above alluded to. I do assure you, I am most anxious to fulfil all my engagements, and will do my best to satisfy every one; all I require is a little time to arrange matters; and I

think it is not asking too much, in requesting, under the circumstances, that such may be granted: at all events, the market for Westerns is evidently falling, and if you are compelled to buy them in, I request you will wait a short time, as I think you will get them at lower prices than the present, and any deficiency that may arise I shall endeavour to arrange if time be given. In conclusion, I beg to state that the non-delivery of the shares is owing to the circumstances stated, and the heavy losses I have had to sustain within a very recent period. Mr. Townley is fully aware of the circumstances in Bristol, and can corroborate the same. I am, &c.

"H. Jacob."

Then came a letter from the plaintiff's attornies to the defendant, to the following effect:—

"January 12.

"Dear Sir—Since you left this morning, Mr. John Jackson, a client of ours, has called upon us relative to a contract he made through his broker, Mr. G. Batley, for the purchase from you of fifty shares in the Great Western Railway, on the 1st of December, at 30*l.* paid, and 7*l.* 10*s.* premium per share. Mr. Jackson this day made a tender of the price to Mr. Townley, who referred him to you, and Mr. Jackson has requested us to inquire what arrangement you are prepared to make as to these shares. If, as we presume, you are not prepared to deliver the shares, Mr. Jackson, although he has sold them, will agree to cancel his contract with you on reasonable terms, and you had therefore better come across, or authorize Messrs. Atkinson & Townley to arrange the matter with him. Requesting to hear from you by return of post, we are, &c.

"Lowndes & Robinson."

To this the defendant replied, in the following terms:—

"Manchester, January 13, 1837.

"In reply to your letter of yesterday, I beg to say, I wrote to Mr. Batley on the subject, previous to my leaving Liverpool. It is my intention to be over on Monday next, when I shall endeavour to arrange with you respecting the shares. I shall, at the same time, bring with me the various documents, &c.

"Henry Jacob.

"To Messrs. Lowndes & Robinson."

The jury found a verdict for the plaintiff, leave being reserved to the defendant to move to reduce the damages to nominal.

Alexander, on obtaining the rule for that purpose, referred to *Bryan v. Lewis* (1), where it was ruled by Lord Tenterden, that if a man sells goods to be delivered by a future day, and neither has the goods at the time, nor has entered into any prior contract to buy them, nor has any reasonable expectation of receiving them by consignment, but means to go into the market and buy the goods which he has contracted to deliver, he cannot maintain an action for damages for non-performance of the contract.

Cresswell and *Crompton* shewed cause, and contended, that there was no ground for the application. The fact of the tender, upon which issue had been joined, and which was peculiarly for the decision of the jury, had been found in favour of the plaintiff. Neither was it necessary for the plaintiff to have made an actual tender; an averment of his readiness to perform the conditions would have been sufficient—*Pordage v. Cole* (2), *Rawson v. Johnson* (3), and *Waterhouse v. Skinner* (4), where it was held, that an averment of the plaintiff's readiness and willingness to pay for the article to be delivered by the defendant, without any allegation of an actual tender of the money, was sufficient. The letters of the defendant, upon this occasion, are decisive, more especially that of the 13th of January, in answer to one of the 12th, in which he is informed that a tender has been made to his brokers, who referred the party to him; and he, the defendant, does not repudiate the brokers, nor deny their authority to receive the amount tendered. He thus recognizes the validity of the tender, and he should not now be allowed to retract. They also referred to *Capel v. Thornton* (5) and *Wilmott v. Smith* (6).

Wilde, Serj., Alexander, and Wightman, in support of the rule, urged, that the

issue found for the plaintiff, as to the tender, had not been substantiated. The consequence of refusing the defendant's application would be, to establish as a doctrine, that the broker who has authority to sell, has also an authority to receive the proceeds of the sale, a doctrine fraught with danger to merchants. The Court, in forming its opinion, would be guided by the decision in *Bingham v. Allport* (7), where it was held, that a tender, made to the clerk, who at the time disclaimed authority from his master to receive the debt, was insufficient. Neither could any conclusion, beneficial to the plaintiff, be deduced from the defendant's letter, in answer to that in which he is informed that a tender has been made to Messrs. Atkinson & Townley, for, when such alleged tender was made, the agency had terminated—the transaction in which these persons had been employed, was at an end. They were not then the defendant's agents at all; they had then no authority whatever; and this distinguished the case from *Moffat v. Parsons* (8), where the tender to a clerk was held to be a good tender to the principal, inasmuch as that clerk was personally authorized to receive money.

TINDAL, C.J.—The question now submitted to our consideration, arises upon the issue joined upon the second plea, which the defendant has pleaded to the plaintiff's action, and in which he traverses the tender made by the plaintiff; and the question, it should be recollected, comes before us after the jury have found a verdict for the plaintiff upon this very issue; and it is for us now to determine, whether the verdict should or should not be disturbed upon the very point which has been already submitted to the jury by the Judge. In forming a conclusion upon the subject, it is not necessary to decide whether a tender made to a broker who has sold goods for his principal, is or is not sufficient in law. It is not upon such ground I come to the conclusion which I am about to express, but I will state the grounds upon which I form my opinion: I form it upon the contents of the letter

(1) Ry. & Moo. 386.

(2) 1 Saund. 320, n. 4.

(3) 1 East, 203.

(4) 2 Bos. & Pul. 447.

(5) 3 Car. & Pay. 352.

(6) Moo. & Malk. 238.

(7) 1 Nev. & Man. 398; a. c. 2 Law J. Rep. (N.S.) K.B. 86.

(8) 5 Taunt. 307.

which has been produced; and I think the fair inference to be drawn from this letter is, that the tender to the broker, under the circumstances of this case, is a good and valid tender. For the purpose of forming our decision, let us look at the situation of the parties. The defendant had not the shares; this is admitted by the pleadings; consequently, they could not be delivered. The tender, therefore, would have been merely one of form, as the shares which the defendant had not could not by possibility be delivered. Be it, however, recollected, that I do not urge this observation for the purpose of excusing the want of a tender where such is necessary; but when a letter, written by the defendant upon a subject like this is equivocal, and makes it doubtful whether the tender was good or not, we shall not, I think, be doing any great violence to such letter, if we hold that the tender is admitted to be good. A letter was written on the 12th of January; and when the defendant writes his answer on the following day, knowing what had been done, and that a tender had been made, he closes with the offer which is made after the tender, and declares his intention to come over on the morrow. This answer, as it appears to me, amounts to a ratification of all that has been done: it admits, I think, that a contract had been entered into—that a tender had been made to a party properly authorized; and its propriety should not now be disputed. If I may resort to an argument deduced from analogy, in support of the conclusion at which I have arrived, the case resembles that in which the indorser of a bill of exchange, by paying the amount, admits that every previous and preliminary step has been complied with. Under all the circumstances, the defendant has, I think, admitted the tender to be formally good; and the rule should be discharged.

PARK, J.—I am a great enemy to the discussion of points on which it is unnecessary to decide. I, therefore, will not enter into any argument as to the readiness and willingness of the party, neither am I called upon to discuss the question, whether a tender made to a broker, merely authorized to sell, is good. It is equally unnecessary to consider whether an authority to sell is, *per se*, an authority to re-

ceive. I will come to a decision upon the particular circumstances of the case. We cannot, as I think, read these letters, and consider their dates, without seeing, in the exercise of that common sense which governs transactions between man and man, that they amount to a ratification of that which has been done—that the brokers had an authority which had not been revoked. Upon this point it should be also recollected, that Townley was not examined, as I think he should have been. Atkinson & Townley refer the plaintiff to the defendant. They do not say that they are actually rejected as agents by the defendant, but their meaning is, that, in the present state of the market, they will have nothing more to do with the shares—that consequently the party is not to look to them; and they refer him to the defendant himself. In a letter of the 12th of January, Lowndes & Robinson, the immediate agents of the plaintiff, tell the defendant, if he did not know it before, that a tender of the money has been made to the brokers. What, in such case, would a man of sense say? would he not write an answer to this effect—"Why do you speak to me of a tender to Atkinson & Townley, they are not my agents, they have not been authorized by me"? Instead of saying this, he immediately admits the whole, or he says in answer that which is equivalent to such admission. He does not say, "I do not employ Atkinson & Townley, I have no knowledge of them now; they were once my agents, it is true, but we have quarrelled." He does not write this, or to this effect, but he is totally quiescent on the subject. Thus the tender is, in my opinion, good, and the rule should be discharged.

VAUGHAN, J.—I agree. The case has, I think, been reduced to a very narrow point, by the observations of the learned Judge which are added to the report. The question turns entirely upon this, whether the tender is or is not sufficient. It is unnecessary to discuss the question, whether the delivery of the shares was a condition precedent to the payment of the money, or one concurrent with it. From the letters, it is impossible not to see that there was a clear recognition of the authority of the brokers; if such was not the case, would

not the defendant, upon receipt of the letter of the 12th of January, have disclaimed the agency altogether? Instead, however, of this, he evinces a wish to make terms, and mentions his intention of coming over the next day. It is, I think, impossible to read the whole of the correspondence between the parties, without concluding, that the authority given to the brokers was not revoked.

COLTMAN, J.—This is, as it appears to me, an attempt, and not a very laudable one, to defeat the justice of the case. We, of course, cannot strain the law for the purpose of attaining justice, but still it is very satisfactory to make both concur. I do not say whether every broker, who is employed to sell, is authorized to receive money; upon this subject I do not say anything. But, by the usage of the place, the broker may have such authority. Such fact is not, however, stated here; the counsel chose rather to refer the matter to the opinion of the Judges upon another point; and it is to this point alone we are to look. The facts of the case shew the understanding of the parties: it is quite clear what intention they had. As it appears to me, the brokers had such authority; and, in support of this opinion; it should be remembered, that it was to them the party made the tender. What do the brokers do? they no doubt refuse to accept the money; but do they refuse because they have been deprived of their original authority? I deny it. Their conduct did not amount to a denial of an authority to receive money for their principal; the meaning of their conduct was, that their principal could not make a transfer of the shares, as he had them not; and consequently they, the brokers, could not, as honest men, receive the money. The defendant, in the letter which has been referred to, does not deny the authority of the brokers, but says, he will come over on the morrow. He should not now be allowed to advance this objection—he should not be allowed to defeat the justice of the case; and, upon the whole, the rule should be discharged.

Rule discharged.

1837. } DOE d. NORTH v. HARRIET
June 10. } WEBBER.

Ejectment—Mortgagee—Copyhold—New Trial.

In ejectment for certain copyhold premises by the mortgagee, it appeared, that the premises in question were conveyed to him by a common law conveyance, without a surrender to the lord:—Held, that the mortgagee had but an equitable title, and could not support an ejectment.

Quære, whether the defendant, the widow of the mortgagor, who had continued in possession since the death of the mortgagor (who also died in possession) was estopped by the recital in the conveyance from disputing the title of the lessor of the plaintiff.

Upon verdict for the plaintiff, with leave to the defendant to move for a nonsuit, the Court (when they perceive that the objections are independent of, and unconnected with the merits, and such as will probably be removed upon a second trial), for the purpose of saving the plaintiff the trouble and expense of beginning de novo, will grant a new trial, instead of a nonsuit, the plaintiff paying the costs.

Ejectment by mortgagee of copyhold premises against the widow of mortgagor. The mortgagor died in possession of the mortgaged premises in 1828, and his widow continued in possession up to the time of this action.

At the trial, the lessor of the plaintiff relied on the following evidence of title:—Indentures of lease and release, bearing date the 15th and 16th of July 1817, and made between W. Webber (husband of the defendant) of the one part, and R. North, the lessor of the plaintiff, of the other part, whereby, after reciting, that W. Webber under and by virtue of a certain grant by copy of court roll of 27th of March 1786; and by divers mesne acts, &c., then stood lawfully or equitably seised or possessed of, and well entitled unto, a certain dwelling-house, tan-yard, and premises, with the appurtenances, to hold for the terms of the lives of J. Hancock, P. Hancock the younger, and W. Hancock; and that W. Webber had occasion for the sum of 800*l.*, and had applied to North to advance him the same on a mortgage and security of the said copyhold premises thereinbefore mentioned,

and the fee simple and inheritance thereof; it was witnessed, that in consideration of 800*l.*, W. Webber did grant, bargain, sell, assign, and set over unto North, his executors, administrators, and assigns, all the premises, and the copy of court roll and other deeds to the same belonging, to hold to North, his executors, &c. during the natural lives of said J. Hancock, P. Hancock the younger, and W. Hancock, and the life of the longest liver of them, subject to the rents, heriots, &c. due in respect of the same. After reciting certain indentures of lease and release of the 24th and 25th of March 1812, of four parts, and made between the Bishop of Rochester of the first part, John King of the second part, the said W. Webber of the third part, and Edward Boucher of the fourth part, by which last-mentioned indentures, after reciting that the said W. Webber had contracted and agreed with the bishop for the absolute purchase of the inheritance, in fee simple, of the hereditaments and premises thereafter mentioned, for the sum therein expressed, it was witnessed, that, for the considerations therein mentioned, the said J. King, at the request and by the direction of the said bishop, testified as therein mentioned, did bargain, sell, alien, and release, and the said bishop did grant, bargain, sell, alien, release, ratify, and confirm unto the said W. Webber, his heirs and assigns, all those messuages or tenements, dwelling-houses, tan-yard, cottage, shop, and garden, hereditaments and premises thereafter more particularly described, with the appurtenances, parcel of the manor of the prebend of Wiveliscombe, to hold the same unto the said W. Webber, his heirs and assigns, for ever,—it was further witnessed by the indentures now set forth, that in consideration of the said 800*l.* so as aforesaid paid by North to W. Webber, W. Webber did grant, bargain, sell, alien, release, and confirm unto said North, his heirs and assigns, all those the said messuages and tenements then converted into a dwelling-house and tan-yard, with the appurtenances; and also all that cottage, &c. situate, &c., together with all out-houses, &c., and the reversion, &c., and all the estate, &c.; to hold the same unto and to the use of North, his heirs and assigns for ever. And it was further wit-

nessed, that for the considerations aforesaid, W. Webber, in pursuance and exercise of a power vested in him by the said recited indenture of release of 25th of March 1812. and of all other powers, &c., did direct, limit, and appoint unto North, his heirs and assigns, all those the aforesaid messuages, tenements, cottage, and other the hereditaments hereinbefore granted, &c., to hold unto and to the use of North, his heirs and assigns, for ever, subject to the usual proviso for redemption, on payment of the 800*l.* in December following. Covenant from W. Webber for payment of the said 800*l.* and interest; that he was lawfully seised, and also lawfully and equitably possessed of the copyhold messuage, &c., for the lives of said J. Hancock, P. Hancock the younger, and W. Hancock; that he had power to grant, &c.; for peaceable enjoyment free from incumbrances; and for further assurance.

It was objected, for the defendant, that the lessor of the plaintiff had no title in a court of law, as his right of action was founded upon the assignment by a common law conveyance of copyhold premises, which should have been conveyed by surrender, consequently he had but an equitable title. It was also said, that there was no privity between the defendant and the mortgagor; and, therefore, she should not be affected or prejudiced by a deed to which she was not a party, or by anything that might be inferred from the recitals. A verdict was found for the lessor of the plaintiff, with leave to the defendant to move to have it set aside, and a nonsuit entered, if the title of the lessor was found not to be such as would support an ejectment.

Erle shewed cause.—The objection, that the recital in the deed of release, that the premises were copyhold, and, therefore, that no legal title was conveyed to the mortgagor, is met by the recital of the indenture of the 24th and 25th of March 1812, between the Bishop of Rochester and the parties therein named, which operated as an extinguishment of the copyhold. The authorities are decisive on the subject. In *Wakeford's case* (1), where the Earl of Bedford, lord of the manor, sold the freehold interest of a copyholder

(1) 1 Leon. 102.

of inheritance to another, so as it is now no part of and divided from the manor, and afterwards the copyholder doth release to the purchaser, the Court held, that by this release, the copyhold is extinguished and utterly gone; and, in *Lane's case* (2), it was resolved, that by the acceptance of the term by the copyholder, the copyhold estate was determined. *Blennerhasset v. Humberstone* (3) shews, that a release by him which hath a right to copyhold (he being *dominus pro tempore*) to one which is admitted copyholder, extinguisheth the right of the copyhold by deed: and it was said by *Snaggs, Serj.* in *Anonymous* (4), that he had known it adjudged, that, notwithstanding the words will not amount to a surrender, yet the consent and agreement of the lessee, proved by the deed, will amount to a surrender. It is said, that these recitals are not evidence against the defendant, as there is no privity between her and the lessor of the plaintiff, but as she came in under the mortgagor, she is estopped from disputing his conveyance.

Rogers and Bere, in support of the rule.—The mortgage deed shews a direct conveyance of a copyhold by assignment, instead of by surrender, and no change of the copyhold tenure by enfranchisement. That can only be by conveyance of the lord seised in fee to a copyholder; and it does not appear that the Bishop of Rochester was lord of the manor, or seised in fee, but rather *jure ecclesiæ*, the premises being described as parcel of the manor of Wiveliscombe, or that the re-lessee was a copyholder—*Dancer v. Evett* (5), and *Howard v. Bartlett* (6). Upon the question of estoppel they referred to *Grant v. Wainman* (7), *Doe v. Brooks* (8), and *Doe v. Shelton* (9).

Cur. adv. vult.

(2) 2 Rep. 17.

(3) Hutt. 65.

(4) Cro. Jac. 21.

(5) 1 Vern. 392.

(6) Hob. Rep. 181; a.c. as *Waldoe v. Bartlett*, Cro. Jac. 573.

(7) 3 Bing. N.C. 69; s.c. 5 Law J. Rep. (N.S.) C.P. 344.

(8) 3 Ad. & El. 513; s.c. 4 Law J. Rep. (N.S.) K.B. 222.

(9) 3 Ad. & El. 265; s.c. 4 Law J. Rep. (N.S.) K.B. 167.

NEW SERIES, VI.—C.P.

TINDAL, C. J.—This was an action of ejectment, brought by a mortgagee against the widow of the mortgagor, in which it appeared, that the mortgagor died in possession of the mortgaged premises in 1828, and the widow continued in possession after the death of her husband up to the time of the ejectment brought. The objection taken at the trial, on the part of the defendant, and upon which the learned Judge gave leave to the defendant to move to enter a nonsuit, was this: that the mortgaged premises were copyhold, and that the only title set up by the lessor of the plaintiff was an assignment of the copyhold premises by a common law conveyance of lease and release, and not by any surrender to the lord, according to the custom of the manor; and, we think, it appears from the deed of release, produced by the plaintiff at the trial, and which was the only evidence on which he relied, that the premises in question were of copyhold tenure, for they are expressly described in various parts of the deed, as being copyhold at the time of the execution of the deed; and as the plaintiff did not produce any surrender according to the custom of the manor, but relied entirely on the deeds of lease and release produced by him, we think that upon his own shewing, he had not any legal interest, but an equitable interest only in the premises, and was therefore not in a condition to maintain an ejectment. The plaintiff, in his answer to this objection, has contended, that if it does not appear expressly upon the face of the deed, yet that it does by necessary inference, that an enfranchisement of this copyhold had taken place by a conveyance in 1812, of the freehold of the premises from the then lord of the manor to the mortgagor and his heirs.

But, upon reference to the deed, as recited in the mortgage, and even admitting that such recital is evidence by way of estoppel against the present defendant, the widow, as coming in by claim under her husband (of which, however, there may be considerable doubt), still we think there is no sufficient evidence furnished by the deed, that there has been any enfranchisement. An enfranchisement is made by a common law conveyance of the fee simple of the particular tenement by the lord of

the manor to the copyholder. But, upon the recital of the deed, it does not distinctly appear that the Bishop of Rochester, the releasor of the inheritance, was seised of the fee simple of the manor; and if he had only a limited interest in the manor, he could not enfranchise. Again, it appears from the deed of release, that the premises "were parcel of the manor of the prebend of Wivesliscombe;" from which, unexplained, the inference would be, that the lord of the manor was seised in right of his prebend only; in which case he would be prevented by the restraining statutes from parting with the fee, and consequently from enfranchising the copyhold, unless power had been given to him by some private act of parliament, of which there was no evidence.

We think, therefore, that the plaintiff has, by his own evidence, shewn the infirmity of his own title, and that the mortgagor may take advantage of these objections, which amount, in fact, to this, that the plaintiff is not the legal mortgagee. But, as it is probable that upon another occasion the plaintiff may be able to supply those defects, which have no bearing on the merits of the case, and it would be an useless expense to the parties to direct a nonsuit to be entered, and thereby to compel the mortgagee to commence another ejectment, we think it right, under the circumstances, to direct a rule to be made absolute for a new trial upon payment of costs of the former trial by the lessor of the plaintiff.

Rule absolute accordingly.

1837. } PASCOE AND ANOTHER V.
June 9. } J. PASCOE.

Replevin — Departure — Distress — Arbitration.

In replevin, the defendant avowed as for rent service at common law. In his plea in bar, the plaintiff alleged that the defendant demised and transferred the premises to the plaintiffs for all the residue and remainder of his estate and interest therein, and that the defendant had not any reversionary estate or interest in the same. In his replication to the plea in bar, the defendant alleged, that a reference of all matters in dispute had taken

place, and that the arbitrator had decided in his award, that the defendant should have authority to distrain:—Held to be ill, as a departure, inasmuch as the defendant in his avowry relied on a common law right to distrain, and, in his replication, upon a right of distress given by the award of an arbitrator.—Held, also, that the plea in bar to the avowry, admitting a demise, but setting up an assignment, was not incongruous.

Quære—can an arbitrator give the power of distress for a rent newly fixed by him, and which power the landlord did not possess, as to the rent originally fixed by the demise? At all events, in an avowry under such a power, it should appear by express words, or necessary intendment, that the arbitrator had such authority, or, that the question as to the power of distress was a matter in difference.

*Replevin. Avowry and cognizance, first, that the plaintiffs for a long time, to wit, for all the time during which the rent thereafter mentioned to be distrained for was accruing due, and thence until and at the time when &c., held and enjoyed the premises in which, &c., with the appurtenances, as tenants thereof to J. Pascoe the younger, by virtue of a demise to the plaintiffs, at a yearly rent of 32*l.*, payable half-yearly. Distress for 80*l.* rent arrear. Secondly, that the plaintiffs, for the space of two years and upwards next before and at the time of making the agreement thereafter mentioned, held and enjoyed the premises, as tenants thereof to J. Pascoe, by virtue of a demise thereof to the plaintiffs theretofore made, at a yearly rent of 36*l.*, payable half-yearly: that, before the making of the said agreement, to wit, on the 21st of September 1831, the said J. Pascoe the younger had caused to be distrained on the said premises divers goods and chattels, for the sum of 36*l.*, arrears of rent due on the 24th of June then last past, to the said J. Pascoe the younger; and plaintiffs had replevied the said goods and chattels, and commenced an action against J. Pascoe the younger, in the sheriff's court of Cornwall, which action of replevin was afterwards removed, by virtue of a writ of *recordari facias loquelam*, from the said sheriff's court to the Court of King's Bench, and was then pending: that*

disputes and differences having arisen and being subsisting between the said parties relative to the said distress and action at law, and other matters relative to the said premises, particularly as to the amount of the yearly rent which should be paid for the said estate, the plaintiffs and J. Pascoe the younger, for the ending and determining thereof, did, before the said time when &c., to wit, on the 29th of June 1832, by a certain agreement in writing then made between the said J. Pascoe the younger and the plaintiffs, mutually and reciprocally agree with each other, that, as well the matters aforesaid as all other matters in difference between the said parties, and, more particularly, the amount of the rent which should be paid for the said premises, should be, and the same were thereby referred to the award, arbitrament, final end, and determination of R. J., whose award was to be final and conclusive, both at law and in equity, as well on the part and behalf of J. Pascoe the younger, as on the part and behalf of the plaintiffs, to settle and ascertain the same, and to award, order, and determine by his award what he should think fit to be done and performed by the said parties respectively, respecting the several matters aforesaid, &c.: that the said R. J. did afterwards, &c. make and publish his award in writing indented under his hand and seal, between the said parties, upon and concerning the premises aforesaid; and did thereby (amongst other things) award, order, and determine, that, from and after Midsummer then last, the plaintiffs should pay to J. Pascoe the younger, for the premises in which &c. the sum of 32*l.* per annum, instead of the sum of 36*l.* per annum before paid, by half-yearly payments, that is, at Christmas and Midsummer in every year, so long as he should continue to hold the said premises; and that the said J. Pascoe the younger should have power of distress for recovery of the said rent of 32*l.* per annum: as by the said award, reference being thereunto had, would more fully appear; of which said award the plaintiffs afterwards, to wit, on &c., had notice: that the plaintiffs, from the time of making the said award, until and at the said time when &c. held and enjoyed the premises

in which &c., with the appurtenances, as tenants thereof to the said J. Pascoe the younger, at and under a certain yearly rent, to wit, the said yearly rent of 32*l.* payable half-yearly on the 24th of June and the 25th of December in every year, by even and equal portions; and that the said J. Pascoe the younger, by means of the premises, had, for and during all the time last aforesaid, such power of distress as aforesaid; whereupon the distress was made for the sum of 64*l.* for two years' rent so due and in arrear as aforesaid.

Pleas in bar to each of the avowries and cognizances: that, by the said demise in the said avowry and cognizance mentioned, the said J. Pascoe the younger did demise and transfer the said premises, with the appurtenances, in which &c., unto the plaintiffs, for all the residue and remainder of his, the said J. Pascoe the younger's, estate, term, and interest of and in the same; and that the said J. Pascoe the younger had not then, or at the said time when &c., or at any time during the said demise to the plaintiffs, any reversionary estate, term, or interest of or in the premises, with the appurtenances, in which &c., or any part thereof, expectant upon or to take effect upon, or at any time after the expiration of the term granted to the plaintiffs by the said demise; concluding with a verification.

The replications to the pleas in bar relied on the award set forth in the second avowry and cognizance.

Rejoinders—that it was not referred to the said R. J., whether J. Pascoe the younger should have power of distress for recovery of the said rent of 32*l.* per annum; concluding to the country.

Demurrer—for that the plaintiffs had, in and by their said rejoinders, stated and attempted to put in issue a fact not alleged by the defendant in his replication, and wholly irrelevant and immaterial, to wit, that it was not referred to the said R. J., whether J. Pascoe the younger should have a power of distress for recovery of the said rent of 32*l.* per annum; and also, for that the said rejoinders containing new matter, the plaintiffs should have concluded the same with a verification, and not by praying that it might be inquired of by the country. Joinder.

Stephen, Serj., for the demurrer.—The plaintiffs' allegation amounts, in substance to this: true it is, we owe rent; but our liability is not of such a nature as to render us liable to a distress, as the defendant has not the power of resorting to such remedy. In alleging the transfer of the residue and remainder of the defendant's estate, term, and interest to the plaintiffs, they have set forth that which is immaterial, and that for two reasons: first, because the submission to reference included the point, and gave the arbitrator authority to do that which he has done; and, in the next place, though it were a rent sec, and, consequently, could not be distrained for at common law, that remedy is given, under certain qualifications, for such rent by the 4 Geo. 2. c. 28. s. 5. Thus, therefore, there being no difference as to remedy between the rent sec and rent for the payment of which the land is charged with a distress, the allegation of the tenant of the defendant's estate and interest furnishes no answer to the action. The plea in bar admits tenure, and that which is, in fact and substance, a rent service; and for such the lord may distrain, as of common right—*Litt. ss. 122, 213, 214*: and, at the same time, it sets forth that which, according to *Parmenter v. Webber* (1), is an assignment of defendant's entire interest, and, consequently, he could not distrain. How can propositions so repugnant be reconciled? He also referred to *Palmer v. Edwards* (2), and distinguished the case from *Preece v. Corry* (3).

Ogle, contra.—The plaintiffs are entitled to the judgment of the Court. The avowry here is in the general form given by 11 Geo. 2. c. 19. s. 22; and no arbitrator had the power of doing what has been done here, namely, giving the power of distress. Things in the realty might be submitted to; but they could not be recovered upon the award—*per Treby, C.J.*, in *Marks v. Marriot* (4). The subject-matter affecting the freehold and inheritance of land, could not be determined by arbitration—1 *Roll. Abr.* 242, l. 10, 1 *Com. Dig.* tit. 'Arbitrament,' (D) 3;

and in *Hunter v. Rice* (5), Lord Ellenborough said, "There is a difference between property awarded to be transferred by the owner to another, and property which is actually transferred by the contract of the owner, through the medium of his agent. If the party had accepted the money tendered, that would have been a ratification of the award, and an assent, on his part, to a transfer of the property; but, without that, I cannot conceive that the property was transferred by the mere force of the award." Besides, the defendant has no right to raise the question, as it does not appear in the margin of the demurrer-book—*Brogden v. Marriot* (6). Enough, however, does appear, on the face of the pleadings, to entitle the plaintiffs to succeed. The subject of discussion was a chattel; the defendant admits that all his interest had passed; and nothing is more certain, than, if there is no reversion, there is no power to distrain: — *v. Cooper* (7). Besides, the defendant is guilty of a departure; for, in his avowry and cognizance, he relies upon the common law right to distrain, as for rent service; whereas, in his replication to the plea in bar, he relies upon a power of distress given under an award.

Stephen, in reply, insisted, that the present should be considered as the case of a rent sec, for which the power of distress has been given by statute. The argument that the arbitrator could not give a right to distrain, was met by the case of *Doe v. Rosser* (8), where it was said that the consent of the parties, that the award of the arbitrator, chosen by themselves, should be conclusive as to the right to the land in controversy between them, was sufficient to bind them in an action of ejectment.

Cur. adv. vult.

TINDAL, C. J.—In this action of replevin the defendant has made two avowries and cognizances; the first is in the general form given by the statute 11 Geo. 2. c. 19, that the plaintiffs held the premises in which &c. as tenants to Pascoe the younger, under a demise thereof to

(1) 2 B. Mo. 636.

(2) 1 Doug. 186.

(3) 5 Bing. 24; s. c. 6 Law J. Rep. C.P. 205.

(4) 1 Lord Raym. 114.

(5) 15 East, 100.

(6) 5 Law J. Rep. (N.S.) C.P. 108.

(7) 2 Wils. 375.

(8) 3 East, 16.

them made for a certain rent, and then avows for two years' rent in arrear. To this avowry the plaintiffs have pleaded in bar, that by the demise in the avowry and cognizance mentioned, Pascoe the younger demised and transferred the premises in which &c., to the plaintiffs for all the residue and remainder of his (the lessor's,) estate, term and interest of and in the same, and that he, the said Pascoe the younger, had not then, nor at the said time when &c., or at any time during the demise, any reversionary estate, term, or interest in the same. The defendant has replied to this plea in bar, a power of distress given to Pascoe the younger, by the award of an arbitrator, to whom certain disputes and all matters in difference between him and the plaintiffs had been referred.

The plaintiffs, in their rejoinder to this replication, allege, that it was not referred to the arbitrator whether the defendant, Pascoe the younger, should have a power of distress, to which rejoinder the defendant demurs specially. Upon this state of the pleadings, it is obvious that the defendant's replication to the plea in bar would be bad upon general demurrer, on the ground of departure, the defendant in his avowry and cognizance relying upon the common law right to distrain as for rent service, and in his replication setting up a power of distress given under an award. The question, therefore, so far as the first avowry and cognizance are concerned, becomes this, whether the plea in bar affords any legal answer thereto? This question is to be determined as if it were upon a general demurrer to the plea in bar, and therefore, no objection can be available which amounts to matter of form only, such as that the plea in bar is in effect no more than the general traverse, *non tenuit* or *non demisit*; and looking at the substantial allegations in the plea in bar, we think it alleges with sufficient certainty that Pascoe the younger, at the time of making the demise, did not reserve any reversion in himself, and, consequently, without any express provision for that purpose, has no remedy by distress. The authorities to this point are collected in *Bacon's Abr.* tit. 'Distress,' A.

And as to the argument, that the plea

in bar is incongruous, inasmuch as it admits a demise, but sets up an assignment, we cannot distinguish it from that of *Preece v. Corry*, which was held to be a good plea in bar; nor from the authority of the decision in *Parmenter v. Webber*, where the assigning of the landlord's whole interest in a term to the plaintiff was held to be evidence which supported the plea of *non tenuit*. For, although it is true, that this rent may be a rent *sec*, and that the remedy is the same under the statute for a rent *sec* as for a rent service, yet the avowry is for a rent service at common law, and not for a rent *sec*. So far, therefore, as relates to the first avowry and cognizance, and the pleadings dependent thereon, we think the plaintiffs are entitled to judgment.

The second avowry and cognizance rests upon a power of distress given by an award under an agreement entered into between the plaintiffs and the defendant Pascoe the younger, by which certain disputes and differences relative to a distress which had been then made, and an action at law then depending, and all other matters in difference between the said parties were submitted to the arbitration of Mr. Julian. The plaintiffs plead in bar to this the very same matter which they had pleaded in bar to the first avowry, viz. that Pascoe the younger had demised to them all the residue and remainder of his own estate, term, and interest in the premises in which, &c., and that he had no reversionary interest in himself. To this plea in bar, the defendant replies the very same matter as that contained in the second avowry, viz. the power of distress given by the arbitrator; and the plaintiffs rejoin thereto, that the giving such power of distress was not a matter within the submission. Upon this state of the pleadings, arising on the second avowry and cognizance, the rejoinder must be given up, as being a departure from the plea in bar; and the question of law must be taken to stand as if there had been a general demurrer by the defendant to that plea in bar. In that view of the case, the facts admitted on the record would be, that Pascoe the younger had originally demised to the plaintiffs the premises in question,

at the rent of 36*s* per annum; but that, upon such demise, he had parted with the whole of his estate and interest, and left himself no reversion; and that a distress had been put in for one year's rent due under such demise, which the plaintiffs had replevied, and the action of replevin had been removed into the Court of King's Bench, and was still pending. It would also appear upon the record, that disputes and differences had arisen, and were subsisting between the parties as to the distress and action at law, and other matters relative to the said tenement, particularly as to the amount of the yearly rent which should be paid for the said estate, and that the parties agreed to refer "as well the matters aforesaid, as all other matters in difference between them," to the award of Mr. Julian. The question, therefore, becomes this, whether under such submission the arbitrator had authority to give a power to distrain for the rent newly fixed by him, which power of distraining the landlord did not possess as to the rent originally created by the demise. And we think the arbitrator's authority to give this power ought either to appear by the express words of the submission, or that it should be brought within the general words of the submission, by a distinct averment on the record, that the question as to the power of distress was one of the matters in difference between the parties to the submission. There is scarcely any conceivable addition to the landlord's powers, which the arbitrator might not have given, unless he is held to be restrained by those two considerations: a power to enter for non-payment of rent or non-performance of covenants might be given by the same authority as a power to distrain.

Upon the single ground, therefore, that we do not see that the arbitrator had any authority to give the power of distress for the rent newly fixed by him, and which in all other respects came in the place of the former rent reserved by the demise, we think the second avowry and cognizance cannot be supported, and that there must be judgment on that also for the plaintiffs.

Judgment for the plaintiffs.

1837. }
June 10. } STOWELL v. ROBINSON.

Frauds, Statute of—Vendor and Purchaser—Time.

In an action to recover the deposit money paid by the vendee upon the non-fulfilment of a written agreement for the purchase of a public-house, whereby the defendant agreed to give the plaintiff possession on or before a certain day:—Held, that evidence of an oral agreement between the parties to alter the day of giving possession, and substitute another within a reasonable time, was inadmissible; as being contrary to the 4th section of the Statute of Frauds, though the plaintiff was not prepared to take possession on the day. Held, also, that the agreement was not invalidated in consequence of the vendor having, at the time of the agreement, no licence to assign from the ground landlord, as, by the condition of his lease, he was bound to have, as the licence could not be made out until it was known in whose name it should be filled up. Neither was it an objection to the agreement, that the defendant had not registered the assignment of the premises in question to him, nor various other assignments, previous to his own, inasmuch as the objection could be cured at any time before the completion of the purchase, as there was no subsequent purchaser who had registered the assignment to himself.

The first count in the declaration stated, that the defendant was possessed of a public-house in Middlesex, called the Newcastle-upon-Tyne, for the residue of a term; that by an agreement between the plaintiff and the defendant, the defendant agreed to sell the lease of the said public-house to the plaintiff, and to deliver possession upon the 3rd of May; that upon the making of the agreement the plaintiff paid a deposit of 50*l.*, and the defendant undertook that he then had lawful right and title to assign over the said lease to the plaintiff. The declaration then alleged, that the defendant had not lawful right and title, at the time of making the agreement, to assign over the lease to the plaintiff, whereby he was prevented from performing the agreement on his part.

Pleas—1st, non-assumpsit;—2nd, to the

first count, that defendant had lawful right and title to sell and assign over the lease as in the agreement mentioned;—3rd, to the first count, that neither plaintiff nor defendant were ready by the day in the agreement mentioned for completing the purchase; that they therefore agreed to postpone the performance of it for a reasonable time, and that the plaintiff should accept an assignment of the lease if the defendant made out a title within such reasonable time; that within such reasonable time the defendant made it appear to the plaintiff that he had such title, but the plaintiff refused to perform the agreement, and prevented its completion; and that the promise mentioned in the declaration was oral only;—4th, to the first count, that the lease to be sold was an indenture of lease between Sir R. Sutton and one Preston for thirty-one years, which lease had been, by various mesne assignments, conveyed to the defendant; that this lease contained a covenant on the part of Preston not to assign without the consent in writing of Sir R. Sutton; that Sir R. Sutton gave his consent in writing to the assignment by Preston to the defendant. The plea then stated, that before and at the time of the agreement in the first count mentioned, the defendant had full title to assign, except that he had not procured Sir R. Sutton's licence so to do, of which the plaintiff had notice before the 3rd of May, mentioned in the agreement; that the defendant could have procured a licence from Sir R. Sutton, but that the plaintiff undertook to procure the licence himself, and discharged the defendant from doing so, unless the plaintiff gave him notice of his application to Sir R. Sutton being unsuccessful; that by reason of this, defendant forbore to apply to Sir R. Sutton until the day mentioned in the agreement had passed; and that, in the meantime, he received no notice from the plaintiff of his inability to procure the licence; that the plaintiff did not use due diligence in procuring the licence from Sir R. Sutton, and after he had given such notice, discharged the defendant from procuring it, which he otherwise could and would have done, whereupon the plaintiff, of his own wrong, procured the breach of the promise in the first count mentioned;

—5th, to the first count, so far as it related to the 50*l.* deposit, a waiver of the time for completing the promise, and that the plaintiff prevented the completion of the agreement by refusing to perform his part of it.

Issue joined on the 1st and 2nd pleas; and, to the 3rd, 4th, and 5th, replication *de injuriâ*.

Upon the trial, it appeared, that the deposit of 50*l.* had been paid by the plaintiff as set forth in the agreement, which was in writing, and bore date the 19th of April 1836. The defendant agreed thereby, that he and all, if any, other necessary parties would assign and set over the lease of the premises, together with the possession and good-will of the same, and would give the plaintiff quiet possession of them on or before the 3rd of May 1836. The defendant had no power to assign the lease without the consent of the lessor; at the time of making the agreement he had not obtained any such consent; and assignments prior to the assignment to the defendant, and also that to the defendant, had not been registered. Neither of the parties was, it appeared, ready to carry the contract into effect on the 3rd of May. Objections had been taken to the title, which were then about to be removed. The brokers had not completed the valuation, and, on the 3rd, 4th, and 5th of May the agent of the plaintiff was himself endeavouring to procure the proper assent of the ground landlord to the assignment of the lease; but on the 6th, it having been communicated to him by the ground landlord that a bond, which he objected to give, would be required, he wrote to the defendant, to state that he considered the contract to be at an end, and demanded the return of the deposit. Within a few days after the receipt of this letter, the plaintiff's objections would have been removed, but the demand not being complied with, the action was brought. It was said upon the trial, for the defendant, that the fact of his being without a licence from the ground landlord at the time of the agreement, did not amount to a breach of the agreement; and that the day, the 3rd of May, upon which, according to the arrangement, the possession was to be delivered, was not of the essence of the con-

tract: and it was also contended, that if there had been a breach of the agreement on either point, the plaintiff had waived it by endeavouring himself to procure the licence after the 3rd of May. The verdict having passed for the defendant—

Erle obtained a rule for entering it for the plaintiff on the count for money had and received, or for a new trial. The objections to the verdict were, that the defendant should have obtained a licence before the execution of the agreement, as he could not assign the premises without such. He was also bound to register all the assignments of the premises; and the day, the 3rd of May, was of the essence of the contract, and a different day could not be substituted by oral agreement between the parties—*Goss v. Lord Nugent* (1), where it was held, that oral testimony was not admissible to shew the waiver of the vendee's right to a good title as to a certain lot of ground.

Wilde, Serj., and *Chandless*, shewed cause.—The objections, founded upon the defendant's not having a licence to assign at the time of entering into the agreement, and the want of the registration of the assignments, are unavailing; as, in the former case, the licence must, of necessity, remain a blank until the agreement was executed, and the latter defect may be remedied at any time. Neither is the day, in this case, of the essence of the contract, any more than it is commonly said to be in contracts for building houses or ships (2); and nothing is more common, in contracts of this latter description, than the allowance of extra days. The proposition put forward for the plaintiff amounts, in fact, to this, that the delivery of the possession on the 3rd of May was a condition precedent; but that cannot be, for it does not go to the whole of the consideration (3). *Goss v. Lord Nugent* does not apply, as the evidence there went to shew a waiver

(1) 5 B. & Ad. 58; s.c. 2 Law J. Rep. (N.S.) K.B. 127.

(2) Vide *Lucas v. Godwin*, 3 Bing. N.C. 737; s.c. 6 Law J. Rep. (N.S.) C.P. 205, where, in a contract to complete buildings on the 10th of October, they were not completed until the 15th, and the time was not held to be essential, but merely directory.

(3) Vide *Stavers v. Curling*, and the authorities there cited, 3 Bing. N.C. 355; s.c. 6 Law J. Rep. (N.S.) C.P. 41.

of that which, under the 4th section of the Statute of Frauds, was material; whereas the evidence here was merely as to the waiver of a certain time, which was immaterial, and held to be so in *Cuff v. Penn* (4), *Warren v. Stagg*, cited in *Little v. Holland* (5), and *Thresh v. Rake* (6), which were reviewed and commented upon in *Goss v. Lord Nugent*. A conclusion favourable to the defendant may be also deduced from *Hoadley v. McClaine* (7). There is nothing in the circumstances of the case, which can lead the mind to the conclusion, that the day of the delivery of the possession was essential. The Court will decide the present question on the principle similar to that on which *Havelock v. Geddes* (8) and *Lang v. Gale* (9) were decided, in the former of which it was held, that a covenant in a charter-party of affreightment, that the owner should, at his expense, forthwith make the ship tight and strong for a voyage of twelve months, and keep her so, was not a condition precedent to the recovery of the freight, after the freighter had taken the ship into his service, and used her for a certain period; and in the latter it was held, that the condition for the delivery of the draft of conveyance within three months was not a condition precedent with respect to delivery within the precise time. It should be also borne in mind, that, so far from the time being held essential in its nature, courts of equity, in their ordinary practice, allow the substitution of one day for another.

Erle and *Jardine*, in support of the rule.—The plaintiff does not depend solely upon the neglect to register the assignments, which may be remedied; but the defendant's title was substantially bad, inasmuch as there was not, at the time of the agreement, a written licence from Sir R. Sutton to assign, and it was the defendant's business to procure it—*Lloyd v. Crispe* (10), *Mason v. Corder* (11). The defendant

(4) 1 Mau. & Selw. 21.

(5) 3 Term Rep. 591.

(6) 1 Esp. 53.

(7) 10 Bing. 482; s.c. 3 Law J. Rep. (N.S.) C.P. 162.

(8) 10 East, 555.

(9) 1 Mau. & Selw. 111.

(10) 5 Taunt. 249.

(11) 7 Taunt. 9.

was bound to have been ready upon the 3rd of May, with a valid leave and licence from Sir R. Sutton, and as he was not, the plaintiff had clearly a right to rescind the contract. The argument, that the day of the delivery was immaterial, is contradicted by the authorities. In *Berry v. Young* (12) Lord Kenyon said, "A seller of an estate ought to be prepared to produce his title deeds at the particular day." To the same effect is *Wilde v. Fort* (13), where it was held, that if the vendor of an estate by auction does not shew a clear title by the day specified, the purchaser may recover back his deposit, and rescind the contract, without waiting to see whether the vendor may ultimately be able to establish a good title or not. With regard to the proposition, that time has not been considered essential in courts of equity, and that these courts frequently enlarge the day for performance, such might formerly have been the practice; but, as it was observed by Lord Kenyon in *Heard v. Wadham* (14)—"The practice of the Court of Chancery was much altered of late years in that respect, for that now the Court would not entertain a bill for a specific performance to compel a vendee to make good his purchase, if no conveyance were tendered to him within the time stipulated for by his contract, unless it were shewn that he had waived that stipulation." To the same effect are *Lloyd v. Collett* (15), *Coslake v. Till* (16), *Cornish v. Rowley* (17), *Sug. Vendor and Purchaser* 419, 9th edit.; and in *Hagedorn v. Laing* (18), where the question was upon the construction to be put upon a contract as to the time of taking certain goods, it was held, that the indulgence was for the purchaser, but that the vendor should be ready at all times. The cases cited for the defendant, to which others, such as *Hall v. Cazenove* (19) and *Bornmann v. Tooke* (20) may be added, do not apply. They arose chiefly upon commercial speculations, and the per-

formance upon the exact day was not of such importance, nor were the terms of the contract so rigid and precise, as they are here; and in *Rippingall v. Lloyd* (21), a plea, that by a subsequent agreement, not under seal, made before breach, the time for deducing title had been enlarged, and that the defendant was ready to deduce such title within the enlarged time, was held to be bad. In fine, in asking the Court to receive the evidence of the enlargement of the time for the delivery of the possession, the defendant requires the violation of the 4th section of the Statute of Frauds; and he calls upon the Court to decide in direct opposition to *Price v. Dyer* (22), *Goss v. Lord Nugent*, *Carrington v. Roots* (23), and to the reasoning in *Boydell v. Drummond* (24), where it was held, that the party's signature, in a book not referring to a printed prospectus, which contained the terms of the contract, and which was delivered at the same time to the subscribers, could not be connected with the prospectus so as to take the case out of the statute, as such connexion would be established by parol evidence.

Cur. adv. vult.

TINDAL, C.J.—The plaintiff declared in his first count, upon a special agreement for the sale by the defendant to the plaintiff of the good-will of a public-house, assigning as a breach of the agreement, that the defendant, at the time of the agreement, had no lawful title to assign his lease; and he declared in his second and last counts respectively, for money had and received to his use, and upon an account stated between him and the defendant. The jury found a verdict for the defendant; and a rule was obtained by the plaintiff, calling on the defendant to shew cause why the verdict should not be set aside, and a verdict be entered for the plaintiff on the count for money had and received, or why there should not be a new trial.

With respect to the first count, if the

(12) 2 Esp. 640, note.

(13) 4 Taunt. 334.

(14) 1 East, 619.

(15) 4 Bro. C.C., by Eden, 471, note c.

(16) 1 Russ. 376.

(17) Ma., Sel. N.P. 177, 6th edit.

(18) 1 Marsh. 514.

(19) 4 East, 476.

(20) 1 Campb. 377.

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(21) 2 Nev. & Man. 10; s.c. 5 B. & Ad. 742.

(22) 17 Ves. 376.

(23) 2 Mee. & W. 248; s.c. 6 Law J. Rep. (N.S.) Exch. 95.

(24) 11 East, 141.

matter had rested on that count alone, we should not have thought it a case in which the verdict ought to be disturbed; for we think the breach, which has been assigned in that count, and which has been traversed by one of the pleas, was not proved by the evidence given at the trial of the cause. The breach assigned is, that the defendant, at the time of making his agreement, had not lawful right or title to sell or assign over the lease to the plaintiff. But there was no proof of any invalidity or defect in the defendant's right or title to convey at the time of the agreement; the only objection taken was, that he had not, at that time, procured a licence from the landlord to assign the lease to the defendant, and that the assignments prior to that to himself, and also his own assignment, had not been then registered. But neither of these objections go to impeach the validity of the defendant's title at the time of the agreement; for the licence to assign cannot of necessity be obtained before the agreement is made with the intended purchaser, until which time the name of the intended assignee is not known; and as to the want of registration of some of the previous assignments, and also of that to the defendant himself, as there was no other subsequent purchaser who had registered the assignment to himself, the objection was capable of being cured at any time before the completion of the purchase; and we think the terms of the agreement pointed only at incurable defects in the title, and not to such imperfections as are capable of being removed, and usually are removed, after the agreement is made, and whilst the title is under investigation. The right of the plaintiff, therefore, to recover a verdict, will turn upon the count for money had and received; under which count the plaintiff contends he had a right to recover the sum of 50*l.*, which was advanced by him as a deposit on signing the agreement, upon the ground that the defendant had not completed the conveyance, and given the possession of the premises to the plaintiff, on or before the 3rd of May, according to the stipulation of the agreement. The defendant, on the other hand, contends, that the day specified in the agreement was not an essential and material part of

the contract; and that both the plaintiff and defendant in the completion of the contract acted upon the footing that the precise day was not material, and by their course of dealing, after that day with each other must be taken to have substituted a performance within a reasonable time after the 3rd of May, in the place of a performance on that precise day; and the jury were of that opinion upon the point being left for their determination: and the question which was reserved for our consideration, and which has been argued before us, is, whether such a finding is consistent with the rules of law.

It may be taken in this case to have been proved at the trial, that the parties were neither of them ready to carry the contract into effect on the 3rd of May, not only on account of the objections that were taken to the title, and which were then in a course of being removed, but also because at that time the brokers had not completed their valuation; and it may further be taken, that both upon the 3rd, 4th, and 5th of May, the agent of the plaintiff, the buyer (who appeared to have taken that part of the business upon himself) was endeavouring to procure the proper licence from the ground landlord for the assignment of the lease: but that on the 6th, being informed by the landlord's agent, that a bond which had been objected to would be required to be given by the purchaser, he writes to the defendant on the same day, that he considers the contract at an end, and demands the return of the deposit. Within a few days after this letter, and within what appears to us to be a reasonable time for that purpose, the objections would have been removed. So that the question, as was before stated, is this, can the day for the completion of the purchase of an interest in land, inserted in a written contract, be waived by a parol agreement, and another day be substituted in its place, so as to bind the parties? And we are of opinion that it cannot.

This is an agreement for the sale of land, upon which, by the Statute of Frauds, section 4, no action can be brought, "unless it is in writing, and signed by the party to be charged therewith, or his agent thereunto lawfully authorized." Now we

cannot get over the difficulty which has been pressed upon us, that to allow the substitution of a new stipulation as to the time of completing the contract by reason of a subsequent parol agreement between the parties to that effect, in lieu of a stipulation as to time contained in the written agreement signed by the parties, is virtually and substantially to allow an action to be brought on an agreement relating to the sale of land partly in writing signed by the parties, and partly not in writing, but by parol only, and amounts to a contravention of the Statute of Frauds. Such was the opinion expressed by Lord Chancellor Hardwicke in *Parteriche v. Powlet* (24), and of Sir W. Grant, Master of the Rolls, in *Price v. Dyer*. And we think the reasoning upon which the judgment of the Court of King's Bench proceeds in *Goss v. Lord Nugent*, goes directly to the point, that the evidence now under discussion is inadmissible.

Upon the ground, therefore, that the verdict of the jury in favour of the defendant is founded on that evidence, we think there must be a new trial; to which, however, it will be useless to have recourse, unless the defendant can remove the difficulty by producing evidence in writing as to the enlargement of the time, or unless for the purpose of putting this question upon the record.

Rule absolute.

1837. }
June 12. } CROFT v. MILLER.

Costs—Writ of Inquiry—Covenant.

The costs of a writ of inquiry executed before the sheriff, (on a judgment suffered by default in an action of covenant, in which unliquidated damages were sought to be recovered,) where the damages are assessed at less than 20l. are not to be taxed on the reduced scale, annexed to the order of the 15th of March 1834, but in the ordinary manner.

In covenant, the declaration alleged, that the defendant agreed to pay the costs of a demurrer in a Chancery suit, and also the costs of a writ of attachment issued

against the plaintiff for non-payment thereof. The breach alleged was, that defendant did not pay, in consequence of which the plaintiff was arrested under the writ of attachment, and detained in custody, &c., and was obliged to pay a large sum, to wit, &c. Upon judgment by default and writ of inquiry executed before the sheriff, the damages were assessed at a sum under 20l. The officer having taxed the costs according to the reduced scale, annexed to the order of the 15th of March 1834,

Wilde, Serj. obtained a rule for a review of the taxation, upon the ground, that the writ of inquiry on a covenant of this nature was not within the rule, and that the costs should be taxed according to the usual scale.

Bompas, Serj. shewed cause, and referred to *Hooper v. Leigh* (1). He also cited *Lipscombe v. Savage* (2), where the Court of King's Bench held, (*dis. Paterson, J.*) that where the writ is issued, and before execution the plaintiff gives the defendant credit for a cross demand which has not been pleaded, and thereby reduces the debt to a sum under 20l., the Master should tax costs upon the reduced scale.

Wilde, Serj. in support of the rule, urged, that it could not be the intention of the legislature or of those who framed the rule respecting taxation, that a case like the present should be within the lower scale. The 3 & 4 Will. 4. c. 42. s. 17, which gave the Judges power to send the issues joined to be tried before the sheriff, specified the nature of the actions which might be thus tried, and limited them to those for any debt or demand. The statute never meant to include actions of covenant, which might involve the nicest and most complicated questions of law, and which might be for the recovery of unliquidated damages; and the rule as to taxation, which was framed in the spirit and to meet the intentions of the legislature, should not be held to refer to a description of action which the statute could not be supposed to include.

TINDAL, C. J. observed, that he was strongly inclined to think that this action for breach of a covenant of this nature was not

(24) 2 Atk. 383.

(1) 5 Law J. Rep. (N.S.) C.P. 268.

(2) 5 Dowl. P.C. 385.

within the rule, which in his opinion extended only to debts and demands. The great object would be the attainment of an uniformity of practice, and for this purpose the Court would consult the other Judges, and then send their certificate.

PARK, J. intimated an opinion, that whatever the result might be, the officers could not have acted otherwise than they had.

The COURT afterwards certified to the Prothonotaries, that the rule for the review of the taxation should be made absolute.

1887. }
June 12. } CAPPER V. FORSTER.

Ship and Shipping—Freight—Cargo.

By the terms of a charter-party, the vessel was to proceed to Rio Nunez, where she was to discharge her cargo and take on board another for London, consisting of enumerated articles, or of some of them, with leave to fill up at St. Mary's. Having completed her voyage and discharged, the captain took in a quantity of the enumerated articles equivalent to about one-seventh part of a full and complete cargo. He then went back, at the desire of the defendant's agent, to St. Mary's, where the defendant, the charterer, filled up the cargo with teak wood (not one of the enumerated articles), the staple of the country. In an action against him for so doing, and thereby causing a loss of freight,—held, that upon the construction of the charter-party, as the primary object of the voyage was the obtaining of a cargo of enumerated articles, or of some of them, at Rio Nunez, the defendant was bound to fill up at St. Mary's with merchandise ejusdem generis; consequently, teak wood was excluded. Held, also, that the damages were to be estimated, not upon a cargo composed of certain of the enumerated articles by which the lowest freight would be produced, but that the freight should be calculated as if the vessel had brought home a cargo consisting of average quantities of all the enumerated articles.

The declaration stated, that on the 30th of December 1834, by a memorandum for charter between the plaintiffs as owners of the ship *Flora*, of the measurement of 150

tons, or thereabouts, then lying in the River Thames, of the one part, and the defendant of the other part, it was mutually agreed between the plaintiffs and the defendant, that the said ship should, with all convenient speed, receive and take on board whatever lawful goods and merchandise the charterer might cause to be sent alongside, and therewith proceed to Rio Nunez, and discharge the same at the factory of the charterer's agent, and having so discharged her outward cargo should reload a full and complete cargo of lawful merchandise, which the said merchant bound himself to ship, not exceeding what she could reasonably stow and carry, over and above her tackle, apparel, provisions and furniture; and being so loaded, should therewith proceed to London and discharge at one of the regular docks, at the option of the charterer, or so near unto as she might safely get, and deliver the same on being paid freight as follows, in full for the above voyage; viz., for gum, bees' wax, ivory, and palm oil, 4l. per ton. at 20 cwt. nett at the king's beam; hides, at 7l. per ton of 20 cwt. nett at the king's beam; paddy (or rice in the husk), 3l. per ton nett weight; bullion one per cent.; all or either at the option of the charterer; in full and in lieu of all port charges and pilotage as customary; (the act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever, during the said voyage, always excepted); one half of the freight to be paid in cash on unloading and right delivery of the cargo, and the remainder by an approved bill at three months then following; thirty-five running days to be allowed to the said merchant (if the ship were not sooner dispatched), for loading at the places of loading on the coast of Africa, and ten days on demurrage over and above the said lay days, at 4l. per day: should the quantity of paddy exceed 80 tons, 20s. per ton extra freight was to be paid on the surplus; and the quantity of hides was not to exceed 50 tons. The charterer was to have the liberty of shipping whatever goods he might send outwards, free of freight, but paying the difference of the ship's expenses in taking in cargo and going in ballast; and the vessel was to call at St. Mary's on her

homeward voyage for clearance for England, the charterer paying her port charges and her pilotage in and out of the river Gambia; should paddy or rice be shipped, the charterer was to find dunnage; and should the vessel not be full at Rio Nunez, the charterer was to have the liberty of filling her up at St. Mary's. The vessel was to be dispatched from London ten days after entering out at the custom-house; and the penalty for non-performance of the agreement was 700*l*.

Breach, that the defendant did not, within the said lay days in the memorandum of the charter mentioned, or at any other time before or since, load such full and complete cargo at Rio Nunez aforesaid, but on the contrary thereof loaded at Rio Nunez a small part only of a full and complete cargo, to wit, one-seventh part only of such full and complete cargo as the said ship or vessel could have reasonably stowed and carried, over and above her tackle, apparel, provisions, and furniture; and then wholly refused to load at Rio Nunez any further or greater cargo therein:—that after the defendant had loaded on board the said ship or vessel at Rio Nunez such cargo as aforesaid, to wit, on the 14th of March 1835, the plaintiffs sailed and proceeded with the said ship or vessel, by the order and direction of the defendant, to St. Mary's, in the said memorandum of charter mentioned; and afterwards, to wit, on &c., arrived with the said ship or vessel at St. Mary's aforesaid, and were there ready and willing to suffer and allow the defendant to fill up a full and complete cargo for the said ship of all such lawful merchandise as in the memorandum of charter was mentioned, according to the terms of the said memorandum, and then requested him so to do; nevertheless, the defendant, further disregarding his said promise, did not, nor would, when he was so requested as aforesaid, or within the said lay days in the memorandum of charter mentioned, or at any other time before or since, fill up at St. Mary's such full and complete cargo of lawful merchandise, but then and at all times wholly neglected and refused so to do; and then filled up a small part only of the said ship or vessel with such lawful merchandise as ~~she~~ could reasonably have stowed and car-

ried, over and above her tackle, apparel, provisions, and furniture; and then wrongfully and improperly filled up the said ship or vessel at St. Mary's aforesaid with a certain large quantity of merchandise, other than according to the true intent and meaning of the said memorandum of charter, to wit, with timber and wood: by means of which several premises the plaintiffs not only lost and were deprived of a large sum of money, to wit, the sum of 600*l*., which they might and would have made by having such full and complete cargo of lawful merchandise loaded on board the said ship or vessel at Rio Nunez and St. Mary's aforesaid, according to the terms of the said memorandum of charter, but also, by means of the loading on board the said ship or vessel at St. Mary's aforesaid such cargo of timber and wood, the said ship or vessel was then greatly broken, damaged, injured, and shattered, and rendered of less value to the plaintiffs than she otherwise would have been. And the plaintiffs further said, that after the making of the memorandum, to wit, on &c., a large sum of money, to wit, the sum of 1000*l*., became and was due and payable from the defendant to the plaintiffs for and in respect of the freight of goods, wares, and merchandises, shipped and loaded on board of the said ship or vessel according to the true intent and meaning of the said memorandum, and carried and conveyed therein in the said voyage in the said memorandum mentioned; of which said premises the defendant then had notice, and was requested by the plaintiffs to pay them the same; yet the defendant did not pay to the plaintiffs the said last-mentioned sum.

The declaration also contained a count for freight payable for the conveyance of goods; and a count on an account stated; to which counts the defendant pleaded *non assumpsit*, and issue was joined thereon.

The defendant also pleaded to so much of the breach of the said promise, in the first count of the declaration mentioned, as related to the defendant not loading a full and complete cargo at Rio Nunez, that he could not load such full and complete cargo at Rio Nunez as was mentioned in the said memorandum of charter; and of that he put himself upon the country, &c.

As to so much of the breach of the said

promise, in the said first count mentioned, as related to the defendant not filling up at St. Mary's a full and complete cargo of lawful merchandise as aforesaid, that he did, within the said lay days in the memorandum of charter mentioned, fill up at St. Mary's, in the memorandum of charter and declaration mentioned, a full and complete cargo of lawful merchandise, not exceeding what the said ship or vessel could reasonably stow and carry, over and above her tackle, apparel, provisions, and furniture, according to the true intent and meaning of the said memorandum of charter, and did not fill up the said ship or vessel at St. Mary's aforesaid with any merchandise whatsoever, other than according to the true intent and meaning of the said memorandum of charter; and of that the defendant put himself upon the country, &c.

As to so much of the breach of the same promise, in the first count mentioned, as related to the non-payment of 538*l.* 17*s.* 11*d.*, parcel of the sum of 1,000*l.*, in the first count stated to be due and payable in respect of freight, the defendant pleaded, that after the said sum of 538*l.* 17*s.* 11*d.* became due and payable from the defendant to the plaintiffs in respect of freight, as in the declaration was stated, and before the commencement of this suit, to wit, on &c., an account was had and stated by and between the plaintiffs and the defendant of and concerning the said sum of 538*l.* 17*s.* 11*d.*, and upon that accounting the plaintiffs were found to be in arrear, and indebted to the defendant in the sum of 98*l.* 17*s.* 6*d.*, which was then upon that account allowed to the defendant in account against the said sum of 538*l.* 17*s.* 11*d.*; and the residue of the said last-mentioned sum, to wit, the sum of 440*l.* 5*d.* was then paid by the defendant to the plaintiffs, and accepted by them in full satisfaction and discharge of the balance due in respect of the said sum of 538*l.* 17*s.* 11*d.*, after allowing the said set-off of 98*l.* 17*s.* 6*d.*, and of all damage in respect of the said breach of promise, so far as related to the said sum of 538*l.* 17*s.* 11*d.*; and that the defendant was ready to verify.

The plaintiffs joined issue on the first and second pleas to the first count, and replied to the third, that they did not accept the said sum of 440*l.* 5*d.* in full satis-

faction and discharge of the balance due in respect of the said sum of 538*l.* 17*s.* 11*d.*, and of the said damages in respect of the breach of promise as far as related to the said sum of 538*l.* 17*s.* 11*d.*, in manner and form as the defendant had above in his third plea in that behalf alleged; concluding to the country.

From the evidence given upon the trial (before Tindal, C. J.), it appeared, that the ship sailed from London according to the memorandum of charter-party above referred to, with 336 packages of goods. Upon her arrival at Rio Nunez, the captain was informed by the agent of the charterer, that the cargo intended for the *Flora* had been taken by another vessel, the *Jane*: that consequently, the *Flora* could not be loaded for some time; and, under all the circumstances, it was advisable for the captain to go back to St. Mary's. Acting upon this suggestion, the captain landed all his packages, except thirty, which were afterwards left at St. Mary's. He also took fifty pipes of brandy, consigned to the same place, one box of gold-dust, and 153 quarters of paddy, for a homeward cargo, amounting altogether to one-seventh of a full cargo. At St. Mary's, the charterer put on board 205 quarters of paddy, and 600 hides, and completed the rest of the cargo with 84 loads of teak wood, the staple commodity of the place, at the freight of 4*l.* a load, under a protest from the captain that it was not to affect the demand of the owners. The defendant paid 593*l.* 10*s.* 6*d.* into court.

Upon the trial, the plaintiffs contended, that they were entitled to the freight which the ship would have earned, upon the supposition that there had been a full cargo of the articles mentioned in the charter-party. It was upon the other hand urged for the defendant, that he was justified in putting on board a cargo, consisting of any one of the enumerated articles; viz. one of palm oil, the freight earned on which would have been, it was asserted, less than the sum paid into court. The jury found, that a full cargo of the various articles enumerated in the charter-party, would have produced 663*l.* freight, whilst a cargo of palm oil would produce only 452*l.* Upon the issue joined on the first

breach, the finding was, that the defendant might have loaded a full and complete cargo at Rio Nunez. Upon the second issue, it was found, that the defendant did not fill up at St. Mary's a full and complete cargo of lawful merchandise, according to the true intent of the charter: and, upon the third, that there was still due to the plaintiffs from the defendant 74l. 1s. 6d. for freight under the charter. His Lordship gave the defendant leave to move for a new trial, or a reduction of damages.

Taddy, Serj. having obtained a rule accordingly—

Wilde, Serj., Talford, Serj., and R. V. Richards, shewed cause.—As the vessel did not bring back a cargo of the enumerated articles, the only question is, what remuneration the owners are entitled to receive in consequence of this conduct of the charterer. Now, the rule for the computation of damages, is laid down in *Thomas v. Clarke* (1), where, in an action for not supplying a cargo under a charter-party, according to the terms of which different articles of freight were to be paid for at different rates by weights, and the freighter was at liberty to supply which articles he pleased, it was ruled, that the average value of freight calculated upon the various rates of freight, in the proportion of different articles usually carried on such a voyage, was the proper measure of damages. To the same effect is *Wallace v. Small*, cited in *Irving v. Clegg* (2), and the same doctrine is stated in *Abbott on Shipping*, p. 278. It is said, however, that this rule does not apply, as the charterer is allowed to fill up his cargo at St. Mary's; and it is assumed, that he would have had a right to load with one of the enumerated articles—viz. palm oil. That assumption, however, is not correct, and is not supported by *Moorsom v. Page* (3), for there, the freighter covenanted in the alternative, to provide a full and complete cargo, consisting of copper, tallow, and hides, or other goods on which separate rates of freight were to be paid; and it was held, that, having supplied her with as large a quantity of tallow and

hides as she chose to take on board, he was not bound to provide any copper. The primary object of the charter was that the ship should proceed to Rio Nunez and take in the greater part of a light cargo; and, it was only for the ease and convenience of the charterer that he was allowed to fill up his cargo at St. Mary's.

Taddy Serj., and Wightman, in support of the rule.—It could not have been the intention to take a complete cargo at Rio Nunez; for, if such was the case, the charterer would not have been at liberty to fill up at St. Mary's. Neither can the objection prevail, that too small a portion was taken in at Rio Nunez, as there is no defined limitation of that which might be taken in at St. Mary's. The defendant has complied with the terms of the charter, by filling up with teak wood, which is the staple commodity of St. Mary's, and comes within the description of "lawful merchandise." Besides, the defendant might have taken a cargo of any of the enumerated articles; and, if so, he has paid into court a larger sum than is necessary, as the freight of a cargo of palm oil would have amounted only to 452l. They also objected to the inartificial mode in which the breaches were alleged.

Cur. adv. vult.

TINDAL, C.J.—This was an action of assumpsit, brought on a memorandum for charter, made between the plaintiffs, as owners of the ship *Flora*, of the one part, and the defendant, on the other part; and, upon the issues joined on three breaches, assigned in the declaration, the jury found, as to the first, that the defendant might have loaded a full and complete cargo at Rio Nunez; upon the second, that the defendant did not fill up at St. Mary's a full and complete cargo of lawful merchandise, according to the true intent and meaning of the said charter; and, upon the last, that there is still due to the plaintiffs from the defendant the sum of 74l. 1s. 6d., for freight under the charter. There were other issues joined upon the pleadings, to which it is unnecessary to advert, as the principal question before us turns on the principle on which the amount of the damages ought to be calculated, reference being had to the proper construction of the charter-party. The

(1) 2 Stark. N.P.C. 450.

(2) 1 Bing. N.C. 53; s. c. 3 Law J. Rep. (N.S.) C.P. 265.

(3) 4 Campb. 103.

defendant has brought the case before us upon a rule calling either for a new trial, or for the reduction of the damages given by the present verdict. With respect to the new trial, the defendant contends, that, as to the first two issues, the verdict ought to have been found in his favour. The breaches might, possibly, have been more aptly and precisely assigned with reference to the terms of the charter; but, as the defendant has thought proper to take issue, and go to trial upon them as framed in the declaration, we cannot think them so deficient in form, or so ill adapted to the case, as to be objectionable on that ground, in this stage of the proceedings; and upon the evidence given at the trial, we see no ground to disturb the verdict. As we understand the charter, it contemplates a voyage to Rio Nunez, at which place it was intended, both by the shipowners and the merchant, that the outward cargo should be discharged, and the homeward cargo put on board—such homeward cargo being intended to consist of the enumerated articles, or of some of them; with liberty, however, of filling up the vessel at St. Mary's, that is, of supplying at the latter place any deficiency of the contemplated cargo which they might be unable to procure at Rio Nunez. That Rio Nunez was her place of destination appears manifest, from the provision, that "she was to discharge her outward cargo at the factory of the merchant's agent there; and, having so discharged her outward cargo, was to re-load a full and complete cargo of lawful merchandise, which the merchant binds himself to ship." This is the direct obligation into which the merchant enters; the filling up at St. Mary's is only a liberty given to him in his own ease, and for his relief, in case he should be unable to comply with his direct obligation; and we think this provision in the charter points so specifically to Rio Nunez, as the port of discharge and re-loading of the homeward cargo, that we cannot give to the mention of "ports of loading on the coast of Africa," or "the liberty of filling her up at St. Mary's," the force of altering or controuling the primary intention of the charter. And, upon the evidence before the jury of what had taken place at Rio Nunez, just previous to the

arrival of the *Flora*, we cannot think them wrong in finding the first issue for the plaintiffs; they probably, and not unreasonably, thought that the cargo, which had been recently forwarded by the defendant's agents by another ship, the *Jane*, might have been sent by the *Flora*, if those agents had been inclined so to send it. And, as to the second issue, upon the construction we have already put upon the charter-party, we think the jury right in finding, that the loading nearly a complete cargo of timber at St. Mary's, although it was the staple commodity of that place, was not a "filling up with lawful merchandise," according to the intention of the parties: and that the verdict upon that issue also ought not to be disturbed. The real question, however, between the ship-owners and the merchants arises upon the amount of damages which the jury have found by their verdict; which damages, whether they be considered as the measure of the injury sustained by the plaintiffs upon the first two breaches, or as the sum due for the freight of the cargo actually brought home, upon the third breach, is immaterial. The plaintiffs, on the one hand, contend, that, upon the legal construction of the charter, they are entitled to an amount of freight which would have been earned, if the ship had brought home a cargo consisting of average quantities of all the enumerated articles; the defendant, on the other hand, contends, that the ship-owners are only entitled to freight for the timber actually brought home, upon a *quantum meruit*; or to the freight due upon a full cargo of any one of the enumerated articles, at the option of the merchant; or, at the very utmost, to the freight due upon a full cargo of any one of the articles for which a middle rate of freight is charged—such, for instance, as palm oil; under any of which modes of adjustment the plaintiffs, as it is admitted, are over-paid. Now, if the ship had returned empty, we think the question now raised must be considered as settled. The opinion expressed by the very learned and accurate writer on the law of ships and shipping, referred to in the course of the argument, and the case of *Thomas v. Clarke*, the decision of which was not appealed from by any motion to the Court, appears to us

to lay down and establish a rule, which is at once just and reasonable, and may fairly be inferred to meet the intentions of the contracting parties. And we can see no real distinction to be made between the application of this rule to the case where the ship returns empty, and where she returns with a cargo of articles, altogether, or in a very large proportion, of a different nature and quality from those enumerated in the charter, and between which cargo brought home and the enumerated articles there is no common measure whatever. In both cases, the original intention and expectation of the parties, at the time the charter was entered into as to the amount of freight which would become payable for the voyage, must have been founded upon the assumption, that the ship would bring home a cargo consisting of all or some of the enumerated articles; in both cases, therefore, there exists the same necessity of applying the rule above laid down, which necessity is grounded on the consideration, that, unless you adopt this rule, you have no other guide whatever; the liberty "to fill up with other lawful merchandises," being understood by us to mean other lawful merchandises *ejusdem generis*, at least so far as the calculation of the freight is involved in that construction. And as the question of the amount of damages, or the amount of freight, whichever it is to be considered, was left to a special jury of merchants in the city, who have adopted that rule of calculation, with respect to the breach of a mercantile contract, it is sufficient for us to say, we cannot feel ourselves authorized either to reduce such amount, or to direct a new trial.

Rule discharged.

1837. { DELEGAL v. HIGHLEY.

Libel—Justification—Pleading—Privileged Publication.

In an action for libel, the defendant justified the publication on the ground of reasonable and probable cause, and set forth the facts and circumstances amounting to such cause:—Held, that such plea was ill, inasmuch as it contained no allegation that the

defendant, at the time he caused the charge to be made, had been informed of or knew, or in any manner acted on those facts and circumstances.

Held, also, that a plea justifying a publication, which stated that the plaintiff was charged before the Lord Mayor with having fraudulently obtained the signature of a youth, under twenty years of age, to two blank stamped bills, with intent to injure the good name of the plaintiff, and not alleging that the accusation was founded on facts, which made the charge a true one, or that the publication was justified by the occasion, being a true, full, and faithful account of proceedings in a court of justice, was, in consequence of such omission, ill.

Held, that the publication of an observation made during the investigation before a magistrate, by a party who might be considered as a stranger to the cause, reflecting upon the character, and injurious to the reputation of the plaintiff, was not within the privilege conferred upon publications of what takes place in courts of justice, as such publications should be strictly confined to the actual proceedings in court, and must contain no defamatory observations or comments from any quarter whatever, in addition to what forms strictly and properly the legal proceedings.

Quære—whether the publication of a fair and correct account of proceedings, ex parte, upon a charge before a magistrate, is or is not a privileged publication.

The first count, after the usual allegation of the plaintiff being a person of good name, &c., alleged, that the defendant, falsely and maliciously, and without reasonable or probable cause, caused and procured one John Henley, to make before Henry Winchester, Esq., at the Mansion House, at the city of London, the said H. Winchester then being mayor of the said city, and one of the Justices assigned to keep the peace, &c., within and for the said city, and also to hear and determine divers felonies and misdemeanours committed within the said city, a certain complaint, charge, and accusation against the plaintiff, to wit, that he, the plaintiff, then improperly detained two blank bill stamps, having the signature thereon respectively of J. Henley; and that he, the said plain-

tiff, had fraudulently obtained the said signature of the said J. Henley to the said blank bill stamps respectively; and thereupon the defendant then falsely and maliciously, and without any reasonable or probable cause whatever, caused and procured the plaintiff to be, and the plaintiff then was thereupon summoned to appear, and did, on such summons, to wit, on the 26th of the same month (October) necessarily appear at the said Mansion House, to answer the matters of the said complaint, charge, and accusation, and thereupon, to wit, on the day last aforesaid, the defendant, falsely and maliciously, and without any reasonable or probable cause whatever, caused and procured the said J. Henley to prosecute and continue the said complaint, charge, and accusation before the said H. Winchester, then being mayor, &c., until the said H. Winchester, &c., to wit, on the day and year last aforesaid, having heard and considered everything that was alleged and said touching the said complaint, charge, and accusation, wholly acquitted and discharged the plaintiff therefrom, and then dismissed the said summons; by means of which premises the plaintiff was prevented from attending to his lawful affairs and business, &c. In the second count, the plaintiff alleged, that he was summoned, at the instance of John Henley, to answer the charge above set forth, and appeared before H. Winchester, who, after hearing, &c., discharged the summons; yet the defendant, well knowing the premises, and to make it be believed that the plaintiff had been guilty of having fraudulently obtained the signature of the said J. Henley to the two blank bill stamps, and that he, the plaintiff, had been taken into custody on a criminal charge, in respect of such fraud and misconduct, and to vex, harass, &c. and entirely ruin the plaintiff, on the 27th of October 1835, falsely, wickedly, and maliciously did compose and publish of and concerning the plaintiff, and of and concerning the said proceedings of and before the said H. Winchester, &c., a certain false, scandalous, malicious, and defamatory libel, containing the false, scandalous, malicious, defamatory, and libellous matter following, concerning the plaintiff, and of and concerning the said proceedings of and before the said H. Winchester, that

is to say, "Police, Mansion House. On Monday, H. Delegal, Irish provision agent, 39, Clement's Lane, Lombard Street (thereby meaning plaintiff), was charged before the Lord Mayor (meaning the said H. Winchester), with having fraudulently obtained the signature of J. Henley, a youth under twenty years of age, to two blank stamped bills. Mr. Flower stated the case to his Lordship, and called J. Henley, who said, he was induced by Delegal (thereby meaning plaintiff) to come from Manchester to attend in a shop Delegal (thereby meaning plaintiff) was about to open in the New Cut, Lambeth. After he had been a few days in town, he was desired by Delegal (meaning plaintiff) to go to his counting-house, Clement's Lane, Lombard Street, when some papers were given him to copy. Delegal (meaning plaintiff) then placed before him two pieces of paper, which he desired him to write his name across, which he did, thinking Delegal wished it as a specimen of his hand-writing, but when Delegal removed them, he then saw the stamps, which had been hidden under some other papers. He had since asked Delegal about them, but had received evasive answers. Delegal (meaning plaintiff) produced several letters, which the Lord Mayor refused to look at. He (meaning plaintiff) then stated, that one was only a memorandum, which had been destroyed, and produced a mutilated portion of it, with the name of the complainant written upon it; the other was a bill which had likewise been destroyed; and called Russell, who swore that he saw the bill destroyed about a week ago. Mr. Hobler, the chief clerk, observed, that it was exceedingly improper, under any circumstances, to obtain the signature of the complainant, a mere boy, to bills of exchange. The Lord Mayor said, that as it had been shewn that both the bills had been destroyed, the complainant need be under no further apprehension; and Delegal (meaning plaintiff) was discharged." The third count alleged the publication in the *Courier* newspaper, of the libel above set forth, and averred by way of special damage, that certain provision merchants, naming them, refused to consign their goods to him, as heretofore they had been in the habit of doing; and that certain

bankers, naming them, had refused to discount his bills, &c., which they had been in the habit of doing, and would have continued to do, but for the libel,—to the damage, &c.

Plea—Second, as to the second count of the declaration: that the defendant caused and procured the said J. Henley to make before the said H. Winchester, &c., the said complaint, charge, and accusation against the plaintiff in the said first count mentioned, and caused and procured the plaintiff to be summoned to appear at the Mansion House, and the said J. Henley to prosecute and continue the said charge, &c., upon and with a reasonable and probable cause, that is to say, because heretofore, on the 1st of August 1835, the said J. Henley, being a son of the sister of the wife of the plaintiff, who is also a sister of the wife of the defendant, had agreed with the plaintiff to become a shop-boy, &c., as set out in the count, the said J. Henley being then under twenty years of age, and afterwards, to wit, on the day, &c., he being such shop-boy, was requested by the plaintiff to go to his counting-house, &c., and being so there, the plaintiff placed before him two slips of blank paper, and then desired him, said J. Henley, to write his name across, without acquainting him with the purpose thereof; and said J. Henley did then, being such shop-boy, and under twenty years of age, at the request of the plaintiff, write his name across the said slips of blank paper respectively, the said J. H. being ignorant that the said slips of blank paper were stamped, and thinking that the plaintiff wished only to see a specimen of the hand-writing of said J. Henley. The plea then stated, that the slips of blank paper were stamped, which J. H. did not observe, as they were hidden by certain other papers; that afterwards, on the 10th of August, J. H. requested plaintiff to inform him what the said slips of paper were, but plaintiff did not, nor would then, or at any other time, before the making of the said charge, &c., comply with the said request, or any part thereof. It was then alleged that Harriet, the mother of the said J. Henley, made a similar application to the plaintiff, but with a like result. Wherefore, defendant says, he had reasonable and probable cause to be-

lieve, and did believe, that the said plaintiff, before and at the time of making said charge and complaint, improperly detained the said two blank bills, having the signature thereon respectively of the said J. Henley, and that he, the plaintiff, fraudulently obtained the signature of the said J. Henley to the said blank bill stamps respectively; and this the defendant is ready to verify; wherefore, he prays judgment if the plaintiff, &c.

Fourth—As a further plea to the second count of the declaration, except as to so much of it as charges that defendant composed and published the libel therein mentioned, intending to cause it to be believed that the plaintiff had been taken into custody on a criminal charge, the defendant says, that before the composing and publishing of the libel in the said second count mentioned, to wit, on Monday the 26th of October 1836, the plaintiff was charged before the said H. Winchester, Lord Mayor, &c., with having fraudulently obtained the signature of J. Henley, a youth under twenty years of age, to two blank stamped bills; and defendant further says, that upon the said charge, one Mr. Flower did then state the case to the said Lord Mayor, and did then call as a witness said J. Henley, who then and there stated, (as before). And defendant further saith, that he composed and published the said libel without malice; and that the same contains a true and full account of all that which took place before the said Lord Mayor, touching the said charge and accusation, without any suppression, alteration, or omission, or misrepresentation whatever; therefore, the defendant composed and published the said libel, in the said second count mentioned, as he lawfully might, for the cause aforesaid; and this the said defendant is ready to verify; wherefore, &c.

Fifth plea—As to so much of the said second count of the said declaration, as relates to composing and publishing a certain part of the said libel, with intent to injure the plaintiff in his good name, fame, and credit, that is to say, "Police, Mansion House. On Monday, Charles Delegal, Irish provision merchant, 3, Clement's Lane, Lombard Street, was charged before the Lord Mayor, with having fraudulently ob-

tained the signature of J. Henley, a youth under twenty years of age, to two blank stamped bills,"—defendant says, that before the composing and publishing of the said libel, to wit, on Monday the 26th of October 1835, the plaintiff was charged before the Lord Mayor, at the Mansion House, with having fraudulently obtained the signature of the said J. Henley, then a youth under twenty years of age, to two blank stamped bills; wherefore, defendant composed and published the libel in the introductory part of this plea, and in the said second count mentioned, as he lawfully might, for the cause aforesaid; and this he is ready to verify; wherefore, &c.

Sixth—As to the second count of declaration, except as to so much as charges that defendant composed and published the libel, to cause it to be believed that the plaintiff had been taken into custody on a criminal charge, defendant says, that before the composing and publishing, &c., to wit, on the 1st of August 1836, the said plaintiff did fraudulently, &c. (as stated in the libel). And defendant further says, that he composed and published the said libel, without malice, and that the same contains a full and true account of all that which took place before the said Lord Mayor, touching the said charge and complaint, without any suppression, alteration, omission, or misrepresentation whatever; and that in truth and in fact, before the making of the said charge, to wit, on the 1st of August 1835, he, the said J. Henley, was induced by the said plaintiff, to come up to town to attend in the said shop, &c. (alleging the truth of the other matters contained in the libel), wherefore defendant did compose and publish the said libel, in the said second count mentioned, as he lawfully might, for the cause aforesaid; concluding with a verification.

To these pleas the plaintiff demurred specially, and the defendant joined in demurrer (1).

(1) The following were assigned as causes of demurrer. To the second plea, that it does not shew or sufficiently disclose any reasonable or probable cause for the committing by the defendant of the grievances in the said count complained of; nor does it therein or thereby sufficiently appear that the plaintiff ever was guilty of improperly detaining any blank bill stamps, having any signature thereon, or fraudulently obtaining any signa-

Henderson, for the demurrers.—The second plea to the first count amounts to a plea of not guilty—*Cotton v. Browne* (2). The plea of not guilty, in such cases, only puts in issue the existence of reasonable

ture thereto; nor that defendant, at the time of committing of said grievances, or any of them, had any reasonable or probable cause for believing the plaintiff to have been guilty, as aforesaid; nor that defendant acted in the premises upon or with any such reasonable or probable cause; and that it is consistent with the same plea, and the truth of the matters thereof, as therein pleaded, that the plaintiff, at the time when he requested the said J. Henley to write his name across the said slips of blank paper, believed the said J. Henley to know the purpose thereof, and the evidence of the said stamp, on the said slips of paper, and to be then of full twenty-one years of age, and that the concealment of said stamps, by other pieces of paper, was accidental, and that the signature of said Henley of the same blank bill stamps was in pursuance of a previous and *bond fide* agreement between him and the plaintiff, and that said J. Henley and Harriet Henley respectively, at the times when, as in the same plea alleged, they respectively requested the plaintiff to inform them what the said slips of paper were, well knew what they were, and that the plaintiff is wholly innocent of improperly detaining any blank bill stamps having any signature thereon, and of fraudulently obtaining any signature thereto; and that defendant was wholly ignorant of all the several matters in the same plea alleged as reasonable and probable cause, until after the committal of the said grievances in the said first count mentioned; and also, that it is not in or by said plea alleged or shewn, nor does it therein or thereby respectively appear, so that issue can be taken thereon, that the plaintiff, at the time when he so requested the said J. Henley to write his name across the said blank slips of paper, knew, or believed him to be ignorant of the purpose thereof, or of the existence of the stamps thereon, or to be under the age of twenty-one years, or knew, or caused, or intended the said stamps to be hidden by the other papers, when the said slips of paper were placed before the said J. Henley, by the plaintiff as aforesaid, or believed or knew either the said J. Henley or said Harriet Henley respectively, at the time of requesting information, as in the same plea alleged, to be ignorant of what the said slips of paper were, or was ever guilty in act or intention of improperly detaining the said bill stamps, or fraudulently obtaining the said signature thereto; nor that the defendant at the time of committing the said grievances, or any of them, had been informed of, or knew, or in anywise acted on the said circumstances in the same plea alleged, as shewing justifiable and probable cause, as therein mentioned; nor that defendant ever had any reasonable or probable cause for believing, as in the same plea mentioned, or was in any way privileged, interested, authorized, justified, or excused in the pre-

(2) 3 Ad. & El. 312; s. c. 4 Law J. Rep. (N.S.) K.B. 184.

and probable cause, just as in an action for maliciously proceeding to outlawry, the general issue, not guilty, only puts in issue the existence of reasonable and probable cause, and not the suing out or reversal

of the outlawry—*Drummond v. Pigou* (3). The plea is equally objectionable, upon the ground of its concluding with a verification; whereas, according to the rule laid down, and the reasoning adopted in *Tra-*

mises; and also, for that the same plea contains irrelevant, immaterial, and superfluous matters, to wit, matters not shewing either the guilt of the plaintiff in the premises, nor any reasonable or probable cause for the defendant, at the time of committing said grievance, to believe the plaintiff guilty in the premises; and also, for that the same plea is too general in this, to wit, that it is therein alleged, that defendant acted as is therein mentioned, upon and with a reasonable and probable cause, but no such reasonable and probable cause whatever is stated and shewn in detail and particulars; and in this, to wit, that it is alleged that the defendant did believe, as in the same plea mentioned, but no ground or cause for such belief is sufficiently shewn; and also, for that the same plea amounts to the plea of not guilty; and also, for that the same plea concludes with a verification, whereas the same ought to conclude to the country; and also, for that the same plea is, in other respects, uncertain, informal, and insufficient.

As to the fourth plea of the defendant, by him above pleaded to the second count of the declaration, except as to the introductory part of the same plea mentioned, that the same plea is not sufficient in law, for that the same plea is stated, in the introductory part thereof, to be pleaded to the second count, except as to so much of the said count as charges that the defendant composed and published the libel therein mentioned, intending to cause it to be believed that the plaintiff had been taken into custody on a criminal charge; and is uncertain in this, that it leaves it doubtful whether the whole or what part of the libel is justified or admitted; and insufficient, to wit, in this, that it neither denies, nor confesses and avoids the libel, or any part of it, as stated in the said count; and informal in this, that while it admits and attempts to justify the composing and publishing charged, it does not admit that intention which is by law to be inferred from such composition and publication, and attempts to exclude the consideration of the intention with which the said libel was composed and published, from the question, whether such composition and publication were justified, and tenders too narrow an issue, and contains immaterial, superfluous matter, to wit, the said exception of matter, whereon no issue can be properly taken; and also, for that the same plea does not allege or sufficiently disclose any right, duty, privilege, or authority of the defendant, to compose or publish the said libel, in the second count mentioned, or any part thereof, nor any interest of the defendant in the matters thereof, nor any legal justification whatever; and also, for that whereas the plaintiff has above, in the same count, complained of the defendant, in respect of a libel, imputing that the plaintiff had been guilty of fraudulently obtaining the signature of the said J. Henley, to two blank stamped bills the defendant, in the same plea, has attempted to justify the same libel, on the ground, that the mat-

ters thereof had been charged and asserted by other persons, to wit, in the course of the said proceedings before the said Lord Mayor; and also, for that whereas the same plea in the introductory part thereof is expressed to be pleaded to part only of the said second count, yet, the residue of the same plea is pleaded and professes to be an answer to the whole of the same count; and also, that whereas the same plea in the body thereof purports, and in the latter part thereof is expressed to be pleaded by way of justification for the whole of the said libel, in the said second count mentioned; and whereas the said libel imports, that the plaintiff had been taken into custody, in respect of the charge in the libel mentioned, yet, that the same plea does not allege, or sufficiently shew, that the plaintiff ever was taken into custody on such charge, nor disclose any justification whatever for the said libel, in that respect; and also, for that in the same count and plea, it appears that the said libel contains an untrue, unfair, coloured, partial, and injurious account of that which took place before the said Lord Mayor as aforesaid, and a misrepresentation thereof in this, to wit, that it is therein alleged, that the plaintiff was discharged, whereas it is not in anywise asserted in the same plea, and it is denied in the same count, that the plaintiff ever was taken into custody; and also, for that the same plea neither shows the decision of any court, or person or persons having jurisdiction to decide, whether the plaintiff was guilty or not in the premises, nor asserts the truth of the matters in the same libel imputed to the plaintiff, and therein alleged to have been laid to his charge, before the said Lord Mayor; and also, for that the same plea does not in any way shew that the said libel was published for the purpose of giving the public information, which it was fit and proper for the public to receive, nor for any justifiable purpose whatever, nor that the statements therein contained were warranted by the evidence; and also, for that the same libel states not only what the said Lord Mayor did in the said charge, but also, the evidence alleged to have been given on that occasion, and certain comments in the case, such evidence and comments as in the said libel stated, containing matter false, scandalous, malicious, defamatory, and libellous, as in the same count in that behalf mentioned; and also, for that on the same plea above pleaded, no sufficient or conclusive issue can be taken; and also, for that the same plea is, in other respects, uncertain, informal, &c.

As to the fifth plea of the defendant, by him above pleaded, as to so much of the second count of the declaration in the introductory part of the same plea mentioned, that the same plea is not sufficient in law; for that whereas the plaintiff in the second count has complained of the

(3) 2 Bing. N.C. 114; s.c. 4 Law J. Rep. (N.S.) C.P. 295.

paul v. Mercer (4), the conclusion should have been to the country. With regard to the fourth and sixth pleas, pleaded to the second count, except as to so much of it as charges, that defendant composed and

published the libel therein mentioned, intending to cause it to be believed that the plaintiff had been taken into custody on a criminal charge, the objection is, that the pleas do not, as they should, go to the

defendant for composing and publishing the said libel, not only generally with intent to injure the plaintiff in his good name, fame, and credit, but also, with the further and particular intent in the same count in that behalf mentioned, the same plea is above expressed to be pleaded, as to the composing and publishing a part of the said libel, with intent to injure the plaintiff in his good name, &c.; and that no part of the said libel, as the said libel, and the intent of the composing and publishing thereof, are stated in the same count, is sufficiently denied, or confessed and avoided in the same plea; and that the same plea, in respect of the said reference therein to the said intent, is informal, insufficient, and double, and tenders an improper issue to be tried by the country, and contains superfluous matter; and also, for that the same plea does not allege or sufficiently shew any right, duty, or privilege, or authority whatsoever, of the defendant, to compose or publish any part of the said libel, nor any interest of the defendant in the matters thereof, nor any legal justification whatever; and also, that, whereas the plaintiff has above, in the said second count, complained of the said libel, as imputing to him that he had been guilty of fraudulently obtaining the signature of the said J. Henley, to two blank stamped bills, the defendant has in the same plea, attempted to justify the said libel in that behalf, on the ground that he the plaintiff had been accused, without in anywise shewing that he had been guilty of fraudulently obtaining such signature; and also, for that the same plea does not in any way shew that the said part of the said libel was published for the purpose of giving the public information, which it was fit and proper for the public to receive, or for any other justifiable purpose whatsoever, nor that the said charge, as stated in the said part of the said libel, was warranted by evidence or otherwise howsoever; and also, for that in the same plea as above pleaded, no sufficient or certain issue can be taken, and for that the same plea is, in other respects, informal, &c., and insufficient.

As to the sixth plea of defendant, to the second count of the declaration, except as in the introductory part of the same plea is excepted, that the same is not sufficient in law, for that the same plea is, in the introductory part thereof, expressed to be pleaded to the said second count, except as to so much of the said count as charges that the defendant composed and published the libel therein mentioned, intending to cause it to be believed that the plaintiff had been taken into custody on a criminal charge; and is uncertain in this, that it leaves it doubtful whether the whole, or what part of the libel is admitted, and justified; and insufficient in this, to wit, that it neither denies, nor confesses and avoids the libel, or any part thereof, as

stated in the said count; and informal in this, that while it admits and attempts to justify the composing and publishing charged, it does not admit that intention which is by law to be inferred from such composition and publication, and attempts to exclude the consideration of the intention with which the said libel was composed and published, from the question, whether such composition and publication were justified, and tenders too narrow an issue, and contains immaterial, informal, superfluous matter, &c., to wit, the exception of matter, wherein no issue can be properly taken; and also, for that though the same plea in the introductory part thereof is expressed to be pleaded to part only of the same second count, yet, the residue of the same plea is pleaded, and professes to be an answer to the whole of the same count; and also, for that the same plea leaves part of the matter, to which the same is pleaded, unanswered in this, to wit, that the same plea contains no answer, as to so much of the same libel as imputes that the plaintiff was taken into custody on the said charge, nor any justification whatever in that respect; and also, for that the matters in the same plea pleaded, if the same disclosed a sufficient justification of the composing and publishing, that the plaintiff did fraudulently obtain the said signature of the said, &c., yet do not disclose any sufficient justification of the publishing, that the said plaintiff was charged therewith, before the said Lord Mayor, as in the same libel alleged, and that evidence thereof was given, and that the other matters took place, which, in the same libel, are alleged to have taken place on the said hearing of the said charge before the Lord Mayor, &c.; and also, for that the same plea does not allege or sufficiently shew any right, duty, privilege, or authority of defendant to compose or publish the same libel, or any part thereof, nor any legal justification whatever; and also, for that in the same count and plea, it appears that the said libel contains an untrue, unfair, coloured, partial, and injurious account of that which took place, &c. before the Lord Mayor; and a misrepresentation thereof in this, that it was therein alleged, that the plaintiff was discharged, whereas it was not in anywise asserted in the same plea, and it is denied in the same count, that the plaintiff ever was taken into custody; and also, for that the same plea does not in any way shew that the said libel was published, for the purpose of giving the public information, which it was fit and proper for the public to receive, nor for any justifiable purpose whatsoever, nor that the statements therein contained were warranted by the evidence; and also, for that the same libel states not only what the said Lord Mayor did on the said charge, but also the evidence alleged to have been given on that occasion; and also, certain comments on the case, which evidence and comments, as in the said libel stated, containing matter false, scandalous, defamatory, malicious, and libellous, as in the said

entire. A party cannot adopt the course pursued by the defendant in traversing a libel; and thus exclude from the consideration of the jury the intention which operates upon him, and which constitutes the motive of his conduct. The libel is not divisible; and, therefore, as in *Mountney v. Watson* (5), and *Roberts v. Brown* (6), one proposition cannot be justified apart from the rest. Besides, the objection may be supported, by reason of the inconsistency of the preceding part with the body of the plea, as in *Gray v. Pindar* (7). The reason upon which publications are justified is admitted, as stated in *Bromage v. Prosser* (8), and *Flint v. Pike* (9); but the present case does not come within the rule. The publication here was not, *prima facie*, excusable on account of the cause; nor was it justifiable for the purpose of giving the public information which it was fit and proper for them to receive: besides, it was unsupported by the evidence. The broad principle upon which publications of what occurs in courts of justice may perhaps be justified is, that the public have a right to be present, and, consequently, they are entitled to hear from others what they are authorized to hear themselves. But no analogy exists between such publications and the present. The subject here was not discussed, and finally determined in a court of justice. The matter was merely brought before a magistrate upon a preliminary inquiry and *ex parte* evidence. The investigation took place at a magistrate's office; it might have been private, and the public might have been excluded; neither is it alleged that the magistrate was called upon to act in a judicial

count mentioned; and also, for that the same plea is double and multifarious, and alleges in detail the truth, not only of matters which are in the same libel alleged to have taken place before the said Lord Mayor, on the said charge, but also the truth of the charge then made; and also, that the same plea contains matter superfluous and immaterial; and on the same plea as above pleaded, no certain, single, and sufficient issue can be taken; and also, for that the same plea is, in other respects, uncertain, informal, and insufficient.

(5) 2 B. & Adol. 673; a.c. 9 Law J. Rep. K.B. 298.

(6) 10 Bing. 519; a.c. 3 Law J. Rep. (N.S.) C.P. 168.

(7) 2 Bos. & Pul. 427.

(8) 4 B. & C. 247; a.c. 3 Law J. Rep. K.B. 203.

(9) Ibid. 473; a.c. 3 Law J. Rep. K.B. 272.

or magisterial capacity; consequently, the case is open to the observations made by Lord Tenterden, in *M'Gregor v. Thwaites* (10), and *Duncan v. Thwaites* (11), and of Lord Ellenborough, in *The King v. Fisher* (12). But, independently of these objections, was it not incumbent upon the defendant, in the plea in which he justifies the publication, on the ground of reasonable and probable cause, and sets forth facts and circumstances, to allege, that he was acquainted with, and influenced by, such facts at the time of the publication? There is no such allegation; and it is perfectly consistent with his plea, that, at the time of the wrong done, he was ignorant of such alleged facts and circumstances, and, for his defence, relies upon a knowledge subsequently acquired on a suspicion subsequently created. This, as the Court are aware, is a ground of serious objection to the plea.

V. Williams, contra.—The probable cause may be specially pleaded, though, in effect, it amounts to the general issue—*Lord Cromwell's case* (13), *Pain v. Rochester* (14), *Chambers v. Taylor* (15), *Cox v. Wirrall* (16), *Lake v. King* (17). The objection, that the plea should conclude to the contrary, is founded upon mistake. It was competent to the defendant to submit certain facts to the consideration of the Court, that he might know from them whether they formed an answer in law to the action. The plaintiff might have replied *de injuria*, and put the defendant to prove the truth of all he had stated. As to the other portion of the objection, founded upon the supposed defect in the plea, in not stating, that the defendant, before making the charge, believed that there was just and probable cause for prosecuting the complaint; it was not necessary for him to believe the plaintiff to be guilty when a just and probable cause for the complaint existed. The course pursued upon trials at Nisi Prius establishes this; for if the Judge is of opinion that a reasonable and probable

(10) 3 B. & C. 24; a.c. 2 Law J. Rep. K.B. 271.

(11) Ibid. 557; a.c. 3 Law J. Rep. K.B. 3.

(12) 2 Campb. 563.

(13) 4 Rep. 13.

(14) Cro. Eliz. 871.

(15) Ibid. 900.

(16) Cro. Jac. 193.

(17) 1 Saund. 130, n. 1.

cause does exist, he stops the proceeding. Now, this he would not do, if the belief in the guilt of the party was a question for the decision of the jury. This, therefore, excludes the supposition, that the defendant's belief upon the subject was an ingredient in the case. With regard to the objection, that the defendant does not allege a knowledge of the facts at the time of the publication, such allegation of time upon the record would have been immaterial, as the Court would assume the existence of such antecedent knowledge; just as, reasoning from analogy, in *Owen v. Waters* (18), the Court held, it was not essential, that it should appear, on the face of the declaration, that the right of action had accrued before the suit was commenced. The objection advanced to the fourth and sixth pleas would have some force, if the averments were indivisible; but they are not so. The intentions of the defendant are said to be two, viz. to cause it to be believed that the plaintiff was guilty of a certain offence, and that he had been arrested on a criminal charge; and proof of either would have been sufficient—*The King v. Evans* (19). The doctrine is further confirmed by the opinion of Le Blanc, J., in *Stiles v. Nokes* (20). With regard to the sufficiency of the justification, on the ground of its being an investigation before a magistrate, it is admitted, that there is no authority upon this precise point; but the Court cannot withhold assent from the cases giving certain privileges to publication of proceedings in courts of justice, and which have been conferred from a sense of public utility. The principle referred to, and to the advantage of which the defendant is fully entitled, is to be found in *Curry v. Walter* (21), *The King v. Wright* (22), *The King v. Fisher* (23), where Lord Ellenborough said, "The publication of proceedings in courts of justice, where both sides are heard, and matters are finally determined, is salutary, and is therefore permitted"—*Saunders v.*

Mills (24), *Lewis v. Walter* (25), *The King v. Carlile* (26); and the principle founded upon public utility, and acted upon for the public advantage, may be also extracted from the cases cited upon the other side for the plaintiff. With regard to the objections advanced to the sixth plea, they are answered by *Fairman v. Ives* (27), where it was held, that a petition, addressed by a creditor of an officer in the army to the Secretary at War, *bonâ fide*, and with a view of obtaining, through his interference, the payment of a debt due, and containing a statement of facts, which, though derogatory to the officer's character, the creditor believed to be true, is not a malicious libel, for which an action is maintainable.

Henderson, in reply, denied the applicability of *Lord Cromwell's case*, and of the doctrine found in 1 *Saund.* 131. The decision in *Pain v. Rochester* was not satisfactory, as Gawdy, J. had doubts upon the subject. *Chambers v. Taylor and Cox v. Wirrall* are also objectionable upon principle. Neither is it an answer to the objection, that the plea concludes with a verification, and that the plaintiff should reply *de injuriâ*, as *Whittaker v. Mason* (28) renders it at least doubtful, whether he could. The cases on which the defendant relies, such as *Curry v. Walter* and *Duncan v. Thwaites*, are very far from maintaining the proposition to the extent laid down, that reports of what occurs in courts of justice may be published; still less can they be said to justify publications of *ex parte* and preliminary discussions before magistrates.

Cur. adv. vult.

TINDAL, C. J.—The first count in the declaration is framed in the usual form for causing and procuring a false and malicious charge to be made against the plaintiff before a magistrate, and proceedings to be taken thereon without any reasonable or probable cause. The second plea, which is pleaded to that count only, alleges in terms, that the defendant caused and pro-

(18) 2 Mee. & Wels. 91; s. c. 6 Law J. Rep. (N.S.) Exch. 13.

(19) 3 Stark. N.P. 35.

(20) 7 East, 492.

(21) 1 Bos. & Pul. 523.

(22) 8 Term Rep. 293.

(23) 2 Campb. 563.

(24) 6 Bing. 213; s. c. 8 Law J. Rep. C.P. 24.

(25) 4 B. & Ald. 605.

(26) 3 B. & Ald. 167.

(27) 5 B. & Ald. 642.

(28) 2 Bing. N.C. 559; s. c. 5 Law J. Rep. (N.S.) C.P. 57.

cured the charge to be made upon and with a reasonable and probable cause, and then proceeds to state what that reasonable and probable cause was, and, in so doing, alleges the several facts and circumstances attending the transaction out of which the charge before the Lord Mayor arose. To this plea there is a special demurrer, alleging as one ground of objection, that it contains no allegation, that the defendant at the time he caused the charge to be made, had been informed of, or knew, or in any manner acted on those facts and circumstances: and we are of opinion, that the plea is bad, not in form only, but in substance, on this ground of objection. The gravamen of the declaration is, that the defendant laid the accusation without any reasonable or probable cause operating on his mind at the time; and under the plea of not guilty, the defendant must have failed at the trial, if he had not proved that the facts of the case had been communicated to him, or at all events so much of the facts as would have been sufficient to induce a belief of the plaintiff's guilt in the mind of any reasonable man, previous to the charge being laid before the magistrate. This was held by the Court of King's Bench in the course of last term, upon a motion for a new trial in a case of *Docwra v. Hilton*. And if the defendant, instead of relying on the plea of not guilty, elects to bring the facts before the Court in a plea of justification, it is obvious that he must allege as a ground of defence, that which is so important in proof under the plea of not guilty, viz. that the knowledge of certain facts and circumstances which were sufficient to make him or any reasonable person believe the truth of the charge which he instituted before the magistrate, existed in his mind at the time the charge was laid, and was the reason and inducement for his putting the law in motion: whereas, it is quite consistent with the allegations in this plea, that the charge was made upon some ground altogether independent of the existence of the facts stated in the plea; and that the defendant now endeavours to support the propriety of the charge, originally without cause, by facts and circumstances which have come to his knowledge for the first time since the charge was made. Upon this ground we hold the second plea to be insufficient in law.

NEW SERIES, VI.—C.P.

The second count of the declaration is, for the composing and publishing of a false and malicious libel; the libel consisting of the publication, in a newspaper, of a police report of the same proceedings before the Lord Mayor, which form the subject-matter of the first count. And the fourth and sixth pleas are each pleaded to the second count, "with the exception of so much of the count as charges, that the defendant composed and published the libel therein mentioned, intending to cause it to be believed that the plaintiff had been taken into custody upon a criminal charge." To this plea various objections have been assigned for cause of special demurrer, and have been urged in argument before us. We think, however, an objection appears upon the face of the plea, which renders it unnecessary for us to give any opinion, either upon the formal objections which have been urged against its validity, or on the more general question which has been raised, viz. whether the publishing of a fair and correct account of proceedings *ex parte*, upon a charge before a magistrate, is or is not a privileged publication; for each of these pleas alleges, as a ground of justification, "that the supposed libel contains a full and true account of all that took place before the Lord Mayor, touching the said charge or complaint." But it is an established principle, upon which the privilege of publishing a report of any judicial proceedings is admitted to rest, that such report must be strictly confined to the actual proceedings in court, and must contain no defamatory observations or comments from any quarter whatever, in addition to what forms strictly and properly the legal proceedings. The principle is so laid down in the case of *Lewis v. Clement*, and in other cases. But in the libel set out in the declaration, after the statement of the evidence given before the Lord Mayor, an observation is inserted of Mr. Hobler the chief clerk, "that it was exceedingly improper, under any circumstances, to obtain the signature of the complainant, a mere boy, to bills of exchange." This appears to us to be a substantive reflection on the character and conduct of the plaintiff, which is altogether unwarranted, in two respects; it was not made in the course of any judicial proceeding, by any one whose duty called upon him to make

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it: it was uttered by a person, who, for this purpose, must be considered as an entire stranger: it is the same as if made by any bystander in the court. Again, it was not warranted by the facts which were brought in evidence against the plaintiff, which amounted, not to a charge of obtaining signatures to blank bills of exchange, but to a charge of obtaining the signature of a young man to two blank pieces of paper which had been stamped with stamps for bills of exchange. The libel, therefore, contains a serious reflection on the character of the plaintiff, which the privilege set up in the fourth plea, supposing it to exist, does not extend to justify;—a reflection, the truth of which is not justified by the facts stated in the sixth plea; and, on those grounds, we think both these pleas are bad.

The fifth plea is pleaded to the publication of a certain part of the libel, which is thereby separated and divided from the rest; namely, that part which states, that the plaintiff was charged before the Lord Mayor with having fraudulently obtained the signature of a youth, under twenty years of age, to two blank stamped bills, with the intent to injure the good name and reputation of the plaintiff. There can be no doubt but that the publication of the fact, that such an accusation was made against the plaintiff, is calculated to injure him in his good name and reputation; and that the defendant is therefore called upon to justify such publication; and the only justifications which the law admits to the publication of an accusation of this nature, are two: first, that the accusation against the plaintiff was founded on facts, which make the charge itself a true charge; and, secondly, that the publication was justified by the occasion; viz. that it is a true, full, and faithful account of proceedings in a court of justice. The plea in question sets up neither of these grounds of defence. It is merely an assertion, that an accusation was made by some third person, reflecting on the character of the plaintiff. Even whilst *The Earl of Northampton's case* (29) was held to be law to its full extent, the repetition of a slander by a third person was no justification, unless the party gave the plaintiff a ground of action against such third person, by naming the original author (29) 12 Rep. 134.

of the slander at the time; nor, it would seem, unless he averred in his justification, his belief, that the accusation was true; per Bayley, J. in *Macpherson v. Daniel* (30). But the case of *De Crespigny v. Wellesley* (31) furnishes an authority, that this doctrine does not extend to the publication of a written libel; and that where such libel consists in publishing the fact of an accusation having been made against another, the defendant must shew the accusation to be true. The justification in the present case, in fact, amounts to no more than a republication of the libel itself.

If the libel is to be taken as containing a publication of legal proceedings,—as might be surmised from the whole of the libel as stated in the declaration,—then the plea is bad, because it omits to state, that it is a true and accurate report containing the whole of what passed on that occasion. The terms of the accusation should be stated, not merely the result of it; for if the terms in which it was preferred were stated, it might carry with it its own refutation or explanation. See *Saunders v. Mills*, *Flint v. Pike* (32), *Smith v. Thomas* (33). And, still further, it appears on this very record, that the libel justified is in fact a part of a legal proceeding only, viz. the charge, which the defendant is not justified in publishing alone. See *Rex v. Lee* (34), *Rex v. Fisher* (35). We therefore think the fifth plea bad also; and, upon the above several pleas demurred to, we give our

Judgment for the plaintiff.

1837. { BRAMAH AND ANOTHER v. EVAN
MEREDITH ROBERTS AND
OTHERS.*

Joint Stock Company—Bill of Exchange.

In an action by the plaintiffs, indorsees of a bill of exchange, drawn by a director of a joint stock company, upon and accepted

(30) 10 B. & C. 270; s. c. 8 Law J. Rep. K.B. 14.
(31) 5 Bing. 403; s. c. 7 Law J. Rep. C.P. 100.
(32) 4 B. & C. 473; s. c. 3 Law J. Rep. K.B. 272.
(33) 2 Bing. N.C. 372; s. c. 5 Law J. Rep. (N.S.) C.P. 52.

(34) 5 Esp. 123.

(35) 2 Campb. 563.

* Vide 1 Bing. N.C. 466, 481; and 4 Law J. Rep. (N.S.) C.P. 81, where this case came before the Court upon special demurrer to the replication, and upon motion to withdraw the demurrer.

by the chairman for self and directors, it having appeared that the defendants, since they became members of the association, neither paid nor sanctioned the payment of any bills of exchange, except such as though drawn before, were payable after they became directors, and which were given for services done to the company, and that no bills had been given since some of the defendants became directors, but all payments had been made in cash; and there being no evidence given by the plaintiffs of the constitution of the company, nor of any authority given by deed or otherwise, to any one of the directors, to bind the other directors, or to bind the company at large, by his acceptance of bills of exchange:—Held, that there was no proof of an implied authority given to one director to bind the others by his acceptance; and that the verdict found for the defendants was warranted by and consistent with the evidence.

This was an action brought to recover the sum of 500*l.*, the amount of a bill of exchange, dated the 22nd of October 1833, drawn by the defendant, W. Clare, upon the defendants, E. M. Roberts, J. and G. H. Foster, F. Blakesley, and others, directors of the South Metropolitan Gas and Coke Company, payable, three months after date, to the order of the defendant Clare, and by him indorsed to the plaintiffs. The bill was accepted by the defendant, E. M. Roberts, as chairman, for himself and directors (2); and the question in the cause was, whether the defendant Roberts had authority to bind the other defendants, as directors of the company, by the acceptance in question. The company was, it appeared, projected in 1828, by the defendants, Roberts and Clare, and in July 1830, the defendant, W. Baker,

(2) The bill was in these words: "London, 22nd October 1833. Three months after date pay to my order the sum of 500*l.* for value received. W. Clare. To Messrs. E. M. Roberts, James and G. H. Foster, F. Blakesley, and others, directors of the South Metropolitan Gas and Coke Company." The acceptance was as follows: "Accepted for self and directors, E. M. Roberts, chairman, payable at Sir C. Price & Co., bankers." The defendants, E. M. Roberts, L. Roberts, and W. Clare, said in their plea, that Clare did not indorse the bill to plaintiffs *modo et forma*; and to the residue of the declaration, that they did not promise, &c. The pleading of the other defendants will be found in 1 Bing. N.C., and 4 Law J. Rep. before referred to.

became a member of the managing committee; and in January 1831, the defendant Lewis Roberts joined the undertaking. In the latter end of March 1833, the defendant G. H. Foster became a director; and in the April following, the other defendants, J. Foster, F. Blakesley, and W. Lyall, became members of the direction. Previously to the directors of 1833 joining the concern, the other defendants had been able to raise only a small sum from the deposits paid by the subscribers for shares, and had incurred liabilities to a considerable extent, for which they had accepted bills sometimes in the same form as the acceptance in question, at others in the names of three of the directors, in the style of an ordinary partnership, and at others in the name of the defendant Evans M. Roberts, without the addition of his title of chairman.

The company's account with the Messrs. Price, bankers, was opened on 3rd of April 1830, and was closed on the 11th of February 1832, the balance being paid up to the 24th of December 1831. There were no funds in the hands of the bankers until the 18th of March 1833, and the first payment was made on the next day, the 19th. The greater part of the bills above referred to, were outstanding at the time of the new directors joining the concern; and these gentlemen, having satisfied themselves that the acceptances had been given for value received on account of the company, directed the company's bankers to discharge them out of the funds acquired by the issue of shares, after their joining in the speculation. The following is a copy of the letter, addressed by the directors to the bankers, authorizing payment of the bills.

"South Metropolitan Gas Office, 3, Crosby Square, 24th April 1835.

"To Sir C. Price & Co.

"Gentlemen—We have the honour, in pursuance of a resolution entered into at a general meeting of the directors, held on the 22nd inst., to transmit you the following particulars of bills accepted by E. M. Roberts, Esq., for account of the South Metropolitan Gas Company, and to request that the same may be paid on presentation." [Then followed the list of bills.]

This letter was signed by all the direc-

tors. The plaintiffs, for the support of their case, relied on this letter, and upon the fact of the payment of two or three other bills, drawn previously to the new directors joining the company, but paid subsequently; and it was said, that it being proved, that a partnership existed under the firm of the South Metropolitan Gas and Coke Company, which carried on business by means of bills of exchange, and that the defendants were partners in the concern prior to the acceptance of the bill upon which the action was brought, and that the company had gone on paying bills of exchange, it followed that no evidence of express authority from the other defendants to E. M. Roberts to accept bills, was required; that the public had become familiar with that course of business; and it was therefore the duty of the defendants, by express notice, to caution the public if any alteration had taken place in the mode in which their business was carried on.

The questions left to the jury by the learned Judge, Tindal, C.J., before whom the cause was tried, were, whether E. M. Roberts had any express authority from the other defendants to accept bills of exchange for them, or whether the defendants had recognized any such authority in him, by the payment of the bills given in evidence. The question of implied authority was reserved for the consideration of the Court. A verdict having passed for the defendants—

Wilde, Serj. obtained a rule for setting it aside, and entering a verdict for the plaintiffs, or for a new trial.

Sir W. W. Follett, Crowder, and Amos, shewed cause.—The defendants are not liable upon this bill, unless Roberts had authority to make them responsible by his acceptance, and the onus of proving this was strictly upon the plaintiffs. There is no authority implied by law in some directors of a company to bind other directors and shareholders by a bill of exchange, in the same manner as there might be in one partner in a trading firm to bind others; for ordinary partnerships and joint stock companies are widely distinguishable in their nature, objects, mode of formation, and management; and the mutual trust and confidence that exists in the one, is not to be found in the other. It is questionable,

however, whether these persons can be considered as partners in the association at all—*Fox and others v. Clifton* (3). In *Dickenson v. Valpy* (4), it was held incumbent on the plaintiff to give evidence of the authority of the directors of a mining company to draw or accept bills of exchange, either by producing the deed of partnership, or shewing that it was necessary for carrying on the business of that company, or that it was usual for other mining companies to draw bills of exchange, and the only distinction between that case and the present, is, that this company was formed for the purpose of manufacturing gas instead of working mines. Besides, as the bill was drawn out of the ordinary form, it was imperative upon the plaintiffs, if they meant to hold the defendants liable, to make inquiries on the subject; they were bound to ascertain upon what grounds Roberts assumed an authority to bind the others. A bill drawn, as this was, may be considered as drawn by procuration, and in *Attwood v. Munnings* (5), it was held, that a person taking such a bill, ought to exercise due caution, for he must take it upon the credit of the party who assumes the authority to accept, and it would be only reasonable prudence to

(3) 6 Bing. 77; s. c. 9 Bing. 115; 9 Law J. Rep. C.P. 277. This case, after two concurrent verdicts for the plaintiff, came before the Court, upon a rule for a second new trial, which was made absolute; Tindal, C.J., saying, "If the questions had been merely questions of fact, we should probably have hesitated much, after two concurrent verdicts for the plaintiffs, before we should have sent the cause down to a third investigation; for though no precise rule can be laid down upon this point, but each case must stand upon its own proper ground; yet, it would be only upon very strong and well-grounded dissatisfaction with the former verdicts, that the Court would be induced so far to interfere with the proper province of the jury, on questions which the law has placed under their peculiar jurisdiction, as to send a mere question of fact to trial by a third jury, when two have before pronounced the same opinion upon it. But the questions in this case submitted to the jury, were not questions of mere fact, but questions in which the law and fact were so intimately involved and combined together, that the jury cannot be said to have come to a right conclusion upon the fact, unless they are contented to take the law upon the subject, from the Judge who presides at the trial."—Upon this subject, vide *Steel v. Foster*, ante, 265, where, after two concurrent verdicts, the Court refused to send the case to a third investigation. But the questions there, were questions of fact.

(4) 10 B. & C. 128; s. c. 8 Law J. Rep. K.B. 51.

(5) 7 B. & C. 278; s. c. 6 Law J. Rep. K.B. 9.

require the production of that authority. The inquiry, if made in this case, at the bankers where the bill was made payable, would distinctly have negatived the fact of Roberts's authority to accept, and have proved to the plaintiffs that no cheques or orders would be paid, unless they had the signatures, first, of three directors, and from a certain period of five directors, countersigned by the secretary. Even in cases of ordinary partnerships, where the power of accepting bills is implied by law, such power may be rebutted by express previous notice to the party taking such security, from one partner, that the other would not be liable—*Lord Galway v. Mathews* (6). The doctrine will be found still further illustrated in *Denton v. Rodie* (7), and *Ducarrey v. Gill* (8). A case has also occurred, where the banker who advanced money upon bills of exchange drawn by a partner in his own name, had no remedy against the partnership, though the proceeds were carried to the partnership account—*Emly v. Lye* (9). The plaintiffs, therefore, ought not to recover, as they were themselves to blame in taking a bill drawn out of the common form, without making proper inquiries as to the authority of the acceptor; and there was nothing to shew any necessity for drawing bills, or that the plaintiffs were deceived or misled.

Wilde, Serj. and Kelly, in support of the rule.—*Dickenson v. Valpy* and *Fox v. Clifton* are inapplicable, as those were clearly cases of joint-stock companies, and the latter case was decided, upon the ground that the defendant, by the mere payment of a deposit, had not become a partner in the concern. In the present case, there are none of the circumstances belonging to a joint-stock company; no mention is made in the deed of any shareholders, and the defendants are in the situation of ordinary partners, notwithstanding they have assumed the name of directors. For aught that appears, they are the only partners, and they have rendered themselves responsible, by paying bills in the same form as the present, as well as in other forms. A change of directors, or an addition to their number, cannot alter their responsibility,

for the concerns of the company appear to have been carried on by means of bills of exchange at a long credit, and the directors from time to time paid or renewed such bills. As to the negligence of the plaintiffs in omitting to make inquiries relative to the authority of the acceptor, the rule upon that subject has been much relaxed since the decision in *Gill v. Cubitt* (10), as in *Backhouse v. Harrison* (11), where Patteson, J. said he never approved of the doctrine, and in *Crook v. Jadis* (12), where it was held, that nothing short of gross negligence would be an answer; and the doctrine was again questioned by Parke, B., delivering the judgment in *Foster v. Pearson* (13). It is said, that the onus of proving the implied authority to accept, lies on the plaintiffs; but, on the trial, they did prove that which was equivalent—they proved that the defendants came into the association, that they sanctioned the payment of the bills then running; and they gave no intimation of any change or alteration in the mode of transacting business. As to the cases of *Lord Galway v. Mathews*, *Emly v. Lye*, and the others which have been referred to, they were merely instances of bills improperly drawn.

Cur. adv. vult.

TINDAL, C.J.—This was an action in which the plaintiffs declared, in their first count, upon a bill of exchange for 500*l.*, bearing date the 22nd of October 1833, drawn by W. Clare upon and accepted by the defendants, payable to the order of the drawer, and by him indorsed to the plaintiffs. Three of the defendants, E. M. Roberts, Lewis Roberts, and W. Clare, pleaded to this count, that W. Clare did not indorse the bills of exchange to the plaintiffs; and the remaining five defendants, viz. Baker, the two Fosters, Lyall, and Blakesley, pleaded that the defendants did not accept. The issue upon the first plea was found for the plaintiffs; the issue upon the second for the defendants; and the question comes before us on a motion by the plaintiffs for a new trial, upon two

(6) 10 East, 263.

(7) 3 Campb. 493.

(8) 1 Moo. & Malk. 450.

(9) 15 East, 7.

(10) 3 B. & C. 466; s. c. 3 Law J. Rep. K.B. 48.

(11) 3 Nev. & Man. 188; s. c. 3 Law J. Rep. (N.S.) K.B. 38.

(12) Ibid. 257; s. c. 3 Law J. Rep. (N.S.) K.B. 87.

(13) 1 Cr. M. & R. 849; s. c. 4 Law J. Rep. (N.S.) Exch. 120.

grounds: first, that from the situation in which the defendants were placed with respect to each other, there was an implied authority given to any one to bind the others by his acceptance; and next, that the verdict was against evidence.

The bill of exchange, when produced in evidence, appeared to be dated the 22nd of October 1833; to be drawn by William Clare, and to be directed to "Messrs. E. M. Roberts, James and G. H. Foster, F. Blakesley, and others, directors of the South Metropolitan Gas Light and Coke Company, No. 3, Crosby Square; and the form of the acceptance was, "Accepted for self and directors.—E. M. Roberts, chairman." The bill was made payable to the order of the drawer; by whom it was afterwards indorsed to the plaintiffs. Upon the face of the bill, therefore, and without evidence to explain the actual relation of the parties to each other, it did not appear to be a bill of exchange accepted by one of the partners of an ordinary firm trading in partnership together, but a bill drawn upon the directors of a joint stock company, and accepted by the chairman for himself and the other directors; for the address of a bill to the directors of a metropolitan company, and the frame of acceptance by a chairman of such directors, for himself and the other directors, can only be referable, unless some explanation is given, to a company of the description well known in all the courts of law and equity in Westminster Hall as joint-stock companies, and not to ordinary partnerships in trade. It was proved upon the trial of the cause, that Clare, the drawer of the bill, from whom the plaintiffs derived title, and upon whose indorsement they rely, was the same William Clare who is one of the acceptors, and one of the defendants in his capacity of acceptor: so that the bill is drawn by one of the directors upon himself and the other directors, payable to his own order, and accepted by another director for himself and the rest. But the right of one director to draw a bill upon the rest, and still further the power of one director to accept a bill for himself and the others, so as to make those others liable, according to the case of *Dickenson v. Valpy*,—in the authority of which case we entirely concur,—is not a right or power implied by law, like

that which belongs to one member of an ordinary partnership in trade, with respect to bills drawn and accepted for the purposes of the trade; it must depend upon the powers given by the charter, or deed or agreement, under which the company is established and constituted, or some other agreement between the parties, whether a bill so drawn and accepted shall or shall not have that legal effect.

But upon the trial of this cause, no evidence whatever was given by the plaintiffs of the constitution of this company, nor of any authority given by deed or otherwise to any one of the directors to bind the other directors, or to bind the company at large, by his acceptance of bills of exchange; and in the absence of such evidence, we are of opinion that no such authority is to be implied by law, or can be held to exist.

The principal contention, however, on the argument before us, on the part of the plaintiffs, has been rested on two grounds: first, that the defendants are, in point of fact, the only persons who have any interest in the concern; so that the calling themselves directors on the face of the bill, is matter of description only, which they have thought fit gratuitously to assume, whilst they are in fact the individual partners in an ordinary trade or business; and, secondly, that even if they are to be considered as directors, the evidence at the trial proved that the defendants had paid various bills accepted in the same form, and that such mode of dealing shews that they have treated themselves as liable under the present form of acceptance, and is sufficient evidence of a mutual authority to bind each other by accepting bills of exchange.

As to the first ground of argument, there was no evidence to shew that the defendants were any other than as described upon the bill, that is, directors of a company properly so called. On the contrary, the evidence given on this subject, so far as it went, tended to establish that a joint-stock company really existed; for it was proved that, in May 1830, the sum of 1*l*. per share had been paid into the bankers as a deposit; that the account was opened with the bankers, in the name of the South Metropolitan Gas Light and Coke Company; that the payments by the bankers

were made upon the signatures of the directors; and that there was a secretary to the company: all which evidence is applicable only to the existence of an ordinary joint-stock company: and if it was intended to rely on an alteration in the nature of the company since that time, such alteration should have been proved by the plaintiffs.

As to the second ground of the plaintiffs' argument, the evidence was, that two of the defendants, the Messrs. Foster, did not become directors until about the 24th of April 1833; that no bill of exchange had been accepted since that time, but that all payments had been made in cash; and that no bill in which the names of the Messrs. Foster were specified, and, indeed, no bill drawn since the time at which they joined the concern, had been paid with their authority. And as to the payments which they had sanctioned, such payments were all confined to payments of former acceptances, before they became partners, which had been given on account of goods furnished to, or work done for the company, that is, acceptances to which they were not personally liable, but which they might think themselves under a moral obligation to pay. If, indeed, the Messrs. Foster had paid bills of exchange drawn upon Roberts and other directors, and accepted by Roberts "for self and other directors," after they had acquired a share in the concern, and become directors, it might have afforded evidence of an authority to the chairman to accept the present bill, and consequently of their liability under such acceptance; but no such evidence was given.

We cannot, therefore, see sufficient reason for sending this cause to a new trial: for we think the jury were justified, upon the evidence which was before them, in coming to the conclusion at which they arrived on both the points left to them; and it is not suggested, that any new evidence could be laid before them upon a second trial, of which the plaintiffs might not have availed themselves on the first. And as to the point which was reserved at the trial for consideration, we are satisfied that there was no implied authority to accept this bill, resulting from the situation of the parties in the concern.

Rule discharged.

1837. { YAP, ASSIGNEE OF PARTINGTON, AN
INSOLVENT, v. HARRINGTON.

Insolvent—Imprisonment—Execution.

Where an insolvent was arrested upon the 5th of November, but was not conveyed to prison until the 12th, being left during the interval in the care of a friend of the officer, and a sale of the insolvent's effects, under a fieri facias took place between the 5th and 12th of November:—Held, that the arrest of the insolvent upon the 5th was not, under the circumstances, such a commencement of his imprisonment as rendered the execution void under the 34th section of the 7 Geo. 4. c. 57. (Insolvent Debtors Act), and consequently, that the defendant, the execution creditor, was entitled to retain the proceeds of the sale.

Trover for the value of certain goods, seized by the defendant under a *fi. fa.*

Pleas—Not guilty; and a denial of property in the goods in the plaintiff as assignee.

At the trial, before Patteson, J., at the Worcester Assizes, it appeared, that a levy was made upon the insolvent's goods on the 28th of October 1836, under a *fi. fa.*, upon a judgment by warrant of attorney from the insolvent to the defendant, and a sale took place between the 5th and 12th. The insolvent was arrested on the 5th of November 1836, by a sheriff's officer, who took him to a beer-house, and left him in the care of a person, (to whom he delivered the warrant,) and he was not taken to prison until the 12th of November. The learned Judge directed the jury to find a verdict for the plaintiff, if they thought the party, in whose charge the insolvent was left, was the assistant of the officer, to whom the warrant was originally delivered; and for the defendant, if they thought that he was merely the friend of the officer. Accordingly, the jury found, that the insolvent was not in the custody of the sheriff's officer, but of his friend, and gave a verdict for the defendant.

R. V. Richards, pursuant to leave, moved to enter a verdict for the plaintiff, contending, that the arrest of the insolvent must be taken to be the commencement of his imprisonment, so as to make the subsequent sale of the goods invalid within

the 34th section of 7 Geo. 4. c. 57(1); and he referred to sections 30 and 31, wherein the words used were, "arrest or other commencement of imprisonment," as bearing out that construction of the act.

Talfourd, Serj., and Busby, shewed cause.—The question is, whether the insolvent was in such custody, on the 5th of November, as would have entitled him to petition for his discharge under the Insolvent Act. Section 12 clearly establishes that he was not, for it enacts, that the statute is to extend only to prisoners within the walls; and the only excepted case is that of a party who cannot continue to reside within the walls without serious injury to his health. The 30th and 31st sections, referred to upon the other side, create restrictions favourable to the creditors, and are, in themselves, strong arguments against the interpretation attempted to be given to the statute. And besides, if such was the intention of the legislature, it was easy for them to have declared it:—at all events, from analogy to that which is required by the bankrupt law, the confinement should be continuous, which was not the case here, as Newman had no authority to detain the insolvent. The object for which the plaintiff contends, could not be attained by a series of broken and successive imprisonments—*Trice v. Webber*(2), *Barnard v. Palmer*(3). The situation of the insolvent should be considered as within the words of Tindal, C.J. in *Sims v. Simpson*(4), where his Lordship expresses himself thus:—"It is said, that the use of the word 'prisoner' implies, that the assignment should pass

(1) Which enacts, "that in all cases where any prisoner who shall petition the said Court for relief under this act, shall have executed any warrant of attorney to confess judgment, or shall have given any *cognovit actionem*, whether for a valuable consideration or otherwise, no person shall, after the commencement of the imprisonment of such prisoner, avail himself or herself of any execution issued or to be issued upon any judgment obtained or to be obtained upon such warrant of attorney or *cognovit actionem*, either by seizure and sale of the property of such prisoner or any part thereof, or by sale of such property theretofore seized or any part thereof; but that any person or persons to whom any sum or sums of money shall be due in respect of any such warrant of attorney or *cognovit actionem*, shall and may be a creditor or creditors under this act."

(2) Willes Rep. 464.

(3) 1 Campb. 509.

(4) 1 Bing. N.C. 306; a.c. 4 Law J. Rep. (N.S.) C.P. 35.

whatever he possessed at the time he became a prisoner; but the word 'prisoner' is used only to identify the person, and not to give a retrospective effect to his acts."

R. V. Richards, in support of the rule.—The scope and object of the act are, that the property of a debtor shall be divided amongst his creditors, as soon as he is in custody with a view of taking the benefit of the act. As the insolvent went to prison upon the process whereon he was arrested, the rights of the assignee were inchoate at the time of the arrest. The rights of the creditors cannot be affected by the wrongful act of the sheriff, or his officers; for if so, the statute might be rendered inoperative by their collusion.

Cur. adv. vult.

TINDAL, C.J.—The principal question raised in this case for our consideration, turns upon the proper construction to be put upon the 34th section of the general Insolvent Act, which limits the time after which no one shall avail himself of any execution upon a judgment signed under a warrant of attorney or a *cognovit actionem*, given by a prisoner who petitions under that statute. The words of that section are, that no person shall avail himself of such execution "after the commencement of the imprisonment of such prisoner." On the part of the plaintiff it is contended, that the arrest of the debtor is, within the meaning of this section, the commencement of his imprisonment; on the part of the defendant it is, on the other hand, contended, that looking at the whole act, "the commencement of his imprisonment" is the first moment of the debtor's being actually committed to the walls of the prison, from which moment his right to petition under the statute takes its commencement. If the answer to this question had depended upon the 34th section alone, there would have been little difficulty in the case. The words themselves in their natural sense import the being actually in prison; and such construction of the word imprisonment appears to be warranted by reference to the 10th section of the act, which describes the persons who shall be capable of taking the benefit of the act as "persons in actual custody within the walls of any prison;" and still more by reference to the 12th section, which ex-

pressly enacts that the statute shall not extend to any person "who shall not be at the time of filing his petition and during all the proceedings thereon, in actual custody within the walls of the prison, without any intermission of such imprisonment." And it is a further argument in favour of this construction of the section, that the actual imprisonment of the debtor within the walls of the prison is a fact that may well be presumed to be notorious to his creditors, after which any creditor holding a warrant of attorney must be considered as taking proceedings thereon at his own peril: whereas the precise time of the actual arrest of the debtor may be often a fact involved in obscurity and uncertainty. The difficulty, however, arises from the introduction of the word "arrest," in sections 30 and 31. The 30th section (which contains the provision as to the insolvent having goods in his possession, order, or disposition, by the consent of the true owner,) begins by enacting, that if any person who shall petition for his discharge from imprisonment under the act, "shall, at the time of his arrest, or other commencement of such imprisonment," by the consent of the true owner, have in his possession, &c.; and the plaintiff contends, and we think justly contends, that the statute does in this instance expressly declare, that the arrest of a prisoner is one of the modes by which his imprisonment may be commenced. And again, the 31st section gives room for the same observation; as it contains provisions with respect to distresses for rent made "after the arrest or other commencement of the imprisonment of any person who shall petition under the act."

That in each of these two sections, and for the purposes contained in these sections, the arrest of the prisoner is made the limit of time after which certain consequences, therein respectively specified, are to follow, must, as we think, be admitted; nay, further, it must be admitted also, that the arrest of the prisoner is one of the modes by which his imprisonment may be commenced for the purposes of these sections. Whether the insertion of the word arrest, as one of the modes of the commencement of the imprisonment of the debtor, in the 30th and 31st sections, and the omission of that word in the

34th, the section now under consideration, arose from inaccuracy, or from any intended distinction with respect to the subject-matter in those respective sections, may be the subject of some doubt; though it certainly is very difficult to see any reason for any such intended distinction: and upon the whole, we think the proper construction of these sections is, that where the actual imprisonment within the four walls of the prison follows upon the arrest, as one continuous act, within the usual time allowed and required by law, and the course of practice, there the arrest shall be taken to be the commencement of the imprisonment; but where, after the arrest is made, any delay not sanctioned by the due course of law takes place before the actual commitment of the defendant to prison, such as by the favour of the plaintiff, or the negligent or permissive escape of the prisoner, or any other cause of the same nature, there, not the arrest, but the actual coming within the walls of the prison is, within the meaning of the statute, the commencement of such imprisonment. For we think great uncertainty might arise as to the right of creditors, and the validity of transactions, honest in themselves, if they were made to depend upon the happening of events of which the creditors had no notice; and in the particular case, it would seem to be unreasonable that an execution under a warrant of attorney, for anything that appears to the contrary given *bona fide*, and for a valuable consideration, should be held to be voidable where it was completed before the actual imprisonment of the debtor, because such execution was not executed until after the original arrest made, in a case where the insolvent was not committed to actual imprisonment in the county gaol until after an unreasonable and unjustifiable delay. This circumstance it is, which appears to us to distinguish the present case from that of *Stevens v. Jackson and others* (5); in which case the delay of a week between the arrest of the bankrupt in his house and his committal to prison, was accounted for "by his having been arrested in bed, dangerously ill, and incapable of being removed;" during all which interval the bailiff's follower kept the key of his house.

(5) 1 Marsh. 469.

Such a delay may well have been considered as *reasonable* under the circumstances; the duty of the officer, as observed by Mr. Justice Heath, even where the prisoner is taken in execution, being only to carry him to prison "within reasonable time." But in the present case, the arrest of the insolvent at Cheltenham takes place on the 5th of November, and the commitment to Gloucester gaol is delayed until the 12th, and in the interval it is expressly found by the jury, that he was in custody, "not of the sheriff's officer, but of a friend of the sheriff's officer," without any excuse suggested for the delay.

We cannot, therefore, consider this intervening imprisonment as a legal imprisonment, continuing from the first arrest; and on that account we think the arrest was not, in this case, the commencement of the imprisonment within the meaning of the act; and that the execution having been completed before the insolvent was actually committed to the county gaol, it is not avoided under the 34th section, as an execution after the commencement of the imprisonment of the insolvent.

Rule discharged.

1837. }
June 9. } PERCEVAL v. CONNELL.

Variance—Writ of Trial—Amendment.

Where the writ of trial misrecited the date of the writ of summons, but the objection was not insisted on at the trial, which proceeded, and the plaintiff obtained a verdict, the Court would not set aside the writ of trial for such defect, but ordered the rule to be suspended until the plaintiff obtained leave to amend the writ of trial, he paying the costs of the application to the Court.

In this case, the date of the writ of summons was the 22nd of June 1836, whilst the writ of trial alleged such date to be the 6th of July 1836. The discrepancy was observed on the trial, which, however, proceeded without interruption, and the plaintiff had a verdict.

Thomas obtained a rule for setting aside the writ of trial, on the ground of the misstatement above referred to, relying upon *White v. Farrer* (1).

James shewed cause, and urged, that the date of the writ of summons, as alleged in the writ of trial, was a mere mistake, from which no inconvenience could arise, or that the objection should have been taken at the trial. He referred to *Whipple v. Manley* (2), as an authority, that the writ of trial was conclusive as to the date of the issuing of the writ of summons; and he therefore contended, that the application should be rejected.

Thomas was heard in support of the rule.

TINDAL, C.J.—*White v. Farrer* does not apply. The defendant there did not appear, and there did not seem to be in that case a waiver of the imputed defect in the writ of trial, whereas the cause here proceeded, and the plaintiff had a verdict upon the evidence. We shall, I think, meet the justice of the case, by ordering the rule to be suspended until the plaintiff applies for leave to amend the writ of trial, in the recital of the date of the writ of summons, he paying the costs of this application.

The other Judges concurring—

Rule suspended accordingly.

(1) 2 Mee. & W. 288; s. c. 6 Law J. Rep. (N.S.) Exch. 85.

(2) 1 Mee. & W. 432; s. c. 5 Law J. Rep. (N.S.) Exch. 191.

REGULA GENERALIS.

IT IS ORDERED, That from and after the last day of this present *Trinity* term, all the offices, (the *Secondaries*' excepted,) be open in term, from eleven in the forenoon until five in the afternoon; and not in the evening: and that the *Secondaries*' Office be open in term, from eleven in the forenoon until three in the afternoon; and from six o'clock until eight o'clock in the evening: and that in the vacation, all the offices be open from eleven in the forenoon until three in the afternoon; except between the 10th day of *August*, and the 24th day of *October*; when they are to be open from eleven in the forenoon until two in the afternoon only.

N. C. TINDAL.
J. VAUGHAN.

J. A. PARK.
THOS. COLTMAN.

END OF TRINITY TERM, 1837.

REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
Court of Exchequer of Pleas
And Exchequer Chamber.

BY
WILLIAM GOLDEN LUMLEY, Esq., JOHN DEEDES, Esq., and
CHARLES SHAPLAND WHITMORE, Esq.,
BARRISTERS-AT-LAW.

7 WILLIAM IV.

MICHAELMAS TERM	1
HILARY TERM	71
EASTER TERM	112
TRINITY TERM	180

CASES ARGUED AND DETERMINED

IN THE

Court of Exchequer of Pleas.

MICHAELMAS TERM, 7 WILL. IV.

1836. }
Nov. 4. } JEFFERIES v. CLARE.

Agreement—Onus Probandi.

A declaration on an agreement, that the defendant would retake a public house previously sold by him to the plaintiff, and pay a certain sum and the value of the stock and licences, provided Messrs. C. & Co. would take him as tenant, alleged, that the defendant did not ask nor make any effort to cause Messrs. C. & Co. to take him as a tenant. The defendant pleaded, that he did ask and did make every effort to cause Messrs. C. & Co. to take him as their tenant, but that they would not:—Held, that it was incumbent upon the plaintiff to prove that the defendant had not made due efforts to procure Messrs. C. & Co. to take him as a tenant; and that, as it appeared that C. & Co. would not take him as a tenant, the plaintiff was properly nonsuited on those pleadings.

Assumpsit on a special agreement, whereby, in consideration that the plaintiff had taken a licensed public house from the defendant, and paid him 600*l.* for the good-will, and had taken the fixtures and stock in trade at a valuation, the defendant agreed

that the defendant should retake the house of the plaintiff at the expiration of twelve months, on having one month's previous notice so to do, and pay the plaintiff 500*l.* for the good-will, and take the fixtures and stock in trade at a valuation, and pay the plaintiff the value thereof, and for the time to come in the licences, on their being transferred to the said defendant on his taking possession of the said house, provided Messrs. Combe & Co. would accept him as tenant thereof.

The declaration alleged, that the plaintiff gave the notice and required the defendant to retake the house, and pay the money, but that the defendant did not, though often requested, ask the said Messrs. Combe & Co. to accept him as their tenant, nor did he make any effort or attempt to cause them to accept him as such tenant, as he ought to have done, according to the meaning of the agreement, and that the plaintiff was always ready to give up the house and to have the said licence transferred to the defendant, but that the defendant refused to take it.

Plea—That the defendant, after the notice, did ask and request the said Messrs. Combe & Co. to accept him as their tenant, and did make every effort to cause them

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B

to accept him as their tenant, but that they would not then, or at any time, accept him as such.

At the trial, before Lord Abinger, C. B., at the Sittings in Middlesex after last Trinity term, the plaintiff called a clerk of Messrs. Combe & Co., who stated, that, in September 1834, he received an application by the defendant for the house in question or for any other house of that firm. He answered, that a personal interview was necessary before anything could be settled respecting the house in question. The defendant's broker also made an application to the same purport, and received a similar answer. It did not appear whether he saw Messrs. Combe & Co. or not, and the clerk stated that they would have required a higher rent. Thereupon the learned Judge nonsuited the plaintiff.

Kelly now moved to set that nonsuit aside, and for a new trial. First, the issue was on the defendant, and it was for him to prove that he had used all his endeavours to be accepted as a tenant by Combe & Co., and it did not appear on the evidence whether he had the interview or not. The defendant ought to have proved that fact.

[ALDERSON, B.—The question as to the *onus probandi* does not always turn upon the affirmative language of the plea, but upon the necessity of the averments in the declaration. All negative allegations by the plaintiff must be met by affirmative averments; the proof of the issue is not, therefore, thrown upon the defendant. It makes all the difference here on whom the proof of the issue lies; if on the plaintiff, he must shew that the interview did not take place; if on the defendant, he must shew that it did.]

[PARKE, B.—You are to prove two things: first, that the defendant did not ask Combe & Co. to accept him as their tenant; the evidence shews that he did. Secondly, that he did not use all his efforts to cause them to accept him;—but what evidence have you that he did not?]

Secondly; the witness said, that Messrs. Combe & Co. would have required a higher rent for the premises. That was not admissible in bar of the action, whatever might have been its operation in mitigation of damages. It was not specially pleaded, as it ought to have been.

LORD ABINGER, C. B.—The real point in the cause was, whether Combe & Co. would accept the defendant as their tenant, and the evidence proved that they would not. There ought to have been an allegation of the affirmative in the plaintiff's declaration; but the averment was the material part of the plea, and is an answer to the action.

Rule refused.

1836. }
Nov. 7. } CLARK v. CHAMBERLAIN.

Ship and Shipping—Salvage—1 & 2 Geo. 4. c. 75—Trove—Conversion.

A ship, being on shore, received assistance from the owner of a smack, who put down an anchor and hawser attached to the ship, and left the latter, having its deck under water, for the purpose of carrying away some of the ship's stores, but with an intention to return:—Held, that the anchor and hawser were not parted with or left, within the meaning of the 1 & 2 Geo. 4. c. 75. s. 1, so as to warrant a claim to salvage in persons who came and took them up.

The agent for the Deputy Vice Admiral of a county, who received certain goods, alleged to have been left at sea, from the finder, and, on an application by the real owner, refused to deliver them up until the salvage was paid, or the payment thereof secured, held guilty of a conversion, the goods not being liable to salvage. If he had refused to deliver them up until it had been determined whether salvage was due or not, he would not have been guilty of the conversion; and, semble, such a defence would have been open to him on the general issue.

Trove for anchors, hawsers, and ropes.

Pleas—First, Not guilty. Second, that, except as to one anchor and hawser, the plaintiff was not possessed as of his own property, and, as to the said anchor and hawser, that they had been and were parted with and left by a certain vessel of the plaintiff on the coast of Essex, and being so parted with and left thereupon, had been taken up and taken possession of at sea on the same coast by one Thomas Mills and other persons, who thereupon, after their arrival at the port of Colchester, being the port at which they first arrived with such

articles so found, according to and in pursuance of the statute 1 & 2 Geo. 4. c. 75. duly delivered the said anchor and hawser into and deposited the same in the proper place appointed by the Vice Admiral of the county of Essex for safe custody, until the same should be claimed by the owner thereof, and the salvage charges and expenses thereon should be paid, or security given for payment thereof to the satisfaction of the salvors. And the plea then stated, that the defendant, as the agent for the deputy of the Vice Admiral at that port, received the anchor and hawser at the place so appointed for safe custody, and kept them for the purposes aforesaid, and detained them, because the plaintiff would not pay the salvage costs and expenses, or give satisfactory security for the payment thereof.

Replication to this plea—*De injurid.*

On the trial, at Guildhall, before the Lord Chief Baron, at the sittings after last term, it appeared, that a brig called the *Aurora*, on the 22nd of March, being ashore off the coast of Essex; assistance was offered by one Joseph Mills, but refused by the captain. On Thursday the 31st, Thomas Mills and Joseph found the brig, with her deck under water, attached to an anchor and hawser, which belonged to the plaintiff, who was the owner of another smack, by which assistance had been rendered to the brig, and which was at the time engaged in carrying away goods from the wreck. The Mills's took up the anchor and hawser, and delivered them to the defendant, the agent at Colchester of the Deputy Vice Admiral of Essex, within whose jurisdiction the articles were taken. He was applied to by the plaintiff, but refused to deliver them up, unless the salvage was paid, or security given for its payment. Upon these facts his Lordship was of opinion, that the defendant's special plea was not proved, and the plaintiff recovered a verdict.

Knox this day moved for a new trial for misdirection, and made two points. First, the special plea, which was framed upon the 1 & 2 Geo. 4. c. 75. s. 1. (1) was proved.

(1) Which enacts, "That all pilots, boatmen, hovellers, or other persons who shall take up any anchors, cables, tackle, apparel, furniture, stores, or materials, or any goods or merchandise, which may

The statute does not mean that the goods, which are parted with or left by any vessel at sea, must necessarily be wreck or absolutely derelict; it is enough if there be no one to take care of them. The facts of the case shew that the anchor and hawser had been left in that sense. Secondly, there was no conversion by the defendant. He is a public officer, whose duty is pointed out by the legislature — namely, to receive all goods delivered to him, and keep them in safe custody until claimed by the owner, and the salvage be paid. He is not to determine the ownership of the goods, or the validity of the claim for salvage. If that be disputed, the parties are to go before three Justices, who are to determine it (2). The defendant then was justified in making the demand for the salvage; and that being the case, he is not guilty of a conversion, and was entitled to a verdict on the general issue—*Bull. N.P.* 45—*Alexander v. Southey* (3).

PARKE, B.—I think the defendant is not entitled to a rule in this case. If the real ground of the defence be, that the defendant acted in the performance of his duty as a public officer, he ought to have shaped his plea differently. He should have stated,

have been parted with, cut from, or left by any ship or vessel, within any harbours, rivers, or bays, or on any of the coasts of this kingdom, whether the same ship or vessel shall be or shall have been in distress or otherwise, and which shall have been weighed, swept for, or taken possession of, by any such boatman, pilot, hoveller, or other person, shall send a report in writing of the articles so found, and stating the marks, if any, thereon; and also an accurate and particular description of the bearings, distances, situations, and time, when and where the same were found, to a Deputy Vice Admiral, or his agent at or near to the port or place where such boatman, pilot, hoveller, or other person, shall first arrive with such articles, within forty-eight hours after his or their arrival at such port or place, or before he or they shall leave the port, if he or they shall quit it before that time shall expire, and shall also within such period as aforesaid deliver such articles so found into a proper warehouse, or such other place as the Vice Admiral of each county shall appoint for safe custody, until the same shall be claimed by the owner or owners thereof, or his, her, or their agent or agents, and the salvage together with other charges and expenses as are hereinafter directed to be paid, in respect of such articles, paid by him or them, or security given for the payment thereof, to the satisfaction of the salvor or salvors thereof."

(2) Section 7th.

(3) 5 B. & Ald. 247.

that the anchor and hawser had been delivered to him *as goods which had been left at sea*, and that he kept them in his safe custody *bona fide* until the salvage was paid. Then the question would have arisen on the record, whether he was justified or not. Instead of that, he has pleaded that they were *left at sea*. That word must be interpreted in the same way in the plea as in the statute; and it is perfectly clear that an anchor attached to a vessel, as in the present case, cannot be said to have been *left*, within the meaning of the statute. It must, at all events, have been detached from the ship. The hardship upon the defendant, if any, arises from his improper plea. Then, as to the general issue: no doubt, if, instead of insisting upon the salvage being paid, he had simply said, "I do not know whether the salvage is due or not, and cannot deliver up the goods until that is settled," he would not have been guilty of a conversion. He kept the goods, however, until the salvage should be paid, taking it upon himself to determine that it was due.

ALDERSON, B.—The facts stated in the plea are, that the anchor and hawser had been parted with and left by the ship at sea. The facts proved were, that the anchor and hawser had been taken out of a vessel, and had not been left, but had been attached to another to secure her. It cannot be said, that the plea has been proved to the satisfaction of the Court or jury. As to the plea of the general issue, it might have been a question, whether evidence might not have been given under it to shew, that the defendant had a justifiable ground for detaining the goods, if he had not insisted upon detaining them for the salvage.

LORD ABINGER, C. B.—I thought that the defendant's plea involved the question, whether the anchor and hawser were left under such circumstances as to warrant the belief that they had been *abandoned* by the owner. I think that is the meaning of the words *left* and *parted with*, and that they do not apply to cases where the party is able to save the goods, or where they have been left through accident or negligence.

Rule refused (4).

(4) See the new provision as to goods wrecked of small value, in 5 & 6 Will. 4. c. 60. s. 7.

1836. { TURQUAND AND OTHERS, ASSIG-
Nov. 9. { NEES OF WILLIAM KNIGHT, A
BANKRUPT, v. JOHN KNIGHT.

Evidence—Confidential Communication—Attorney—Bankrupt.

The question in the cause being, whether a bankrupt had deposited a lease as a security for a debt, before or after an act of bankruptcy, his attorney, to whom he had applied to raise him some money, was not allowed to state whether, at the time of that application, he produced the lease.

Trover for a lease, dated the 26th of August 1835, from Calvert to William Knight.

Pleas—First, Not guilty. Second, that the plaintiffs were not possessed of the lease as of their own property. Third, that before William Knight became bankrupt, to wit, on the 28th of September 1835, he deposited the lease with the defendant, as a collateral security for the repayment of a sum of 850*l.*, in which sum he was then indebted to him.

Replication to this plea, *de injuria*.

At the trial, before the Lord Chief Baron, at Guildhall, at the sittings after last term, it was proved that the fiat of bankruptcy issued against William Knight, on the 19th of December 1835, within two months after the act of bankruptcy; and the case on the part of the plaintiff was, that the deposit of the lease must have taken place after the act of bankruptcy. For this purpose, a witness was called, who stated that he had been the attorney for the bankrupt in November 1835, and had been applied to by him to procure for him a loan of money. It was then proposed to ask him whether the bankrupt had not the lease in question in his possession at that time. It was objected, that having been the attorney for the bankrupt, he could not be allowed to answer that question. The learned Judge determined in favour of the objection, and the evidence was rejected. A verdict having passed for the defendant—

Sir F. Pollock, on a former day in this term, moved for a rule to shew cause why there should not be a new trial, on the ground of the rejection of this evidence. He urged that this was not the common

case of an attorney, called upon to give evidence of a client; but here he was acting in the character of a scrivener, the application by the bankrupt being only for the loan of a sum of money.

[PARKE, B., referred to the case of *Greenough v. Gaskell* (1), and *Wheatley v. Williams* (2), and observed—Suppose the lease had been put into his hands, in order that he might prepare a security for money already advanced, so that he would be in the character of a conveyancer? If he were merely a licensed conveyancer, it would be difficult to say that he would be privileged.]

Cur. adv. vult.

On this day—

LORD ABINGER, C.B. said—A motion was made in this case for a new trial, on the ground of the rejection of evidence. The Court were, at the time, strongly inclined to hold that the evidence had been properly rejected. We have since examined the authorities on this subject, especially the case of *Greenough v. Gaskell*, where Lord Brougham went through all the cases, and the weight of authority is in favour of the rejection of the evidence. As to the point of the witness being a scrivener, Lord Nottingham laid it down, that he would not compel a scrivener to disclose the communication made to him (3).

ALDERSON, B.—The rule seems to be correlative with the extent of the summary jurisdiction of the Courts over attorneys. In *Ex parte Aitken* (4), the Court of King's Bench laid down this rule: "Where an attorney is employed in a matter wholly unconnected with his professional character, the Court will not interfere in a summary way to compel him to execute faithfully the trust reposed in it. But where the employment is so connected with his professional character as to afford a presumption, that his character formed the ground of his employment by the client, there the Court will exercise this jurisdiction." So

where the communication which is made, regards a circumstance so connected with the employment, that the character formed the ground of the communication, it is privileged from disclosure.

Rule refused.

1836. }
Nov. 10. } HATCHER v. SEATON.

Evidence—Competent Witness.

Where the payee of a note, payable six months after demand, advanced the money to one of two partners to be employed by him as his capital in the partnership, held, that she was a competent witness for the defendant. In an action brought by the maker, after the dissolution of the partnership, against his copartner, on a covenant to repay his share of the capital, to prove that she had made a demand of payment, and had delivered the note over to the defendant, who offered it as a set-off against the plaintiff's claim, although she stated that she did not wish to withdraw the money from the business, but expected to receive the money with interest from the defendant,—the Court held, that she was a neutral witness.

Covenant upon an indenture of dissolution of partnership between the plaintiff and defendant, dated the 1st of January 1835, wherein it was agreed, that the plaintiff should relinquish the trade to the defendant, and the latter covenanted to pay the plaintiff 70*l.* a year by way of salary, as a shopman, until the 31st of December 1836; and also, upon receiving six months' previous notice from the plaintiff, to pay to him 600*l.*, and in the meantime to pay interest thereon, at the rate of 5*l.* per cent. in addition to the salary. Breach, that though the plaintiff, on the 10th of April, gave six months' notice to pay the said sum of 600*l.*, the defendant neglected to pay it. There was also a further breach, for the non-payment of the interest on that sum.

The defendant pleaded, as to all the sums in the declaration mentioned, except 11*l.*, that on the 8th of October 1833, the plaintiff made a promissory note for 800*l.*, payable six months after demand, to Mary James, or bearer, with interest thereon; that she delivered it to the defendant; and

(1) 1 Myl. & K. 98.

(2) 1 Mee. & Wels. 533; s. c. 5 Law J. Rep. (N.S.) Exch. 237.

(3) In *Harvey v. Clayton*, 2 Swanst. 221, n.; see also *Anon.*, Skin. 404.

(4) 4 B. & Ald. 49; see also *Ex parte Yeatman*, 4 Dowl. P.C. 309.

that she had demanded the payment of it six months before the commencement of the suit. The plea then stated a similar note for the same amount, payable to one Mary Smith, who in like manner had made the demand, and had delivered it to the defendant. The plea averred that the plaintiff was, at the commencement of the suit, indebted to him in the sum of 650*l.*, by virtue of the said promissory notes, and in 700*l.* on an account stated, and in 50*l.* for interest, which sums exceeding the damages sustained by the plaintiff, in respect of the breach of covenant, except as to the 11*l.* the defendant offered to set-off. As to the 11*l.* there was a plea of payment into court. The plaintiff replied, that the notes were not delivered to the defendant, nor were the demands in the plea mentioned made in manner and form, &c. And to the payment into court, damages *ultra*.

At the trial, before Gurney, B., at the sittings in Westminster, during last Trinity term, it appeared that the plaintiff had brought this 600*l.* into the partnership, which sum he had borrowed from the two ladies, Mrs. James and Mrs. Smith; and the question in the cause was, whether they had *bonâ fide* delivered the notes to the defendant. A witness proved that Mrs. James had done so; and Mrs. Smith was called for the defendant, to prove that she had made the demand of payment, and had also delivered her note to him. She stated, on the *voir dire*, that she did not wish to draw the money from the business, and that the bill belonged to the defendant, but she expected to receive back her 300*l.*, with interest, from him. Upon this it was objected, on the part of the plaintiff, that she was an incompetent witness, being interested in the event of the suit, since she was only to receive a consideration for the note, provided the money was allowed to remain in the business, which would not be the case unless the defendant succeeded. The learned Judge overruled the objection, and the jury found a verdict for the defendant.

Platt, in Trinity term, obtained a rule for a new trial, on the ground that this witness was incompetent; against which, cause was shewn this day by—

Barstow, who contended, that Mrs. Smith was a neutral witness, and indifferent in

this action. If the plaintiff succeeded, she would be entitled to have her note back from the defendant; if the defendant succeeded, she held him responsible for the 300*l.* and the interest upon it. In either event she is entitled to that money, and no more. He referred to *Venning v. Skuttleworth* (1).

Miller, in support of the rule, urged, that it appeared, in fact, that the defendant was only acting as trustee for Mrs. Smith, and therefore, if the defendant failed, she would be bound to reimburse him his costs.

LORD ABINGER, C.B.—Whether the defendant fails or succeeds, he will be indebted to the witness for this money, and must be responsible for it to her. She has transferred all her interest in the note to him.

PARKE, B.—His liability to her is quite independent of this action. Mrs. Smith has Hatcher's security for the money, which she has handed over to the defendant, and he is to pay her the proceeds. If the plaintiff succeed in this action, the defendant must give it back to her; if not, then he must pay her the money. He has, in fact, engaged to change her security. Mrs. Smith was therefore a neutral witness.

ALDERSON, B. and GURNEY, B. concurred.

Rule discharged.

1836. }
Nov. 11. } BROOKS v. ELKINS.

Stamp—Promissory Note.

"11th October 1831. I. O. U. 20*l.*, to be paid on the 22nd inst., W. B.," requires a stamp, either as a promissory note, or as an agreement.

This was an action of assumpsit for money due to the plaintiff, to which the defendant pleaded a set-off.

At the trial, at Guildhall, before the Lord Chief Baron, at the sittings after the last term, the defendant, in proof of his set-off, gave in evidence the following document:

(1) Bayley on Bills, 536, n.

"11th October 1831.

"I. O. U. 20*l.*, to be paid on the 22nd inst.

"W. Brooks."

It was objected to, as requiring a promissory note stamp. His Lordship received it, but gave the plaintiff leave to move, if the Court should be of opinion that it ought to have been stamped. The plaintiff recovered a verdict for 35*l.*

Maule moved to increase the damages by 20*l.* He contended, that this was not like the simple I. O. U., which being only an admission of a debt was evidence only, whence the law implied a promise to pay the money; but, here, there was an express promise to pay it on a day certain. The Court granted a rule to shew cause; and—

Erle, this day, endeavoured to contend, that this did not require a stamp;—but—

Per Curiam.—This is either a promissory note, and no particular form of words is required to constitute a note,—or it is an agreement for the payment of money, of the value of 20*l.*, and in either case requires a stamp.

Rule absolute (1).

1836. }
Nov. 21, 25. } *M'KUME v. SMITH.*

Costs—Practice—Passing the Record.

In the Exchequer and King's Bench, the plaintiff has not a right to enter his record immediately after issue has been joined, so as to charge the defendant with the costs; but the Master has a discretion to allow them or not, according to his judgment.

Issue was joined on November 4, for the second sittings in term, which was on the 22nd; the plaintiff passed the record on the 10th. On the 11th, the defendant obtained an order to pay the debt and costs. The Master refused to allow to the plaintiff the costs of passing the record, amounting to the sum of 2*l.* 0*s.* 6*d.*

Kelly, on a former day in term, moved for a rule, that the Master should review his taxation of the costs, contending, that

(1) See *Morris v. Dixon*, 5 Law J. Rep. (N.S.) K.B. 153.

the plaintiff had a right to enter his record as soon after the issue had been joined as he thought fit. Here, also, there had been no notice of any intention to pay the debt before the record was entered.

Barstow shewed cause in the first instance.—This was entirely a question for the Master to exercise his discretion upon; he has done so; and the Court will not disturb it.

Cur. adv. vult.

On this day,—

LORD ABINGER, C.B., said—We think this question was proper to be left to the Master's discretion, and the rule must be discharged. It appears, that the practice is so in the Court of King's Bench, as well as in this court, though in the Common Pleas the plaintiff has a right to enter his record immediately after issue is joined. It is very desirable that there should be some general rule on the subject.

Rule discharged.

1836. {
Nov. 21. { GURNEY AND OTHERS, EXECUTORS OF THOMAS SOWDEN,
v. SIR W. RAWLINS AND OTHERS.

Will—Probate—Bona Notabilia.

By indenture under seal, three of the directors of a life insurance company "ordered, directed, and appointed, that the capital stock and funds of the company should stand charged with the payment of the money insured, to the executors of the covenantee." The testator died in the diocese of Exeter, and the indenture was found within that diocese:—Held, that an Exeter probate was sufficient to enable the executors to recover on the policy, though the defendants resided, and all the stock and funds of the company were situate, in the diocese of London.

Demurrer to a replication. The declaration, in covenant, by the plaintiffs as executors stated, that whereas on the 7th of November 1807, by an indenture or policy of insurance it was witnessed, that T. S. signed a declaration to the Eagle Insurance Company as to his age, and his engagement to pay the premium; and it

was further witnessed, that the defendants, three of the directors of the said company, did order, direct, and appoint that, if the said T. S. should depart this life at any time within the term of one year, or any time within the years which should follow, provided such payments as aforesaid should have been duly made, the capital stock and funds of the said company should stand charged, and be liable to pay to his executors, &c. within three months after his decease should have been duly certified to the directors of the said company, the full sum of 500*l.* Then the declaration set forth the usual provisions and conditions to which policies of this description are subject, and there were averments of the due performance of all, and that T. S. was dead. Breach—non-payment of the said sum of 500*l.* after notice of the death. Profert of the letters testamentary.

Plea—That at the time of the death of the said T. S., and of the proving of the will, and the granting of the said letters testamentary, the defendants were and still are commorant and resident in London, and the whole of the capital stock and funds of the said company were situated, placed, located, and fixed within the city of London, which is in the diocese of London; wherefore the proving of the said will, and granting of the said letters as far as they relate to the said policy, did not belong to the Bishop of Exeter; and the said letters testamentary produced in court are void.

Replication—That the said T. S. died within the diocese of Exeter, and the said policy of insurance at the time of his death was also within the said diocese.

Demurrer, and joinder in demurrer.

Wightman in support of the demurrer. Two questions arise in this case. First, whether the letters testamentary are valid. Secondly, if not, whether they are void, or voidable only (1). The rule of law is, that simple contract debts are considered to be the effects of the deceased in the diocese where the debtor lived at the time of the death, while specialty debts are effects in the diocese where the securities are found at the time of the death (2). There is a

third case where a charge is created by a specialty upon property situated in another diocese. That is the present case; and, therefore, this covenant was *bona notabilia*, and there ought to have been a prerogative probate.

[PARKE, B.—This is the case of a specialty.]

It is not a contract, but a mere charge upon effects situate in London.

[PARKE, B.—Then your objection ought to go higher, and you ought to contend, that no action is maintainable on it.]

It is not proposed to contend for that. This is a specialty charging effects situate in the diocese of London, like a lease of lands, which is to be accounted as *bona notabilia* where the lands lie (3). The object of the defendants is only to ascertain who is legally entitled to receive the money.

LORD ABINGER, C. B.—This does not give any right against the fund itself, though, if the fund be inadequate, the defendants will not be liable. Either the policy is entirely void, or the defendants are personally liable upon the covenant. The company will be quite safe in paying to the plaintiffs.

PARKE, B.—The defendants undertake, by an instrument under seal, that this sum of money shall be paid, if the funds prove adequate. Therefore this is equivalent to a covenant to pay, if T. S. go to Rome. In the case referred to, of the lease, the rule proceeds upon the ground, that the value of the term is the assets, not the lease itself. The only available property to the testator in this case was the specialty.

ALDERSON, B.—If any one can maintain an action on this covenant, the executors, under an Exeter probate, can.

GURNEY, B. concurred.

Judgment for the plaintiffs.

(*White*, contra, was to have argued for the plaintiffs.)

(1) See, on this distinction, *Lysons v. Barrow*, 3 Bing. N.C. 486; s. c. 5 Law J. Rep. (N.S.) C.P. 102.

(2) Bac. Abr. 'Executors and Administrators,' E; Roll. Abr. 909.

(3) See Com. Dig. 'Administrator,' B, 4.

1836. } THE ATTORNEY GENERAL v.
Nov. 4. } PARSONS.

Information of Intrusion—Twenty Years' Possession.

Under the 21 Jac. 1. c. 14, if the defendant, in an information of intrusion, proves a possession for twenty years, the proof of title is thrown upon the Crown; which proof may be given in that action, and the king is not compelled to adopt any previous proceedings to ascertain his title.

This was an information of trespass and intrusion, already reported in 5 *Law J. Rep.* (N.S.) *Exch.* 242, to recover lands, part of the manor of Iscoed, in Radnorshire, to which the defendant pleaded, not guilty.

It came on for trial at the last Herefordshire Assizes, before Patteson, J., when the defendant proved that the encroachment in question had been made for more than twenty years, and claimed to have a verdict in his favour. The learned Judge ruled otherwise, and the jury gave their verdict for the Crown.

Curwood now moved for a new trial.—The Crown having been out of possession for twenty years, cannot recover the lands in an information of intrusion. The title cannot be tried in a proceeding of this nature, but must be determined by an inquest of office. The statute 21 Jac. 1. c. 14. enacts, "that whensoever the king shall have been out of possession by the space of twenty years, before any information of intrusion brought, or to be brought to recover the same, the defendant may plead the general issue, if he so think fit, and shall not be pressed to plead specially; and in such case the defendant shall retain the possession he had at the time of such information exhibited, until the title be tried, found, or adjudged for the king."

[LORD ABINGER, C.B.—How do you suggest that the inquiry should be taken?]

By a writ directed to the sheriff, as other inquests of office.

Per Curiam.—The object of the statute is simply to provide, that after a possession of twenty years, the defendant shall not be bound to set out his title by a special plea, which otherwise he would have

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been bound to do. The proof of title in that case is thrown upon the Crown, and even though the king prove an intrusion, yet the defendant shall hold the possession, unless the title of the Crown be proved. There is no need of any distinct proceedings.

Rule refused.

1836. } THE KING v. SHERIFF OF MID-
Nov. 11. } DLESEX, IN A CAUSE OF BAR-
TON v. MORGAN.

Affidavit, Entitling of—Attachment.

An attachment is said to be granted against the sheriff, so that the proceedings are on the crown side, when the rule for the attachment is obtained.

The defendant was arrested in September, and in the same month the sheriff returned *cepi corpus*. On the 29th of September, the sheriff went out of office. On the 5th of October, a Baron's order was obtained for the sheriff to return the writ, and a rule was subsequently obtained for an attachment against the sheriff for disobedience thereto.

Humsfrey, on a former day in this term, moved to set aside the order and the rule, as irregular.

Erle now shewed cause, and objected that the affidavits were wrongly entitled. No attachment had been issued against the sheriff; they ought not therefore to have been entitled *The King v. the Sheriff of Middlesex*.

Humsfrey.—The rule for the attachment has been served: we cannot tell whether the attachment itself has been issued.

[PARKE, B.—It is stated in *Mr. Tidd's Practice*, 314 (1), that as soon as the attachment is granted, the proceedings are on the crown side. It is reasonable to consider the attachment to have been granted when the rule has been obtained. The sheriff cannot know when it is sued out.]

Per Curiam—

Rule absolute, for setting aside the attachment: discharged for setting aside the Baron's order.

(1) 9th edit.

C

1836. } PROBERT V. PHILLIPS AND
Nov. 10. } OTHERS.

Costs—Issues.

Where, in assumpsit, the plaintiff recovers a verdict on the general issue, but the defendant recovers on the special pleas a verdict equivalent to the sum so found for the plaintiff, the defendant is entitled to the postea, and to the general costs of the cause.

Assumpsit for work and labour, goods sold and delivered, money had and received, and on an account stated.

Pleas—1st. Non assumpsit, as to all except 15*l.* 15*s.* 7*d.*;—2nd. As to 52*l.* 12*s.*, parcel of the sums in the declaration mentioned, payment;—3rd. As to 52*l.* 12*s.*, other parcel of the sums in the declaration mentioned, that the work was done under a special agreement, that the plaintiff should suffer a deduction for any damage sustained by the defendants, in consequence of the non-repair of the harness by the plaintiff, on which he was employed, and that the damage amounted to 52*l.* 12*s.*;—4th. A set-off of 20*l.*, for use and occupation;—5th. Payment into court of 15*l.* 15*s.* 7*d.* The replication denied the payment in the second plea, the agreement and the damage in the third, and the set-off in the fourth, and accepted the sum of 15*l.* 15*s.* 7*d.* The cause was referred to a barrister, at the last Spring Monmouthshire Assizes, to certify the verdict, who certified as follows:—For the plaintiff, on the first plea, damages 73*l.* 18*s.* 10*d.*; for the defendants, on the second plea, as to the sum of 52*l.* 12*s.*; and on the third plea, as to 20*l.*, and on the fourth plea, as to 5*l.* 6*s.*, the total being 77*l.* 18*s.* The associate thereupon delivered the *postea* to the defendants, and the Master had taxed the costs of the cause for the defendants.

Greaves now moved for a rule to shew cause why the *postea* should not be delivered over to the plaintiff, and why the Master should not tax the plaintiff the general costs of the cause. This was analogous to the cases of trespass, where the defendant pleaded the general issue and a justification, and succeeded upon the latter only; the plaintiff was entitled to the general costs of the cause—*Broadbent v. Shaw* (1). Here,

(1) 2 B. & Ad. 940; a.c. 1 Law J. Rep. (n.s.) K.B. 42.

the defendants unnecessarily pleaded the general issue, and failed upon it.

PARKE, B.—The plaintiff is entitled to the costs of that issue, but no more. In those cases, there was something on which the plaintiff did succeed, which the special plea did not cover; but, here, the defendants have recovered on the whole.

Per Curiam—

Rule refused.

1836. }
Nov. 15. } DAWSON V. M'DONALD.

Pleading—Several Pleas—Bill of Exchange.

Where a defendant in one plea denied the acceptance, and in another the indorsement of a bill of exchange, the Court refused to allow him to plead in addition, that it was drawn on paper stamped contrary to the provisions of the 4 & 5 Will. 4. c. 60.

Assumpsit against the indorser of a bill of exchange. The defendant had obtained a Judge's order for leave to plead—first, that the acceptor did not accept the bill; secondly, that the defendant did not indorse it; and thirdly, that the bill was drawn upon paper not duly stamped, according to the rules of the Commissioners of Stamps, made under the authority of 4 & 5 Will. 4. c. 60.

Humfrey, on a former day, obtained a rule to shew cause why so much of the order as authorized the last plea should not be set aside; against which—

Richards, this day, shewed cause, and attempted to argue that the plea was necessary, but the Court were decidedly against him.

ALDERSON, B.—It would create great doubt as to what is put in issue by these pleas, if we were to allow them as several and distinct. A doubt has been raised, whether the Statute of Frauds can be given in evidence under the general issue (1). It is a great pity that the meaning of the rules has been so misunderstood.

PARKE, B.—I quite agree in that observation.

Rule absolute.

(1) See *Smith v. Dixon*, 4 Dowl. P.C. 571.

1836. }
Nov. 16. } LEWIS v. KERR.

Practice.—Striking out Plea.

Where an attorney, on being served with process, said he would appear and accept a declaration, the Court refused to strike out a plea, that he was an attorney of another court.

This was an action by the drawer against the acceptor of a bill of exchange. The defendant, who was an attorney, having been found with some difficulty, said he would appear and accept a declaration. He did appear, and pleaded to the declaration, that he was an attorney of another court.

C. Jones applied to the Court to strike out the plea, because, first, there is no privilege for an attorney as to the court in which he is to be sued; and secondly, the plea is contrary to his undertaking.

PARKE, B.—You must demur to raise the first question, and as to the other objection, there was no undertaking not to plead this plea.

Per Curiam—

Rule refused.

1836. }
Nov. 15. } BAKER v. BROWN.

Verdict, Increase of—Interest.

Where, in an undefended action of covenant on a mortgage deed, the damages were taken for the interest to the time of default only, the Court refused to increase the verdict by the addition of interest down to the time of signing judgment.

Debt for 1,025*l.* on a covenant in a mortgage deed, dated the 26th of May 1835, for payment of 1,000*l.*, with 5*l.* per cent. interest, alleging half a year's default on the 26th of Nov. 1835; that 1,025*l.* was due; concluding with an allegation of 100*l.* damages for detention of the debt.

Plea—Non est factum.

At the trial, before Gaselee, J., at the last Assizes for Surrey, the cause being undefended, a verdict was taken for the sum of 1,025*l.* only.

Petersdorff this day moved for leave to increase the verdict to the amount of 1,058*l.* 12*s.* 6*d.*, which would be the proper sum due down to the time of signing judgment, and which the plaintiff would have been entitled to receive. The omission to take the latter sum arose from the mistake of counsel.

[PARKE, B.—All we can do for you is to set aside the trial and grant a new one. Or you may apply to the Judge who tried the cause, to amend the verdict according to his note.]

That would be unavailing, because his note corresponds with the verdict. There is a case in *Godbolt*, where, in an action on the statute for not setting out tithes, the jury had given only the single value, but the Court increased the verdict to the treble value given by the statute.

ALDERSON, B.—There, the jury had exercised their judgment, and the Court only awarded the legal consequences.

Rule refused.

1836. }
Nov. 17. } M'DOWALL v. LYSTER.

Pleading—Practice—Adding Pleas.

Where a defendant had pleaded that a cheque was given in payment of a gambling debt, the Court refused to give him leave to add a plea, that the cheque was drawn above fifteen miles from the place where payable, and was falsely dated.

Assumpsit on a banker's cheque by the holder. The defendant pleaded that it had been given in payment of a gambling debt, and that the plaintiff was a holder without consideration.

Sewell applied for leave to add a plea, that the cheque had been drawn, in fact, above fifteen miles from the place where it was made payable, and that it was dated falsely, contrary to the provision of the statute, 9 Geo. 4. c. 49. s. 15. The time for pleading had expired.

The Court refused to interfere, saying that they would not assist the defendant to defeat an instrument which he had executed in an illegal manner.

ALDERSON, B. observed, that to raise this objection, the defendant ought to have pleaded that he did not make the cheque.

Rule refused.

1836. }
Nov. 17. } WILLIAM KNIGHT v. TURQUAND.

Bankruptcy—Official Assignee.

The official assignee is in the same situation as the general assignees of a bankrupt, and is not entitled to the protection afforded by the 6 Geo. 4. c. 16. s. 44, limiting the period for the commencement of the action to three months, where he seizes goods, the property of the bankrupt, who disputes the bankruptcy.

This was an action of trespass, brought against the defendant, an official assignee, under a fiat of bankruptcy, issued against the plaintiff, to try the validity of that fiat.

At the trial, before the Lord Chief Baron, at the last Kingston Assizes, it was proved that the property of the plaintiff had been taken and sold more than three months before the commencement of the action. It was objected on the part of the defendant, that the action was too late, according to the 6 Geo. 4. c. 16. s. 44, and his Lordship nonsuited the plaintiff. On a former day in this term—

Platt obtained a rule *nisi* to set this nonsuit aside, and cited *Edge v. Parker* (1), *Carruthers v. Payne* (2), and *Worth v. Budd* (3), in which it had been decided that that section does not apply to actions brought against assignees.

Thesiger and *Clarkson*, this day, shewed cause.—Those cases do not govern the present. The defendant is an official assignee, appointed under the authority of the 1 & 2 Will. 4. c. 56. s. 22. He is an officer of the Court of Bankruptcy; at least it is to be inferred from section 60, that he is an officer appointed under that act. The official assignee is chosen by the commissioners, and the selection is to be made out of a number of persons already appointed by the Lord Chancellor. The pro-

perty vests in him by virtue of that statute, and his acts appear to be proceedings under it. If so, as the 6 Geo. 4. c. 16. s. 44. is incorporated with it by section 16, the defendant is entitled to the same protection as the messenger under the fiat, or the provisional assignee under the Insolvent Debtors Act.

[ALDERSON, B.—In *Munk v. Clark* (4), the Court of Common Pleas decided, that the official assignee was placed in the same situation as the general assignee.]

In that case, the fiat itself was void, and the assignee himself had the money belonging to the plaintiff, in his hands. But here the official assignee had not taken any peculiar part in the seizure, and the action might quite as well have been brought against the other parties. It is hard to hold him out of the protection of the statute, where he does an act which he is bound to perform, by the express provisions of the legislature.

Platt, in support of the rule, referred to the report of *Munk v. Clark* (5), after the second trial.

LORD ABINGER, C.B.—That case has settled, that there is no distinction between the official assignee and the general assignees, and the nonsuit must be set aside.

PARKE, B.—The Court of King's Bench have decided that the assignees of a bankrupt are not within the protection of this statute (6), in conformity with a previous decision of the Court of Common Pleas (7); and the decision was subsequently confirmed by Lord Tenterden (8), so that there is great weight of authority. It is contended that the decision does not apply to the present case. The distinction pointed out is, that where persons have special authority given to them by the statute to act, they are within its protection; but where they act under the authority given by the ownership of the property, they are not. Now the official assignee is in the same situation as the provisional assignee was formerly. The act of parliament has vested all the

(4) 10 Bing. 102; s. c. 2 Law J. Rep. (N.S.) C.P. 186.

(5) 2 Bing. N.C. 299; s. c. 5 Law J. Rep. (N.S.) C.P. 4.

(6) In *Edge v. Parker*.

(7) In *Carruthers v. Payne*.

(8) In *Worth v. Budd*.

(1) 8 B. & C. 697; s. c. 7 Law J. Rep. K.B. 101.

(2) 5 Bing. 270; s. c. 7 Law J. Rep. C.P. 84.

(3) 2 B. & Ad. 172; s. c. 9 Law J. Rep. K.B. 172.

bankrupt's property in him; but if he do interfere, he does so by virtue of that assignment, and of the right of property thereby given to him. The only difference is, that the commissioners must select him out of a certain number of persons appointed by the Lord Chancellor, whereas they might have selected any one to be the provisional assignee. The effect of the statute is to give him the same power as the provisional assignee enjoyed previous to the choice of the general assignees. The defendant, therefore, acted by virtue of his right of property, and is not within the provision of this clause.

ALDERSON, B. and GURNEY, B. concurred.

Rule absolute.

1836. }
Nov. 21. } *Ex parte* WM. KNIGHT.

Bankrupt—Habeas Corpus—Custody.

Where a bankrupt being in execution in the Fleet prison, was committed to the custody of the keeper of Newgate, for not answering satisfactorily, and the keeper of Newgate delivered him to the messenger, who delivered him again to the warden of the Fleet,—the Court refused to grant a writ of habeas corpus, on the ground of a defect in the commissioner's warrant.

William Knight, a bankrupt, was brought before a Subdivision Court of the Commissioners of Bankruptcy, in Basinghall-street, and by that Court committed to Newgate, for not answering questions to their satisfaction. He was at the time in the custody of the warden of the Fleet, in execution for debt, and was brought, by the messenger to the fiat, before the Court. The warrant of committal was directed to the gaoler of Newgate, who delivered the bankrupt to the messenger, and he delivered him back to the warden of the Fleet. He was then confined within the walls of that prison.

Platt moved for a *habeas corpus*, to be directed to the warden of the Fleet, the messenger, and the gaoler of Newgate, to bring up the body of the bankrupt, contending, that the answers set out in the warrant were sufficient, and ought to have been treated as satisfactory.

The Court expressed great doubt, whether they ought to grant the writ, as it was clear that the warden had a right to detain him, under the execution, and would be justified in returning that cause. However, they heard the warrant read, and the observations upon it, and stated, that they would examine it, and give their decision on the morrow.

On the next day,—

PARKE, B. said—That they must refuse the writ on two grounds;—first, that on the perusal of the questions and answers, they considered the commissioners were justified in holding the examination not to be satisfactory; and, secondly, that it did not appear, that the bankrupt was detained in custody on this warrant. The Court of Common Pleas had refused a writ, under the same circumstances, in a case which came before them the day previous (1).

Writ refused.

1836. }
Nov. 21, 24. } OWEN v. WATERS.

Bill of Exchange—Pleading.

Declaration by drawer against the acceptor alleged, that the plaintiff, on the 29th of March, "made his bill payable four months after date, which period has now elapsed:"—Held good on special demurrer.

Assumpsit on a bill of exchange by the drawer against the acceptor.

The declaration stated, that the plaintiff, on the 29th of March, made his bill of exchange payable four months after date, and it contained the allegation—"which period has now elapsed." The date of the declaration was October 25. To this there was a special demurrer.

C. Jones, in support of the demurrer, relied upon *Abbott v. Aslett* (2), and urged, that the declaration was defective in not shewing that the bill was due before the commencement of the suit. The four months might have expired before the declaration, but not before the action was commenced.

(1) *Ex parte Garcia*, see post.

(2) 1 Mee. & Wels. 209; a. c. *Aslett v. Abbott*, 5 Law J. Rep. (N. S.) Exch. 116.

The date of the writ did not appear on the paper books, but it was agreed, if the Court should consider that important, that the writ was sued out on the 16th of August.

Addison, contra.—*Abbott v. Aslett* is only an authority to shew, that such a demurrer as the present is not frivolous. The declaration is, however, sufficient. The forms given by those rules are applicable to all proceedings and in all the courts. Now, in the Common Pleas, and in all proceedings by original, the declaration was never considered to be the commencement of the suit. The new statute for the uniformity of process cannot, therefore, have had the effect suggested. But it is enough if the declaration does not on the face of it shew that the cause of action had not accrued at the commencement of the suit—*Lee v. Clarke* (3). Every averment is presumed to refer to the commencement of the suit. Hence, in common counts, it is not the practice to allege the cause of action to have accrued before the commencement of the suit. Secondly, it does appear that the cause of action had accrued at that time. The bill was made on the 29th of March, and was payable four months after date; it would, therefore, be due on the 1st of August, which was before the writ was issued. It is true the declaration does not state the day of the date, but it alleges, that the defendant made the bill on the 29th of March, and that will be taken to be the day when it was dated—*De la Courtier v. Bellamy* (4), *Hague v. French* (5), *Hunt v. Massey* (6).

[*PARKE, B.*—In *Coron v. Lyon* (7), the date of a bill of exchange differed from the day when the bill was alleged to have been made; and *Thompson, B.* held it not to be a fatal variance.]

Cur. adv. vult.

On this day the judgment of the Court was pronounced by—

LORD ABINGER, C. B.—This case depends upon the question whether it sufficiently appears that the bill was due before the time when the action was commenced.

(3) 3 East, 333.

(4) 2 Show. 422.

(5) 3 Bos. & Pul. 173.

(6) 5 B. & Ad. 903; see also *Giles v. Bowen*, 6 Man. & Selw. 73.

(7) 2 Campb. 307, n.

The Court have considered it, and think *Mr. Addison* is correct in both points. First, that it is not essential that it should appear on the face of the declaration that the right of action had accrued before the suit was commenced; in other words, that the Court does not look out of the declaration to determine whether or not it has been commenced too early. In the case of the Statute of Limitations there must be a plea: the Court will not decide on the declaration that the action has been barred. On the other point also, although the true date of the bill of exchange may be shewn to rebut the inference, as long as it remains without explanation it is to be assumed that it was dated when it was made. On both points, therefore, the declaration is good, and there must be—

Judgment for the plaintiff.

1836. }
Nov. 21. } *MORANT v. SIGN.*

Pleading—Express Colour in Trover.

To trover for an oak, the defendant pleaded, that he was seised in fee of a close, and being so seised, cut down the said oak, and delivered it to one Richard Roe, who delivered it to the plaintiff, whereupon the defendant took it out of the plaintiff's possession, as he lawfully might; which was the conversion complained of:—Held, on special demurrer, that the plea was good.

Trover for an oak tree.

Plea—That before the said time when, &c., to wit, on &c., the defendant was seised in fee of a close called Colebays, at Brokenhurst, in the county of Hants, abutting, &c.; and he being so seised, the defendant, on &c., cut down one oak tree growing on the said close, and stripped the bark, which oak and bark are the same goods and chattels in the declaration mentioned; and that afterwards the defendant delivered them to one Richard Roe, who delivered them to the plaintiff, whereupon the defendant, at the said time, &c. took the said goods and chattels from and out of the possession of the plaintiff, as he lawfully might do for the cause aforesaid, which is the same conversion and disposition in the said declaration mentioned.

Special demurrer, that the plea in effect amounted to a denial of the plaintiff's right of property in the goods and chattels in the declaration, and ought to have been so pleaded, and have concluded to the country.

Barstow, in support of the demurrer.—The plea is bad, whether it be considered as the law stood before the new rules, or as it now is upon those rules.

[*PARKE, B.*—It would have been bad before the new rules, according to the majority of the authorities, as amounting to the general issue.]

Then the new rules do not warrant such a plea as this. The doctrine of express colour, which is entirely fictitious, has never been extended to actions of trover. This is but a denial of the plaintiff's property; and, therefore, the case does not fall within that rule which requires all matters in confession and avoidance to be pleaded specially.

[*ALDERSON, B.*—The defendant says, these goods do not belong to the plaintiff, and he tells him why.]

[*PARKE, B.*—Is there anything in the new rules, which prevents express colour from being given in trover?]

Not in terms, but from the examples in *assumpsit* it may be inferred that it was not to be allowed.

The Court intimating a strong opinion against the demurrer,

Barstow prayed leave to amend, which was granted;—

PARKE, B. observing, that, no doubt, the plea was good.

Manning was for the defendant.

Judgment for the defendant, with leave to the plaintiff to amend.

1836. } WHITE AND ANOTHER v.
Nov. 23. } IRVINE.

Affidavit of Debt—Title.

An affidavit of debt, unentitled in the court or the cause, but sworn before a person describing himself as authorized to take affidavits by virtue of a commission from this Court and the Court of Common Pleas, held sufficient.

Petersdorff moved to discharge the defendant out of custody for a defect in the affidavit to hold to bail. It was not entitled in any court nor in any cause, but it was sworn in Scotland before a person who described himself as authorized by virtue of a commission to take affidavits from this Court and the Court of Common Pleas (1).

[*PARKE, B.*—That is sufficient.]

It is submitted, that, as it does not appear in which court it was intended that the affidavit should be used, a difficulty would be thrown in the way of a prosecution for perjury; at least, it would be requisite to have separate counts.

LORD ABINGER, C. B.—It would be quite enough to allege, that the party made the affidavit, intending to use it to institute proceedings upon it against the defendant.

Per Curiam—

Rule refused (2).

1836. } REED v. SPURR, ADMINIS-
Nov. 23. } TRATOR.

Practice.—Signing Plea.

A writ of plene administravit does not require to be signed by counsel.

The defendant pleaded *plene administravit* without a counsel's signature, and the plaintiff signed judgment.

Mansel moved to set aside that judgment for irregularity. According to the practice of the King's Bench, this is a common plea, which need not be signed by counsel (3). The rule of Hilary term, 2 Will. 4. No. 107, which provides that pleas which conclude to the country shall not be signed by counsel, does not apply to this case.

Swell shewed cause in the first instance.—This plea ought to have been signed. Where a plea operates as a traverse of the plaintiff's allegation, it does not require a signature; but, where it alleges new matter and concludes with a verification, it must be signed. This plea concludes with a verification. The rule of Hil. 2 Will. 4. affords an inference

(1) By the statute 3 & 4 Will. 4. c. 42. s. 42.

(2) See *Perse v. Browning*, 1 Moo. & Wels. 363.

(3) 1 Tidd's Pr. 671, 9th ed.

in favour of the plaintiff, according to the maxim *expressio unius est exclusio alterius*. In *Macher v. Billing* (4), it was decided, that a plea of the Statute of Limitations required to be signed by counsel. According to the practice of the Common Pleas, it ought to have the signature.

LORD ABINGER, C. B.—The Master tells us we follow the practice of the King's Bench, and that this plea does not require counsel's signature. The judgment is irregular, and must be set aside with costs.

1836. }
Nov. 23. } SIMPSON v. HURDISS.

Costs—Special Pleas.

Where the defendant, in libels, pleads not guilty, and also special pleas, and the plaintiff recovers a verdict on all the issues, but less than 40l., and the Judge certifies under the statute 43 Eliz. c. 6, the plaintiff is not entitled to recover the costs of those special pleas, notwithstanding the rule Hilary, 4 Will. 4. No. 7.

This was an action for libel, to which the defendant pleaded, first, the general issue; secondly, a justification; thirdly, that it was a privileged communication.

At the trial, before Gurney, B., the jury found a verdict for the plaintiff on all the issues, damages 1s.; and the Judge certified under the 43 Eliz. c. 6. s. 2, whereupon the Master refused to allow the plaintiff any costs.

Erle now moved for a review of the Master's taxation. By Reg. Gen. Hil. 4 Will. 4. No. 7, the defendant not succeeding upon the special pleas, and it appearing that they were unnecessary, the plaintiff ought to have been allowed his costs on those issues. The Master held, that the certificate operated to deprive the plaintiff of all the costs.

PARKE, B.—That rule is subservient to the statute. The Master was right.

Per Curiam—

Rule refused.

(4) 1 Cr. M. & R. 577; s. c. 4 Law J. Rep. (N.S.) Exch. 16.

1836. }
Nov. 24. } READ v. DUTTON.

Arbitration—Appointment of Umpire—Attachment.

Where an umpire was to be appointed the first thing, and he and the arbitrators, or any two of them, had power to enlarge the time and to make the award, the arbitrators having first enlarged the time, and afterwards appointed the umpire, the Court held, that though both parties subsequently attended the reference, they could not grant an attachment for non-performance of the award, though their conduct might afford evidence of a parol submission.

A rule for an attachment had been moved for by *Chandless*, for non-performance of an award in this case. The cause and all matters in difference had been referred by a Judge's order to the award of two arbitrators, "and such third person as they shall appoint, by writing under their hands, to be indorsed thereon, before they shall proceed on the matters referred to them, or of any two of them, so that they or any two of them shall publish their award on or before the first day of Easter term, or of such day as they or any two of them shall at any time appoint by writing under their hands." One of the arbitrators and the umpire had awarded, that the defendant should pay a sum of money to the plaintiff, together with the costs.

Wightman, this day, shewed cause.—The umpire was not duly appointed. By the order he was to be appointed the first thing, and was to join in the enlargement of the time. Now, the two arbitrators made an enlargement of the time before they appointed the arbitrator.

Chandless.—The parties, nevertheless, went on, and attended the arbitration, and therefore the objection cannot be taken—*In re Hick* (1).

PARKE, B.—They may be bound upon a parol submission, but you cannot have an attachment against them.

Per Curiam—

Rule discharged.

(1) 8 Taunt. 694.

1836. }
Nov. 2. } SHAVE v. SPODE.

Bail, Justification of.

Bail may justify in person, where there has been an insufficient affidavit of justification.

Justification of bail.

Butt objected that the affidavit of justification was insufficient in this case, as not stating where the property was situate, or without separating the value.

Harrison, in support of the bail, stated, that the bail appeared to justify in person.

[*Per Curiam*.—It is only a question of costs.]

Butt.—In *Penon's bail* (1), *Patteson, J.* says, "that where the bail profess to justify in the form appointed by the new rules, and fail to comply with them, they cannot resort to any other form."

Harrison.—That was a case of country bail.

Per Curiam.—If the bail appear, they may justify; but the plaintiff opposes them without the risk of costs.

The bail justified.

1836. }
Nov. 2. } BOLTON v. JOHNSON.

Bail—Justification.

After notice of justification of bail, the plaintiff declared de bene esse; the defendant demurred: the plaintiff applied to a Judge to set aside the demurrer as frivolous, which was refused, and he obtained an order for time to join in demurrer:—Held, that bail could not afterwards be opposed nor justify.

Bail appearing to justify,
Steer was about to oppose them.

Butt objected, that the plaintiff could not oppose them; the plaintiff had obtained a Judge's order for time to join in demurrer.

Steer.—Notice of justification was given in this case; the plaintiff delivered a declaration *de bene esse*, to which the defendant demurred. An application was made

to a Judge at chambers, to set aside the demurrer as frivolous, which he declined doing, whereupon the plaintiff obtained an order for time to join in demurrer. Now the bail come to justify; if so, they may be opposed;—or if the bail have been waived, they need not have come at all.

PARKE, B.—There is no necessity for them to justify; the defendant is already in court.

ALDERSON, B.—How can the plaintiff say, that the defendant is not in court, when he asks for time to answer him?

Per Curiam.—The bail cannot be opposed, nor be allowed to justify.

1836. }
Nov. 3. } DOE d. LORD CARRINGTON v.
LLOYD.

Prisoner—Discharge—Ejectment.

A defendant in execution upon a judgment in ejectment, who has been in prison for twelve calendar months, is entitled to be discharged out of custody.

The defendant had lain in prison for more than twelve months, in execution for the costs of this ejectment.

Ball applied that the defendant should be discharged out of custody, under the 48 Geo. 3. c. 123, stating that the Court of King's Bench had decided, in a case in the present term, that the defendant was entitled to his discharge.

PARKE, B. referred to *Doe v. Reynolds* (1), where the Court decided, that the statute did not apply to a case of ejectment, but granted a rule nisi, which was afterwards made absolute, no cause being shewn.

1836. }
Nov. 24. } DOE d. THRELFALL v. WARD.

This was a similar case, the application being made by—

Butt, who cited *Doe v. —* (2), and referred to two cases at chambers, one of

(1) 10 B. & C. 481; s.c. 8 Law J. Rep. K.B. 226.
(2) 1 Dowl. P.C. 69.

which was decided by Patteson, J., and the other by Coleridge, J., and the preceding decision of this Court.

Cowling, appeared to shew cause, in the first instance, if the question could be considered as open; but—

The COURT said, that it must be taken to be settled. There was a judgment of the full Court of King's Bench one way, but there were two decisions the other way. No doubt there was a judgment for damages here, namely, the 1*s.* which is given for the trespass, and the damages are under 20*l.*

Rule absolute (3).

1836. }
Nov. 10. } PRICE v. MORGAN.

Writ of Trial—New Trial.

A claim against a party for representing that a third person had authorized him to purchase a horse from the plaintiff, who, thereupon, sent it to the agent, but he had no authority to purchase it, is, in substance, a claim for the price of a horse, and the trial may be sent to the under-sheriff under the 3 & 4 Will. 4. c. 42, s. 17.

Seemle, that where a plaintiff obtains a writ of trial, and carries the record down to the sheriff for trial, he cannot, upon being nonsuited, move for a new trial, on the ground, that it was not a case to be tried before the sheriff.

Assumpsit. The declaration stated in the first count, that, in consideration that the plaintiff would send a pony to the defendant, and would sell and deliver it to one J. Ward, the defendant undertook and promised that he was authorized by Ward to purchase it on his behalf; that the plaintiff sent the pony, and was willing to sell it to Ward, but the defendant had no authority to purchase it for him. The second count charged, that the defendant represented generally, that he had authority to purchase the pony, but refused to do so. Third, for a pony sold and delivered.

Plea—Non assumpsit.

The case was sent to be tried before the

(2) See *Goodfellow v. Robings*, 3 Bing. N.C. 1; a. c. 5 Law J. Rep. (N.S.) C.P. 358.

under-sheriff of Herefordshire, who nonsuited the plaintiff on the opening.

Peacock, in Trinity term, obtained a rule for setting aside this nonsuit on an affidavit, made by the agent in London, who stated his information and belief, that the plaintiff's attorney had read a letter from the defendant to the plaintiff, in which he stated, that Ward would very probably be a purchaser of the pony if it were sent to him; that the under-sheriff called upon the plaintiff's attorney to elect whether he would charge the defendant as the agent or as the principal; and, as he elected the former, the under-sheriff decided, that the action was not maintainable, as the principal's name was disclosed, and thereupon nonsuited the plaintiff. He made another point, that this was not a case to be tried before the sheriff, being not a *debt or demand*, but a claim for unliquidated damages.

J. W. Smith now shewed cause.—First, the plaintiff has not properly informed the Court what the under-sheriff's ruling was in this case. He has only produced an affidavit from a person not present at the trial. And the under-sheriff has not taken any note whatever of the case. It is not for the defendant to state the ruling of the under-sheriff.

[The COURT said, they could not act upon the plaintiff's affidavit, and in answer to an observation by *Peacock*, that there had not been time to procure an affidavit from the country, said, that the time for making the motion might have been enlarged if a proper application had been made. And they severely reprehended the conduct of the under-sheriff in not taking a note of the proceedings at the trial.]

Then, as to the other objection, if the trial be *coram non judice*, it is a nullity, but that is no ground for setting aside the nonsuit; and the writ of trial was obtained at the instigation of the plaintiff himself, who now seeks to avoid it.

Peacock, in support of the rule.—This is not a case within the statute. The plaintiff complains of a breach of contract.

[*PARKER, B.*—Could the measure of damages be more than the price of the pony?]

No; but still the damages are unliquidated. Then, *Watson v. Abbot* (1) is an

(1) 2 Cr. & M. 150; a. c. 3 Law J. Rep. (N.S.) Exch. 38.

authority that the Court will set aside a nonsuit, where the case ought not to have been sent to the sheriff. So also it seems is *Edge v. Shaw* (2).

PARKE, B.—I am of opinion that, in substance, this was an action for the price of a pony sold to the defendant; and, therefore, within the act. But, if it were not, I should hesitate before I would grant a new trial in a case where a plaintiff has taken down the writ of trial to the sheriff, and been nonsuited. This point did certainly occur in *Watson v. Abbot*, but does not appear to have been sufficiently considered by the Court. I should therefore have been disposed to discharge the rule on this ground, but it is a case within the act.

ALDERSON, B. and GURNEY, B. concurred.

Rule discharged.

1836. }
Nov. 15. } BAYLEY, ASSIGNEE, v. CHITTY.

Court of Requests—Costs—Statute of Limitations.

A case is within the Middlesex Court of Requests Act, though the plaintiff's demand be reduced below 40s., by a plea of the Statute of Limitations.

Where in debt the jury found a verdict for the plaintiff, 1l. 19s. 3d., and 1s. damages for detention of the debt, the Court held that this was a case within that act, and that the plaintiff ought to be deprived of his costs.

Debt for goods sold and delivered, and work and labour.

Pleas—First, never indebted; second, the Statute of Limitations.

At the trial, before the under-sheriff, the plaintiff recovered a verdict of 1l. 19s. 3d., and 1s. for the damages of the detention of the debt.

On a former day in this term—

Platt obtained a rule to enter a suggestion on the roll, to deprive the plaintiff of his costs under the Middlesex Court of Requests Act, 23 Geo. 3. c. 33. s. 19; against which—

Miller shewed cause, on affidavits, which

disclosed these facts. The action was brought for 4l. 19s. 3d. composed of two items, 3l. for a chest of drawers sold, and 1l. 19s. 3d., the expenses of a distress upon premises at Richmond, made by the insolvent, who was a broker. The Statute of Limitations was an answer to the first item, and, therefore, the plaintiff recovered only 1l. 19s. 3d. He urged three objections: first, that inasmuch as the sum due was really 4l. 19s. 3d., and only cut down by a plea of the Statute of Limitations, the Court would not hold the case to be within the Court of Requests Act. It may be inferred from the observation of Lord Ellenborough in *Horn v. Hughes* (1), that if a party has reasonable or probable cause for proceeding for more than 40s., the case is not within the statute (2). It has been decided, that a plea of set-off does not render the plaintiff liable—*Jenkinson v. Morton* (3).

[PARKE, B.—In the case of a set-off, the debt due to the plaintiff is still due and payable.]

[ALDERSON, B.—The statute was meant to apply to cases where a party has a right to a demand above 40s.; he has no right to demand such a debt in the present case.]

Secondly, the cause of action on which the plaintiff has recovered, arose in Surrey, where the distress was made, and consequently could not have been tried in the Middlesex Court of Requests, which has only jurisdiction over causes of action arising within that county. He referred to *Welsh v. Troyte* (4), *Smith v. O'Kelly* (5), and *Harwood v. Lester* (6). Thirdly, the damages here do amount to more than 40s., because the jury have found 1s. for the damages of the detention of the money; that comes by way of interest, which the jury might fairly give.

Platt, in support of the rule, was relieved by the Court from considering the first and third objection, but was directed to answer the second. He was unable, however, to shew on the affidavits

(1) 8 East, 348.

(2) See also *Harsant v. Larkin*, 3 Brod. & Bing. 257.

(3) 1 Moo. & W. 300; s. c. 5 Law J. Rep. (N.S.) Exch. 183.

(4) 2 H. Black. 29.

(5) 1 Bos. & Pul. 75.

(6) 3 Bos. & Pul. 617.

(2) 2 Cr. M. & R. 415.

that the cause of action accrued in Middlesex, which—

The COURT said it was incumbent upon him to do, and they discharged the rule on this ground, saying that the other answers were of no validity.

Rule discharged (7).

1836. }
Nov. 17. } *TRIBE v. WINGFIELD.*

Writ of Trial—Advocate.

Where an under-sheriff had laid down a rule that he would not hear any person as an advocate, who was not a barrister or an attorney, and refused accordingly to hear a person who was neither one nor the other, but appeared on the behalf of the defendant, and the plaintiff recovered a verdict, the Court held, that the under-sheriff was quite justified in making such a rule; but granted a new trial on payment of costs, it appearing that the defendant had not had a previous notice of the existence of the rule.

This cause was tried on a writ of trial, before the under-sheriff of Warwickshire, and the plaintiff recovered a verdict.

Erle moved for a new trial, on the ground that at the trial a person, who was neither a barrister nor an attorney, appeared as the advocate for the defendant. The under-sheriff, however, refused to hear him, stating, that he had laid down a rule of practice, on these trials, not to hear any person who was not a barrister or attorney. The defendant declined conducting his case in person, and the plaintiff recovered. This person had often practised before the under-sheriff previously.

LORD ABINGER, C.B.—I think the under-sheriff was right; and I will never lend my assistance to enable any person to appear as an advocate in a court of justice who is not a barrister or attorney. But if you can shew that the defendant was taken

by surprise, and that neither he nor his attorney was aware of the change of the practice, you may have a rule on payment of costs.

Erle afterwards obtained a rule on those terms, producing an affidavit by the defendant and the person employed by him, negating previous notice of the change of practice; which was to some extent answered by the affidavits produced by—

Goulburn, Serj., in reply; but—

The COURT, stating that they did not wish, in the slightest manner, to interfere with the rule laid down by the under-sheriff, under the circumstances of this case, made the

Rule absolute, on payment of costs.

1836. }
Nov. 21. } *PUTNEY v. SWAN.*

Pleading—Insufficient Plea.

Where the declaration contained one count on a bill of exchange against the acceptor, and another on an account stated, and the defendant pleaded only that he did not accept the bill of exchange:—Held, that the plea was bad on special demurrer.

The declaration contained two counts: one by the payee against the acceptor of a bill of exchange; the other was on an account stated. The defendant pleaded generally, that he did not accept the bill of exchange in the declaration mentioned, and took no notice of the other count. The plaintiff demurred specially, on the ground that the defendant's plea did not answer the whole of the declaration.

Francillon, in support of the demurrer, referred to the rule Hilary, 4 Will. 4. No. 9 (1), (the Pleading Rules), and was about to argue, that it did not apply to this case, when—

[PARKE, B. said—Certainly the rule has no application to this case.]

(7) In *Fogarty v. Smith*, 4 Dowl. P.C. 595, it was decided, that a defendant is entitled to be discharged out of custody under the 48 Geo. 3. c. 123, where the debt is 20*l.*, and 1*s.* for damages of detention in debt. At the same time, in *Doe d. Threlfall v. Ward*, ante, p. 17, this Court treated the 1*s.* damages in ejectment, as damages within the meaning of that statute.

(1) Which is, "In a plea intended to be pleaded in bar of the whole action generally, it shall not be necessary to use any allegation of *procludi non*, or to the like effect, or any prayer of judgment, and all pleas pleaded without such formal parts as aforesaid shall be taken, unless otherwise expressed, as pleaded in bar of the whole action."

Then, according to the inclination of the Court of King's Bench, in *Worley v. Harrison* (2), this plea is bad on special demurrer, as not answering the whole of the declaration. And the plaintiff would not have been justified in signing judgment, as for want of a plea—*Vers v. Goldsborough* (3).

C. Jones, contra.—Here there is but one bill of exchange, and that is stated in the first count; the defendant's plea, which does not profess to answer the whole of the declaration, can only refer to that first count; and therefore the second count not having been answered, the plaintiff should have signed judgment.

LORD ABINGER, C.B.—There must be judgment for the plaintiff. He could not sign judgment as for want of a plea. If the defendant intended to confine his plea to the first count, he ought to have stated it. We infer that he means to answer the whole declaration.

PARKE, B.—As the plea is not confined to one count, it must be taken to be intended as an answer to the whole. I am quite satisfied that the 9th rule has no bearing on such a case as the present. Its object was to prevent unnecessary statements in the introductory parts of the pleadings. It is therefore declared, that the plea shall be understood as pleaded in bar of the whole action, as contradistinguished from a plea in bar of further maintenance. It was never meant to affect the ordinary mode of pleading to one count, or to one part of the declaration.

ALDERSON, B. and GURNEY, B. concurred.

Judgment for the plaintiff.

1836. } **SHILLIBEER v. SIR R. C. GLYN**
Nov. 21. } **AND OTHERS.**

Pleading—Bailees—Bankers.

A declaration in assumpsit stated, that the defendants were bankers, and that the plaintiff, being about to proceed to Northampton, paid into their banking-house, in London, a

sum of money, that they might cause the same sum to be paid to him at Northampton, at a certain time then agreed upon between them; and the defendants received the sum of money for that purpose, and thereupon, in consideration of the premises, promised to cause the sum of money to be paid to him at Northampton at the time agreed upon:—Held, on demurrer, that the declaration imported an absolute undertaking to pay the money at Northampton; and, therefore, there was a sufficient consideration for the promise; and the declaration was good.

Demurrer to a declaration in assumpsit, which stated, that the defendants were bankers in London, and that the plaintiff, at the time of the making of the promise by the defendants, was the proprietor of divers coaches plying in and about London and its vicinity; and, in order to supply his said coaches with horses, had been in the habit and practice of going to various markets and fairs, held for the sale of horses, at great distances from London, to purchase horses, when he was attended by divers grooms and servants to take care of the horses so to be purchased by him: that, on the 31st of March 1834, being about to proceed to a fair at Northampton, he paid into the banking-house of the defendants, in London, a large sum of money, to wit, &c., in order that the defendants might cause the said sum to be paid to the plaintiff, or his order, at Northampton at a certain time then agreed upon by and between the plaintiff and defendants, to wit, on the 5th of April then next following; and the defendants then had and received the said sum of money of and from the plaintiff for the purpose aforesaid, to wit, in order that they might so cause the same sum to be paid to the plaintiff, or his order, at Northampton; and thereupon, in consideration of the premises, the defendants promised, that they would punctually cause the said sum of money to be paid to the plaintiff, or his order, at Northampton at the time agreed upon. Breach, that the defendants did not cause the money to be paid to the plaintiff at Northampton; and special damage was alleged, that the plaintiff lost the opportunity of making his purchases at the fair, and incurred fruitless expenses on his journey.

(2) 3 Ad. & Ell. 669; a. c. 5 Law J. Rep. (N.S.) K.B. 17.

(3) 1 Bing. N.C. 533; a. c. 4 Law J. Rep. (N.S.) C.P. 65.

Demurrer, and joinder in demurrer.

Manning, in support of the demurrer.—The declaration does not disclose any consideration for the alleged promise of the defendants. They appear to be mere gratuitous bailees, and can only be responsible for gross negligence—*Doorman v. Jenkins* (1), *Sheills v. Blackburne* (2). That is not averred in the present declaration, neither is it stated that the money was left with the bankers *at their request*; so that no consideration executory or executed is stated.

[PARKE, B.—An express undertaking by the defendants is averred, that they would pay it at Northampton.]

But the plaintiff has not shewn any consideration for that undertaking. He does not allege that the promise was in consideration of the deposit.

[LORD ABINGER, C.B.—Is not the giving up of the money by the plaintiff, and the leaving it in the hands of the defendants, a detriment to him? It is averred, that the promise was in consideration of *the premises*. Now, *the premises* are the parting with the money.]

The money was parted with by the plaintiff to be transmitted to the country for his use; that was a benefit to him, and no advantage to the defendants.

[PARKE, B.—It is only necessary to allege a request when the consideration is executed; and the question is, whether, in this case, the promise is not contemporaneous with the delivery of the money?]

Hayes v. Warren (3) shews the necessity of an averment of a request.

[LORD ABINGER, C.B.—Here an agreement is expressly stated—namely, that the one agrees to pay 650*l.* into the hands of the other, who agrees to repay it on request. In the ordinary case of an assumpsit, the agreement of the parties is not stated on the declaration; but there is no objection to stating the agreement specifically.]

[The COURT proposed to the plaintiff's counsel to amend by averring, that the promise was in consideration of the deposit of the money; but he declined doing so.]

Then the mere statement of the delivery to the defendants is not enough, unless it be shewn that they received the money in some character which would render them responsible—*Dartnell v. Howard* (4). It will be said, that the defendants are stated to be bankers; but it is no part of the business of a banker to transmit money to the country; and even if it were, the Court cannot take judicial notice of their business; and there is no statement that the plaintiff was a customer of the defendants.

[PARKE, B.—A banker's business is to borrow money, and to repay it on cheques. The thing to be considered here is, what is the meaning of the allegation in the declaration? Is it that the money was to be paid absolutely, or that the defendants undertook to forward it as carriers? If it be an absolute undertaking to pay at Northampton, the declaration will suffice; if it be an undertaking to forward on a deposit, there ought to have been a request.]

Barstow, contra.—On the facts stated in this declaration, the plaintiff is entitled to recover; and the Court will say, that the defendants undertook absolutely to pay the money at Northampton. *Wheatley v. Lome* (5) is an express authority in support of this declaration, which was indeed drawn upon it. There it was decided, that, if a person accept money from one man to deliver it over to another, the acceptance and promise to deliver it is a good consideration to charge him in assumpsit for not paying it over. This case is recognized as authority in *Jones on Bailments* (6).

[PARKE, B.—That is very like the present case, and enables us to put a construction upon the language of this declaration. If it had turned out in evidence, that there was not any agreement to guarantee the payment, the plaintiff could not recover.]

In *Whitehead v. Greetham* (7) it was held sufficient, to allege a delivery of money to the defendant to lay out in the purchase of an annuity, for charging him with not laying it out on a proper security. Here the plaintiff could not have recovered the money from the defendants in London; he was bound to go or send for it to North-

(1) 2 Ad. & Ell. 256; s. c. 4 Law J. Rep. (N.S.) K.B. 29.

(2) 1 H. Bl. 158.

(3) 2 Stra. 933.

(4) 4 B. & C. 345; s. c. 3 Law J. Rep. K.B. 246.

(5) Cro. Jac. 668.

(6) P. 51.

(7) 2 Bing. 464; s. c. M'Clell. & Y. 203.

ampton. The defendants, therefore, received a benefit by being allowed to retain it in their hands.

Manning was about to reply, when—

LORD ABINGER, C. B. said—Had not the defendants better amend? If a person undertakes to pay a sum of money at a certain time, it is not necessary to allege a request. Now, here, at the time, when the money was paid in, the parties agreed that it should be paid at Northampton on a certain day.

PARKE, B.—If this means that the defendants undertook absolutely to pay at Northampton, there is a good consideration for the promise. On the plea of the general issue that must be proved.

Manning prayed leave to amend.

Judgment for the plaintiff, with liberty to the defendants to amend.

1836. }
Nov. 25. } HEAL v. CURTIS.

Judgment as in case of a nonsuit.

Where issue is joined in a town cause in vacation, it is too early to apply for judgment as in case of a nonsuit in the next term but one after it is so joined.

Motion for judgment as in case of a nonsuit, against which—

Mellor shewed cause.—The application is too early. Issue was joined on the 10th of May, which was in the vacation after Easter term, and no notice of trial had been given—*Wingrove v. Hodson* (1).

Thomas, contra, said, that in a country cause, it would not have been too early—*Williams v. Edwards* (2); and it did not appear that this was not a country cause. But—

Per Curiam.—That ought to have been shewn by the defendant. The application is too early.

Rule discharged, with costs.

(1) 2 Dowl. P.C. 379.
(2) 1 Cr. M. & R. 580; s. c. 4 Law J. Rep. (N.S.) Exch. 40.

1836. }
Nov. 22. } COX v. SALMON.

Costs—Attachment for non-payment of.

The demand of costs on the Master's allocatur may be made by the attorney in the cause.

Shee applied for an attachment for non-payment of costs, pursuant to the Master's allocatur. The only point was, whether there had been a proper demand of the costs. The attorney in the cause had demanded them, but the Master had not directed that they should be paid to him. The officer entertained some doubt whether this was sufficient, but

Per Curiam.—It is quite enough.

Rule granted.

1836. }
Nov. 25. } CHARRINGTON v. METHERINGHAM.

Costs—Overseer—Distress for Poor and Highway Rates.

An overseer of the poor, who is sued for distraining for poor-rates and highway rates, is not entitled to treble costs when the plaintiff is nonsuit.

Trespass against a parish officer, for distraining for poor-rates and highway rates.

At the trial, at Northampton, at the last Spring Assizes, the plaintiff was nonsuited, for not proving a notice of action. The Master taxed the plaintiff his treble costs. In last term,—

Miller obtained a rule for the Master to review his taxation, on the ground, that the defendant was not entitled to more than his single costs.

N. R. Clarke, this day, shewed cause.—The distress being for poor-rates, the defendant is entitled to his treble costs. The stat. 43 Eliz. c. 2. s. 19, gives treble damages to the defendant: that must mean treble costs. Then the Highway Act, 13 Geo. 3. c. 78, gives treble costs, where there is a distress for a highway rate.

Miller and Hurlstone, contra.—*Butterton v. Furber* (1) decides, that a defendant is only entitled to single costs under the 43 Eliz. c. 2; and the Highway Act was repealed by the 5 & 6 Will. 4. c. 50, which came into operation before the trial of this cause, and has not re-enacted this provision (2).

LORD ABINGER, C.B.—The case cited is exactly in point; the defendant may bring his action for the treble damages, which he has sustained, and thus recover his extra costs.

Rule absolute (3).

1836. } HOBBY AND ANOTHER v.
Nov. 25. } PRITCHARD.

Attorney—Taxation of Bill.

Where two persons are jointly liable on an attorney's bill, the Court will not refer it to be taxed on the application of one, and his undertaking only, on the ordinary affidavits.

Whether such a reference could be obtained on a special application to the Court,—quære.

A Judge's order had been obtained by the plaintiff Hobby, to refer the bill of the attorney for the plaintiffs to the Master to be taxed, on the undertaking of Hobby alone; and—

Chandless, on a former day in this term, had obtained a rule to rescind that order; against which, cause was shewn this day, by—

Addison.—This order is right, according to the construction of the statute 2 Geo. 2. c. 23. s. 23, which empowers a Judge, upon application of the party chargeable thereon, and upon submission of such party or parties, to pay what shall be due, to refer an

attorney's bill to be taxed. And the Judge's order is conformable thereto. Here, one of the parties liable has undertaken that the bill shall be paid; and as there is a joint retainer and a joint liability, the undertaking of one will bind the other, as the payment of interest by one of two joint contractors will prevent the operation of the Statute of Limitations against the other.

[ALDERSON, B.—We cannot tell whether the other party admits the retainer or not, for he is not before the Court.]

[LORD ABINGER, C.B.—You contend, that in consequence of a joint retainer, one can bind the other, so as to render him liable to the process of attachment. That cannot be.]

Then the Court will, in the exercise of the authority which they possess at common law, order the bill to be taxed. No doubt, this authority is not altogether settled. The case of *Watson v. Postan* (1), in this court, is a decision in favour of their power; so is *Wilson v. Gutteridge* (2); and in *Dagley v. Kentish* (3), no opinion was expressed. Where an action has been commenced upon the bill, the reference certainly is under that general authority. In this case, the party complains of a collusion between his co-plaintiff and the attorney, and that the latter has a large sum of money in his hands belonging to him.

LORD ABINGER, C.B.—If you had made a special application on these facts, the attorney would have had an opportunity of answering them. But your application has been made on the ordinary grounds. We cannot grant this order.

ALDERSON, B.—The Court would hardly give the attorney less security for the payment of his costs than the statute requires.

PARKE, B. concurred.

Rule absolute.

(1) 2 Cr. & J. 370; a. c. 1 Law J. Rep. (n.s.) Exch. 131.

(2) 3 B. & C. 157; a. c. 2 Law J. Rep. K.B. 221.

(3) 2 B. & Ad. 411; a. c. 9 Law J. Rep. K.B. 183. See *Clutterbuck v. Coombes*, 5 B. & Ad. 400, *contra*.

(1) 5 Brod. & Bing. 517.

(2) But which, in section 109, gives costs as between attorney and client to defendants sued for any act done under that statute, and succeeding on the trial.

(3) It seems, however, that the defendant would have been entitled to double costs, under 7 Jac. 1. c. 5.

1836. }
Nov. 2 & 5. } VERNON v. SHIPTON.

Trover—Pleading—Evidence.

To trover for tin plates, the defendant pleaded — first, not guilty; second, that the plaintiff was not possessed modo et formâ:—Held, that he might shew, under the second plea, that he was a wharfinger, who had received goods of the plaintiff, and that the plaintiff's agent had, with the concurrence of his principal, sold the goods to a third person, and directed the defendant to hold them for the vendee, into whose name he had since transferred them; but that this evidence was not admissible under the first plea.

Trover for tin plates.

First plea, not guilty. Second, that the plaintiff was not possessed of the said goods and chattels as in the declaration mentioned.

At the trial, before Patteson, J., at the last Stafford Assizes, it appeared, that the plaintiff was an iron-dealer, and the defendant was a wharfinger at Liverpool. The plaintiff had agreed to sell certain tin plates to one Saunders, and had sent them to the defendant's wharf, consigned to Saunders. He complained of their quality, and refused to accept them; and the defendant, by his direction, changed the name of the consignee, and acknowledged to hold them for the plaintiff; but, on a subsequent application by the latter to have them transmitted to him, the defendant replied, that he had already transferred them to Saunders's latest order. The defendant proved by Saunders, that, after he had rescinded the sale, the plaintiff had authorized him to sell these plates to one Hargraves, and he had done so. It was objected, that this evidence was not admissible under these pleas. The learned Judge was of opinion that it was not under the first plea, but that it was under the second; and told the jury, that, if they were of opinion that the transfer to Hargraves was with the consent of the plaintiff, then the possession by the defendant for Hargraves under the second order was sufficient to pass the property, and the plaintiff could not recover. The jury found a verdict for the plaintiff on the first plea, for the defendant on the second,

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the learned Judge giving the plaintiff leave to enter a verdict for him on both, if the Court should think the evidence not admissible.

Maulen now moved accordingly.—The plea is, that the plaintiff was not possessed of these plates; and the evidence offered is to shew that the plaintiff licensed the defendant to transfer them to another. Instead of denying the possession, the defendant seeks to shew, that the conversion was licensed. There ought, therefore, to have been a special plea of licence.

[LORD ABINGER, C.B.—You put the case of an actual possession in the plaintiff; but this is the case of a constructive possession in him only. If he had sold his right to another, he has ceased to have the right of possession, and the plea is, that the plaintiff has no right to possess them.]

[PARKE, B.—The issue here is on the plaintiff's possessory title. The evidence shews, that he had parted with the property. No doubt a person may sell his goods lying on a wharf. If the word "possessed" in the plea means actual possession, you may be right; if it means the pure right of possession, you are wrong: it certainly applies to the title.]

There are other words in the declaration implying title, which might have been traversed.

PARKE, B.—They are so in the denial contained in the plea of the plaintiff's being possessed *modo et formâ*.

Per Curiam—

Rule refused.

R. V. Richards, on a subsequent day, moved for a rule to enter a verdict for the defendant on the plea of not guilty. If the property in the goods be shewn not to belong to the plaintiff, and he has no possessory right to them, the defendant cannot be guilty of a conversion: if evidence that the plaintiff has authorized the goods to be sold, and has ordered the defendant to deliver them over to another person, cannot be given in evidence under this plea, how can the jury assess the damages?

[PARKE, B.—They must give the full value, unless the right of property can be shewn in reduction of damages, as to which

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I say nothing at present, as I should pause long before I should allow it.]

A mere demand and refusal do not of themselves constitute a conversion: it cannot be said that the delivery of goods to the plaintiff's agent by his authority is a conversion.

PARKE, B.—I feel no doubt that this is *prima facie* a conversion. It is a delivery of a man's property to a third person, to give him entire controul and dominion over it. If it be meant to be defended, on the ground that it was done by the plaintiff's authority, that defence must be specially pleaded.

ALDERSON, B.—In *Stancilffe v. Hardwick* (1) it was established, that where there is conversion in fact, any excuse for it must be specially pleaded. The question as to a mere refusal on demand is still open; and if this case had stood upon that ground, I should have thought that there should have been a rule; but here there was an actual conversion.

GURNEY, B. concurred.

Rule refused.

1836. }
Nov. 3. } GOLDSHEDE v. COTTRELL.

Bill of Exchange—Substitution—Pleading.

In an action on a promissory note for 420*l.*, the defendant pleaded, that the plaintiff received two bills of exchange of 210*l.* each, to take up and in lieu of the said note, and that the said two bills were not due at the commencement of the suit. The plaintiff negatived the receipt on those terms, and also replied, that one of the bills was due at the commencement of the suit. The defendant put in evidence a memorandum by the plaintiff, that the defendant had given him two bills for 210*l.* to take up a bill for 420*l.* overdue. It appeared, however, that the plaintiff retained the latter, and that one of the bills was overdue when the action was commenced:—Held, that it was a question for the jury, whether the bills were received in substitution of the note, or merely in suspension of the right of action; and the jury having given a verdict for the plaintiff,

(1) 2 Cr. M. & R. 1; s.c. 4 Law J. Rep. (N.S.) Exch. 161.

the Judge not having been asked to leave that question to them, the Court refused to disturb it. Held also, that the defendant was bound to prove the allegation in his plea, that both bills were not due at the commencement of the suit.

Assumpsit on a promissory note for 420*l.*, made by the defendant, payable to his order, and indorsed by him to the plaintiff.

Plea—That, after the note was mature, due, and payable, the defendant, at the request of the plaintiff, gave him, and the plaintiff received, two bills of exchange of great value, to wit, 210*l.* each, to take up the said note for 420*l.*, then overdue, and in lieu thereof, and the defendant is a party to the said two bills, and liable thereon; and that the said two bills of 210*l.* each are not yet due, and are outstanding in the plaintiff's hands. Verification.

Replication—That the defendant did not give the bills of exchange for the purpose in the plea mentioned, and upon the terms therein alleged *modo et formâ*, and that one of the same was due and unpaid at the commencement of this suit.

Issue thereon.

At the trial, before the Lord Chief Baron, the defendant, in support of the plea, put in this memorandum:—

"April 20, 1836.

"C. H. Cottrell, Esq. has given me two bills for 210*l.* each, to take up a bill of 420*l.* overdue.

"B. Goldshede."

And the plaintiff produced one of the bills of exchange, which had been dishonoured, as also the original promissory note, on which the action was brought. It was contended for the defendant, that the right of action on that note was gone, the bills having been taken in discharge thereof. The learned Judge, however, considered that the plaintiff's right of action had only been suspended, and that, as one of the bills was dishonoured, he was remitted to his claim on the note, and the plaintiff recovered a verdict for 442*l.* for principal and interest, the defendant having liberty to move to enter a nonsuit, or to reduce the verdict by the amount of the second note.

The *objection* moved accordingly, and urged the objection that had been taken at the trial, but—

The COURT refused the rule. There was a difficulty as to what was meant by the words "to take up," but it was a question for the jury; and if it had been left to them, which was not required to be done, they would have decided it by reference to the acts of the parties, and, when they found that the note had not been given up, they would not have been induced to treat it as a case where there had been a substitution of the bills for the note. It was also incumbent upon the defendant to prove the second part of his plea, namely, that both bills were not due and payable at the commencement of the suit, which was put in issue by the replication. They were about to grant a rule to reduce the damages, but it being admitted that the second bill had been dishonoured since the action was brought, they refused to grant any rule.

Rule refused.

1836. } ELLIOTT AND OTHERS v.
Nov. 5. } MARTIN.

Contract, Breach of—Evidence.

A bond, set out on oyer, recited a contract entered into by the defendant with the guardians of a union, to supply bread of standard weights, as he should be required, to the poor of the parishes of the union, and that the guardians agreed to pay him the prices of the articles supplied, and of which a bill of particulars should be sent at the time, or within a month afterwards. The defendant also agreed, that in case the bread was not supplied when ordered, or, if supplied, was not of the proper quality, or was sent without a bill of particulars, the guardians might procure the bread elsewhere, and charge the defendant with the difference. The defendant pleaded general performance. The plaintiffs, in their replication, assigned three breaches: first, that the defendant, on a particular day, did not deliver bread according to order, but delivered loaves as and for loaves of a certain weight, which were deficient in weight; secondly, that he delivered loaves without a bill of particulars; thirdly, that he delivered bread deficient in weight on another occasion. The defendant rejoined, that the first breach was before the contract; secondly, that the officer of the

union had waived the delivery of the bill, mentioned in the second breach, which was denied by the plaintiffs, in their rebutter; and, thirdly, that he did not deliver the loaves as and for loaves of the weight specified in the third breach. At the trial, it was proved that the defendant delivered a quantity of loaves to the relieving officer at the poor-house, who weighed them, and as they were found to be deficient in weight, returned them:—Held, that the Judge was warranted in leaving these facts to the jury as evidence of a delivery of the loaves by the defendant; though semble, the pleadings admitted the delivery, and only put in issue the sufficiency of the weight.

The jury having found a verdict for the plaintiffs on the second issue:—Held, that it was a material issue, and that the plaintiffs were entitled to judgment thereon.

Debt on a bond for 10*l*. The defendant craved oyer of the condition of the bond, and set it out. It recited a contract between the defendant and the plaintiffs, on behalf of the guardians of the Towcester Union to supply and deliver good seconds bread, and good seconds flour, to every parish of the union, and provided for the performance of the said contract. The defendant then set out the contract in his plea. It recited the election and appointment of the guardians of the union, under the orders of the Poor Law Commissioners; that they advertised for tenders for the supply of bread and flour to the parishes in the union, and that the defendant had sent in a tender, which had been approved and accepted by the guardians, and then stated that the defendant contracted to serve, supply, and deliver, or cause to be delivered, to the parishes within the union, as the board of guardians should direct, good seconds bread and good seconds flour, the bread at standard weights, and the flour at a specified weight, for certain specified prices; and the plaintiffs contracted to pay the defendant at those rates and prices for every quantity of the said articles so supplied and delivered, and of which a bill of particulars should be sent with each article at the time of the delivery thereof, or within one calendar month from the said delivery thereof; provided, that if the articles should not be supplied

and delivered by the defendant when required, or if the articles supplied should not be of the quality and sort contracted for, or should be deficient in weight, or if the same should be delivered without such bill of particulars, the board might return them at the defendant's expense, and purchase a fresh supply, the defendant being liable to make good any loss that ensued in consequence of a higher charge. Various other stipulations were contained in the contract, which were not material. The defendant then pleaded, that he had fully performed the contract. The plaintiffs, in their replications, assigned three breaches: first, that the defendant was ordered by a person duly authorized by the board of guardians to supply and deliver 264 loaves of bread, of a certain weight, to wit, each of the weight of four pounds, at Towcester, and that he did not deliver the bread pursuant to the said order, but delivered bread, *as and for the proper weight*, which was deficient in weight; the second breach was, that he supplied and delivered bread as being of a certain weight, without a bill of particulars, whereupon the board of guardians returned them, and purchased other bread, and incurred an expense, which they called upon the defendant to make good, but he refused; the third breach was like the first, for the supply and delivery of loaves deficient in weight. The defendant rejoined to the first breach, that at that time the contract was not in force; to the second, that he was ready and willing to give a bill of particulars if the officer of the board of guardians had required it, but that he had stated that it was not necessary to do so, and never required it; to the third breach, that he did not deliver the bread in that breach mentioned, as being of the specified weight. The plaintiffs, in their rebutter, denied, that the officer had stated that it was not necessary to send in the bill of particulars.

At the trial, before Bolland, B., at the last Northamptonshire Assizes, it appeared that the defendant, who, as the pleadings stated, had entered into the contract with the board of guardians for the supply of bread to the poor in the Towcester Union, had supplied bread which was complained of, and was found to be deficient. It had

been ordered to be loaves of four pounds weight; and he promised to supply in future bread of the proper weight. On a subsequent day he sent a quantity of loaves in a cart to the relieving officer, who took some of them into the poor-house, and weighed them, when they proved deficient, and they were all taken back. On this evidence the learned Judge told the jury that, in his opinion, there was a delivery by the defendant of bread, as for four pound loaves, though they were deficient in weight. Upon the second breach, there was evidence as to the conversations of the relieving officer, which was left to the jury, who found a verdict for the plaintiffs on the second and third breaches; and for the defendant on the first, which appeared not to have been pressed.

Adams, Serj. now moved for a new trial, on the ground that the Judge had misdirected the jury on the third breach, and for a rule to enter a verdict for the defendant *non obstante veredicto* on the second. First, there was no delivery of the bread in this case; it was handed to the officer to be weighed, and he returned it, and it was received back by the defendant; it cannot be said to have been delivered.

[The COURT were of opinion that the direction was right; that there was evidence of a delivery of the bread; indeed, the pleadings seemed to admit the delivery, and merely put in issue whether it was of the four pound weight or not.]

The second point is, that the non-delivery of the bill of particulars with the bread is immaterial, as the defendant might have delivered it within a month afterwards.

PARKE, B.—That provision occurs in the clause of the contract, where the plaintiffs undertake to pay for the articles complained of; but the breach is assigned on the subsequent part of the contract, where they are authorized to return the bread, and charge him with the difference. He can only call for payment if he sends a bill of particulars within the month; but they may insist upon the want of it at any time. The issue was material.

Per Curiam—

Rule refused.

1836. } M'GAHEY, CLERK TO THE VES-
 Nov. 15. } TRYMEN OF ST. PANCRAS, v.
 ALSTON AND SEWELL.

Parish Officers—Evidence—Competent Witness—Secondary Evidence.

The paying clerk appointed under the St. Pancras Act is not merely an annual officer.

In an action brought by a vestry clerk on behalf of the parish, under a local act, where there was a plea denying his due appointment to the office:—Held, that evidence of his acting as such, was sufficient prima facie evidence for the plaintiff.—Held also, that one of the vestrymen was a competent witness for him.

Quære—whether in an action against a collector and his surety, the accounts rendered by the former, are evidence of the receipt of money against the latter.

A cheque drawn on account of a parish was delivered to the defendant, the paying clerk. It was shewn that the bankers on that day paid a sum of that amount, and that it was their custom to return the cancelled cheques to the paying clerk, who ought to have deposited them in a proper place at the workhouse: application had been made to his successor at that place, who handed some bundles to a witness, who searched them without success. The paying clerk was not called:—Held, sufficient search to let in secondary evidence of the cheque.

*Debt on a bond for 500*l.*, given to the directors of the poor of the parish of St. Pancras, and their successors.*

1st plea, that the plaintiff was not vestry clerk of the parish.

2nd plea, that the defendant Alston had duly fulfilled the conditions of the bond.

3rd plea cravedoyer of the bond, which was set out, and also of the condition, which was also set out. It recited that the defendant Alston had been appointed an officer or servant of the vestrymen and directors of the poor of St. Pancras, under the title of paying-agent and accountant; and the condition was stated to be, that he should faithfully execute the office of paying-agent, so that no loss should be sustained by the vestrymen, or the directors, or the parish; and that he should, at the weekly and other meetings of the directors

and their successors, and at all other times when required by the said vestrymen and directors, faithfully account upon oath for all monies received by him, and disbursed in the execution of the said office, and verify all things done by him therein in such manner as the vestrymen or directors, or their successors, or the major part of them, had or should appoint, and should conform in all things to the orders and instructions of the vestrymen and directors, and should, within twenty days after removal from his office, make up his account, and pay over the balance to the treasurer or clerk of the said vestrymen or directors for the time being, or to such person as the said vestrymen or directors should appoint to receive the same, and should render up to the said vestrymen or directors, or their successors, all books of account, &c. within twenty days after notice. Sewell was the surety for Alston. The defendants then pleaded, that at the time when the bond was executed, the said office of directors of the poor of St. Pancras, was an annual office, and that the office of the directors, who were in office at the date of the bond, had expired before the commencement of the suit, to wit, on the 31st of March 1834; and then they specifically averred a performance of the condition of the bond during the whole of the period that these directors were in office, until the said 31st of March, when they went out of office. To this plea there was a general demurrer and joinder.

Peacock, in support of the demurrer.—The office in question is a continuing one, and not merely co-extensive with the continuance of the directors. The St. Pancras Vestry Act, 59 Geo. 3. c. 39. s. 3, appoints select vestrymen, without limit to any particular period of office. They, by section 19; are to appoint the subordinate officers, as they shall deem necessary, for the purposes of the act, and may remove them at their will and pleasure, and may revoke, countermand, and vary their appointments. The defendant Alston, therefore, being an officer appointed by the vestrymen, and not by the directors, was removable at their pleasure only. The directors of the poor are elected annually, but the act specifically provides that their election shall be annual. The bond is to be given

to the directors, it is true, but they are only as trustees for the parish.

Tomlinson, contra.—Upon the construction of this act, it appears that the office was annual only. By section 19, the salaries are to be paid "*yearly or otherwise.*" The accounts are to be rendered *monthly*, and the officers are to pay over to the directors *for the time being*. The officer, therefore, seems to depend upon the directors, and to go out of office with them. According to the terms of his appointment, and the duties of his office, as set forth in the condition of the bond, he certainly appears to be the mere servant of the directors. Or if he be the servant of the vestrymen and directors, his office terminated when that of the latter, who formed a part of the entire body, ceased.

LORD ABINGER, C.B.—No plausible argument can be made either upon the words of the bond or of the statute. If every appointment were to be made over again at the end of every year, a most elaborate duty would be imposed on the parish officers.

Judgment for the plaintiff.

The cause was tried on the other issues in last Trinity term, at Westminster, before Gurney, B., when it appeared that Alston had been the vestry clerk of St. Pancras, and had been removed by the vestry; and the dispute in the cause was, as to the right to a certain sum of money, which he claimed for his salary as such vestry clerk. He had been the paying clerk, and, Mr. Scadding having resigned the situation of vestry clerk, the directors of the poor had recommended him to be appointed his successor. The vestry adopted the recommendation, but reduced the salary, and, as they contended, the reduction was to date from the resignation of Scadding; the defendant claimed the higher salary until that resolution was passed. Accordingly, he retained a sum of about 34*l.* in his own hands, entering it in his accounts as paid to himself for his salary. He submitted his accounts to a committee of the vestry, who examined them, and as the defendants contended, assented to them. They were afterwards sent to the auditors, and one of them signed them.

The vestry ultimately dismissed Alston from the office of vestry clerk, and refused to ratify his accounts. To prove the first issue, the plaintiff himself was called, and stated that he was the vestry clerk, and acted as such. It was objected, that this was not admissible evidence in proof of the issue. But the objection was overruled. The plaintiff called a person named Bradley, one of the vestry, who had examined the accounts, to prove that he had not conclusively allowed them, but that this item had been objected to. It was contended, that he was not a competent witness, but the learned Judge overruled this objection also, and told the jury, that the question for them was, whether the defendant Alston had or had not retained to himself any part of the monies that he had received, and that he thought he was not warranted in retaining for the larger salary. The jury found a verdict for the plaintiff.

In the same term—

Sir W. W. Follett moved for a new trial, on the ground of the admission of improper evidence, and on the ground of misdirection. First, it was incumbent upon the plaintiff to prove that he had been duly appointed to the office of vestry clerk, and it was not enough to prove that he acted as such.

[PARKE, B.—Is not the acting in this capacity evidence of his having been duly appointed? It is always sufficient to prove, that justices, constables, and the like, act as such.]

Here the action is to be brought in the name of the vestry clerk: unless the plaintiff be the vestry clerk, the action must fail. Suppose he had brought an action for slander upon him in that character, he must have proved his title to that character—*Sellers v. Till* (1), and *Collins v. Carnegie* (2).

[PARKE, B.—The plaintiff fills a public character; and Tindal, C.J. in *Cannell v. Curtis* (3), intimates a strong opinion, that even in such an action it is enough to give evidence of the party's acting in that character. Here, however, the action is not

(1) 4 B. & C. 655; s. c. 4 Law J. Rep. K.B. 27.

(2) 1 Ad. & Ell. 695; s. c. 4 Law J. Rep. (N.S.) K.B. 196.

(3) 2 Bing. N.C. 228; s. c. 4 Law J. Rep. (N.S.) C.P. 43.

brought for any benefit to the plaintiff; he merely gives his name.]

But if the plaintiff's title be expressly denied, as in the case of an attorney, or the assignees of a bankrupt, it must be proved. It was so in *Curtis v. the Kent Waterworks Company* (4).

[BOLLAND, B. referred to *Berriman v. Wise* (5).]

Secondly, Bradley was not a competent witness. The plaintiff is but the nominal representative of the vestry, of whom Bradley was one. He is, in effect, one of the plaintiffs, and although the statute removes his incompetency, on the ground of interest as a rated inhabitant, yet, if he be a party to the record, he is incompetent on another ground, which is not touched by the statute—*Wilks v. Whitmore* (6).

[PARKE, B.—This point has been already settled in *Fletcher v. Greenwell* (7). The trustees or vestrymen have a public duty to discharge, but no private interest.]

[LORD ABINGER, C.B.—The witness has no personal nor pecuniary interest in the cause; neither is he a party on the record. It is altogether a creation of the legislature.]

Suppose a vestryman bring an action improperly, is he not to pay the costs?

[LORD ABINGER, C.B.—He might be liable for a breach of his public duty.]

Then the Judge misdirected the jury. The question for them was, whether Alston had not rendered his accounts, and they had been acquiesced in; and not whether he was justified in retaining the money as he had done. But even if that question might have been put to them, the evidence shews that he was justified. The directors having appointed him, he became entitled to the salary enjoyed by his predecessor, and when the vestry adopted the resolution of the directors, they authorized him to claim the larger salary, at least up to the time when they reduced it.

Platt, at the same time, moved for a rule on behalf of the defendant Sewell, on the ground that the accounts of Alston were given in evidence, to prove the receipt of the monies by him, for which he

did not account. These accounts were not evidence against the surety, although they were against Alston. He cited *Smith v. Whittingham* (8), *Goss v. Wallington* (9), and *Middleton v. Mellon* (10).

PARKE, B.—There is sufficient doubt on this point, for a rule to shew cause, but on the others there is no ground for a rule. The plaintiff is a public officer; and the rule is, that all public officers, who are proved to be acting in their office, are presumed to have been duly appointed to that office, until the contrary is shewn. It is quite immaterial, that the action is brought in his name. In all actions against justices and constables, no more is requisite than proof of their acting in those characters. Then, in regard to the second objection, the case referred to is a distinct authority that it cannot be sustained, and that the witness was competent, and was not a party. Then the third question is, whether Alston was justified in retaining this sum for his salary. He claims it as having been allowed by the directors. They, however, have no power to settle the amount of the salary; that belongs to the vestry. Then, he says, it has been adopted and allowed by the vestry. It appears, however, that at the time when these accounts were produced, this item was objected to, and, therefore, in fact, it never was allowed. But if it had been allowed, I should have felt great doubt whether a collecting clerk can exonerate himself by a payment, which, at the time it is made, he knows to be illegal; and what he did in the present case was equivalent to payment to a third person, of a sum of money which he knew that person was not entitled to receive.

The rest of the COURT concurred, and *Sir W. W. Follett's* motion was refused.

Cause was shewn, this term, by—

Sir F. Pollock and *Peacock*, against the other rule.—When the report was read, it appeared that the point on which that rule had been granted, did not arise, because it had been shewn, by other evidence, that Alston had received money on account

(4) 7 B. & C. 314; s. c. 5 Law J. Rep. M.C.106.

(5) 4 Term Rep. 366.

(6) Moo. & Mal. 314.

(7) 1 Cr. M. & R. 754; s. c. 4 Law J. Rep. (N.S.) Exch. 126.

(8) 6 C. & P. 78.

(9) 3 Brod. & Bing. 132.

(10) 10 B. & C. 317; s. c. 8 Law J. Rep. K.B. 243.

of the parish, and to discharge himself from that receipt he was obliged to put in the whole of the account. The admissibility of that evidence was disputed. M'Gahey, the plaintiff, stated that on a certain day a cheque was given to the defendant Alston, for 320*l.*, and the banker's clerk proved that a cheque to that amount was paid on that day, and that it was the custom to return the cheques, when paid, to the paying clerk, who at that time was the defendant Alston. It was then shewn that the cancelled cheques were all kept in a particular room in the workhouse, and that this ought to have been deposited there by Alston. A witness stated, that he had applied to the present paying clerk for the cheque at the proper place of deposit: that the latter had given him several bundles, which he had searched, but without success. The paying clerk was not called, and secondary evidence of this cheque was admitted. It was not quite clear whether this had been objected to at the trial.

Platt now contended that the proof of loss was not sufficient to let in secondary evidence of the contents of the cheque. The paying clerk ought to have been called, to shew that he had delivered all the bundles; it is quite possible that the witness might not have examined all the bundles, or that some of them might not have been delivered.

[ALDERSON, B.—It will be presumed, until the contrary is shewn, that all the bundles in the office were produced.]

Sir F. Pollock contended, that there had been a sufficient search for the cheque, and that the secondary evidence was properly admitted. He cited *The Bishop of Meath v. the Marquis of Winchester* (11).

PARKE, B.—I do not think that any further evidence was requisite. It was proved that a piece of paper was given to Alston, and that there was a contemporaneous entry of a payment, and the proper place of deposit for that piece of paper, would have been the parish workhouse. The inference is, that the document is there. A search has been made, which, I think, was a reasonable search, at the place where the do-

cument was likely to be found, and as it has not been found there, it must be taken to have been lost or mislaid.

ALDERSON, B.—What is reasonable evidence of a due search, must depend upon the circumstances of each case; and I think the secondary evidence was properly admitted in this case. The Judge is to be satisfied that all reasonable endeavours to find the documents have been used, and all probability of anything being kept back must be negatived. His Lordship referred to *The King v. Stourbridge* (12) as in point.

GURNEY, B. concurred.

Rule discharged.

1836. } HAYTER v. MOAT, ADMINISTRATRIX OF RICHARD MOAT.
Nov. 17. }

Pleading—Declaration, defective—Practice—Service of Writ—Limitation.

A declaration against an administratrix contained nine counts: the first six alleged promises by the intestate; the seventh was an indebitatus count against her for the funeral expenses; the eighth was for goods sold and delivered to her as administratrix; the ninth was on an account stated. No promise was stated in the seventh count, but the declaration concluded, that in consideration of the premises, the defendant promised to pay the two last-mentioned sums respectively. The defendant pleaded non assumpsit to the seventh count:—Held, after verdict, that it was bad, no promise having been alleged therein, and the conclusion not applying to it.

Semble—where a verdict is taken for a sum generally on the whole of the declaration, subject to the certificate of an arbitrator, he may sever the damages upon the different counts in the declaration.

Where judgment was arrested by the Court in the morning, and a fresh writ was served by the plaintiff upon the defendant in the evening, the judgment of the Court not having been recorded, nor the rule of the court served upon either party, the Court set aside the writ as irregular.

Assumpsit. The declaration contained nine counts. The first six charged the defen-

(11) 3 Bing. N.C. 183.

(12) 8 B. & C. 96; s. c. 6 Law J. Rep. M.C. 63.

dant as administratrix on promises by the intestate. The seventh charged the defendant as administratrix for the funeral bill, but the count did not contain any promise. The eighth was for goods sold and delivered: the ninth was on an account stated with the defendant as administratrix; and the declaration concluded, that, in consideration of the premises, the defendant promised to pay the *two* last sums of money, but that the defendant, disregarding her said promises, hath not paid the said several sums of money. The defendant pleaded as to the first six and the ninth counts, a judgment recovered against her, upon which the plaintiff took a judgment of assets *quando acciderint*, and to the seventh count, non assumpsit. To the eighth the plaintiff entered a *nolle prosequi*. The cause went to trial on the issue on the seventh count, and to assess the damages on the others, when a verdict was taken generally for the plaintiff, subject to a reference to a barrister to certify the amount of damages. He did so, and severed the damages upon the different counts, certifying on the seventh count for the sum of 12*l.* 5*s.* 11*d.*

Crowder, on a former day in this term, obtained a rule to arrest the judgment, taking two objections: first, that there was no promise alleged in the seventh count, and the general conclusion did not apply to that count. He referred to *Price v. Easton* (1). Secondly, there is a misjoinder of counts: the seventh and ninth, charging the defendant personally, cannot be joined with the first six, which charge her in her representative character.

Platt and *Gurney* shewed cause.—As to the first objection, it is cured by the defendant's pleading over.

[*PARKE, B.*—A plea to cure such a defect must be one which admits the promise: here the plea denies it.]

[*LORD ABINGER, C. B.*—There must be an admission of the promise on the record: there is none here.]

Then the Court will infer a promise in this case; that promise is an inference of law, which may be drawn from the facts which are stated—namely, the supply of the goods by the plaintiff to the defendant.

(1) 4 B. & Ad. 434; s. c. 2 Law J. Rep. (N.S.) K.B. 51.

The count states, that the defendant is indebted to the plaintiff for the funeral; and the declaration in its commencement alleges, that the defendant is summoned to answer on promises. It will be inferred, that she promised to pay this debt.

[*LORD ABINGER, C. B.*—The plaintiff has made all the promises, (which include the seventh count); the consideration, in point of fact, for the promise to pay the last two sums mentioned in the declaration. The supply of goods is evidence from which a promise may be inferred; but, in point of fact, the promise may not arise from it.]

Any want of form, as the addition of a *similiter*—*Smain v. Lewis* (2)—or an attornment—*Hitchins v. Stevens* (3), may be supplied after verdict.

The COURT were of opinion that this objection was fatal to that count; and, therefore, the question as to the misjoinder thereof was not argued, but they held, that there was no misjoinder of the ninth count. They proposed to arrest the judgment on the seventh count, and to give judgment for the plaintiff on the others.

Crowder objected that that could not be done; the arbitrator was not authorized to sever the damages, which had already been given generally by the jury. The plaintiff having taken the verdict in that form, cannot now separate it.

LORD ABINGER, C. B.—One bad count vitiates the whole declaration, because it cannot be known upon what the jury have given their verdict. Here, however, the arbitrator's certificate has cured that. The

Judgment must be arrested on the seventh count, and for the plaintiff on the others.

Nov. 25.—The COURT having pronounced this judgment, the plaintiff's attorney, on the same day, sued out a fresh writ against the defendant, and applied to the clerk of the defendant's attorney on the same evening, who said, if the writ were left with him, his principal would appear for the defendant, and the copy of the writ was left with him. On the next

(2) 3 Dowl. P.C. 700.

(3) Sir T. Raym. 487.

day an application was made to a Judge at chambers to set it aside for irregularity, who referred the parties to the Court.

Crowder accordingly applied for a rule to shew cause, why, on payment of the sum of 12*l.* 5*s.* 11*d.*, the service of the writ should not be set aside with costs; contending that, until the judgment had been signed, or, at least, until the rule of the court had been drawn up and served, the plaintiff had no right to sue out a fresh writ.

Gurney shewed cause.—If this be a good objection, it can be pleaded in abatement of the writ, as pendency of another writ for the same cause of action is to be taken advantage of in that way. But, here, the suit was over; the judgment having been arrested, there remained nothing to be done; no costs can be taxed. And, as to the rule for judgment not having been served, the writ itself was not served until after the defendant might have obtained the rule for judgment.

PARKE, B.—The suit was still pending in this case, and the service of the writ was irregular. The Court will not compel the defendant to plead in abatement of the writ.

Per Curiam—

Rule absolute.

1836. }
June 13. } MUSPRATT v. GREGORY.*

Distress—Goods not exempted.

The manufacturer and seller of salt, granted a rent, and charged it upon his salt works and premises, at which he sold salt publicly to all persons who came for it; and there was a cut or canal on the premises, communicating with a public navigation, in which boats coming for salt were accustomed to lie. The plaintiff, an alkali manufacturer, sent a boat to be laden with salt, which he required for the purposes of manufacturing the alkali, and the boat lying in the canal, out of the plaintiff's possession, was distrained for arrears of the rent:—Held, (Parke, B. dissentiente,) that the boat was exempt from the distress.

* This is one of the cases decided in *Trinity term last*, and referred to 5 *Law J. Rep. (N.S.) Exch.* 290.

Trespass for taking a boat of plaintiff called a flat.

Plea—That before the taking of the said boat, by an indenture made the 19th of April 1830, between one William Furnival and nine other separate parties, reciting an indenture of lease executed by M. D. Lowndes and J. Dudley, trustees under a marriage settlement, of the first part; J. Perrin and his wife, of the second part; and Wm. Furnival, of the third part; certain fields and beds of rock salt were demised to Furnival, with powers of duly working the salt-works and of sinking pits and setting up engines and necessary works, and making and erecting wharfs or quays, and loading or landing places upon the demised premises, and to cut canals to the river, for the term of fifty years, at the yearly rent of 187*l.*, and a royalty on the rock salt got and sold by the said W. F.; and further reciting, that one Joseph Tilt was the patentee of some improvements in salt-boilers, and had assigned his patent to W. F., and that the said W. F. had, in pursuance of the said patent, caused proper pans, ranges, and utensils for manufacturing salt to be erected, and had made various alterations and works, and had divided his works into four separate parts; and that, to raise money to complete them, he had agreed to grant a lease of one of those parts and an annuity of 1,050*l.* for ninety-nine years, if one of four lives therein mentioned should so long live, to Maximilian Richard Kymer, one of the parties; and further reciting, that the said M. R. K. had agreed to sell 70*l.* of the said annuity to Levi Ames, 100*l.* to James Brown, 35*l.* to T. W. Claggett, 50*l.* to Chatfield, 70*l.* to John Deacon, 70*l.* to J. N. Kemble, and 140*l.* to Christopher Kymer; and that it had been agreed that the annuity of 1,050*l.* should be divided into eight several annuities, and that all should be granted to F. Kemble and F. Lock in trust, and reciting a warrant of attorney executed by W. Furnival to F. K. and F. Lock to secure the payment of the annuity; and that it was intended that the annuities should be secured by a demise of the salt-works and an assignment of the patent;—it was then witnessed, that, in consideration of the sum of 14,500*l.*, part of which had already been paid by the said M. R. Kymer, and different portions were

paid by the several other parties, the said W. Furnival granted to the said F. Kemble and F. Lock the different annuities mentioned in the recitals to be charged and chargeable upon, and yearly issuing and payable out of, all the closes, fields, beds of rock-salt, brine-pits, houses, buildings, works, privileges, and other premises comprised in the loan to Furnival, and upon all the engines, machinery, &c. now belonging to the premises, and upon all royalties or rents, profits, and produce of the premises, to have, hold, receive, and take the said annuities for the term of ninety-nine years, if any one of four persons therein named should so long live, payable quarterly. And, in case the said annuities should be in arrear for thirty-one days, then F. Kemble and F. Lock were empowered to enter upon the said premises and distrain for the same, in like manner as in distresses for rent reserved upon a common demise, and also to enter upon the premises and take the rents and profits until the arrears should be satisfied. The said W. F. then covenanted with F. Kemble and F. Lock to pay the annuities; that he had good title to grant the annuities and to charge the premises; and that all the said works and premises should remain charged with, and subject and liable to, the distress and entry of the said F. K. and F. L. for the recovery of the same. The defendant then alleged, that the annuities were in arrear; and, because the plaintiff's boat was lying in a cut or canal, being part of the premises in the indenture mentioned, upon which the annuities were chargeable, the defendant, as the bailiff and servant of the said F. Kemble and F. Lock, and by their command, seized and took the said boat so being and lying in the said cut or canal, as and for a distress for the said arrears of the said annuities, and carried the same away to a convenient place within the same hundred, and there impounded the said boat for the space of five days, as he lawfully might do. Conclusion with a verification.

The plaintiff replied, that he was and is a manufacturer of, and trader and dealer in, certain alkalis, to wit, black ash and white ash, and has carried on such manufacture, which manufacture, trade, and dealing was a useful manufacture, trade, and deal-

ing, and of great public benefit; and, for the purpose of manufacturing such alkalis, great quantities of salt are required, and the plaintiff had occasion for and required large quantities of salt, and was accustomed from time to time to use and employ the boat in the declaration mentioned for the purpose of and in bringing, fetching, and carrying away divers large quantities of salt to the plaintiff's premises, to be there used by him in such manufacture, from the salt-works, which said salt was, during all that time, from time to time received in and by such boat in the said cut or canal, at the place in which she was so seized, and thence was carried in and by the said boat down the said cut or canal into a certain river, and thence to the plaintiff's premises; and that, before the said F. K. and F. L. had any interest in or out of the said premises, the said W. Furnival made certain salt-works on the said premises, near to the place where the said boat was so seized; and the said W. Furnival, for the purpose of enabling all the subjects of this realm who should have occasion to purchase salt at the said salt-works to fetch the same therefrom, and to receive the same thence, and to carry the same away in boats, and, for the purpose of enabling the tenants of the said salt-works to have the charge and loading of the said boats, dug the said cut or canal, which communicated with a certain river; and the said W. Furnival and the tenants and occupiers of the said works from time to time manufactured salt there, and sold and disposed of the same there as an article of trade and merchandise, and delivered and supplied such salt so made to *all** persons desirous of buying and taking away the same in boats at the said place in the said cut or canal, and such persons have always taken away the same in their said boats along the said cut or canal; and that, having occasion for salt for the purposes of the aforesaid manufacture, he sent and took his boat into the cut, being the place where salt is usually sold and delivered to persons buying and fetching it away; and the boat was, at the time of its seizure, in the cut for a temporary purpose only, and for the benefit of

* This word was taken to have been inserted in the pleadings by consent of the Court, though it was wanting as they were originally drawn.

trade and manufacture, to wit, for the purpose of receiving, obtaining, and taking the salt, and had not remained there for any long or unreasonable time; and that the plaintiff had no notice of the said deeds, rent-charge, or arrears of rent; and the defendant wrongfully seized the said boat so being in the said cut for such temporary purpose as aforesaid and for the benefit of trade and manufacture. Verification.

To this replication the defendant demurred, and there was a joinder in demurrer.

In Easter term, the demurrer was argued by—

W. H. Watson, for the defendant, and—

Crompton, for the plaintiff; when the Court took time to consider their judgment; and now, differing in opinion, delivered their judgments *seriatim*.

ALDERSON, B.—The question raised upon the demurrer to the replication in this case is, whether the boat, stated to have been distrained for rent by the defendant, was by law distrainable under the circumstances disclosed in these pleadings. [His Lordship stated the replication.]

The leading case on this subject is that of *Simpson v. Hartopp* (1), in which Lord C. J. Willes, in delivering the judgment of the Court, goes very fully into the law on this point. He lays it down, that there are five sorts of things which at common law were not distrainable:

- 1st. Things annexed to the freehold.
- 2nd. Things delivered to a person exercising a public trade, to be carried, wrought, or managed in the way of his trade or employ.
- 3rd. Cocks or sheaves of corn.
- 4th. Beasts of the plough and implements of husbandry.
- 5th. Instruments of a man's trade or profession.

The three first classes are absolutely free and exempt at common law, and the latter *sub modo*, in case there be sufficient distress without them. There are however other exemptions not here enumerated: first, chattels in actual use, or in the actual possession and presence of the owner himself, an exemption intended to prevent a breach of the peace; and secondly, the in-

struments or vehicles of conveyance of goods privileged from distress, or brought to a public market or fair, there to be sold.

Now, of the exemptions enumerated by Lord C. J. Willes, it is plain that only the second can be at all applicable to this case. We must first inquire, therefore, whether this boat is within that rule.

It is a chattel brought by the plaintiff to a place, where, according to the pleadings, a public trade in salt is carried on, and is there left for the temporary purpose of being loaded with that article; whilst it remains in that state, and before a reasonable time for so loading it has elapsed, it is distrained for rent due to the landlord of the premises wherein the trade in salt is carried on. Such are the facts of the case.

The boat is clearly not within the description of goods delivered to a trader to be *carried* or *wrought* (i. e. worked up into another form,) in the way of his trade or employ; for there is nothing to be done to it; it is not brought to be repaired or altered in any way.

Then, is it delivered to be *managed* in the way of the trade or employ of the person to whom it is so delivered?

In *Simpson v. Hartopp*, the word "*managed*" appears to be used as synonymous with "*manufactured*;" but that is too limited a sense of the expression: for the Courts have held, that goods sent to a factor by a merchant are privileged from distress under this head. I think, therefore, that it extends both to the working up of goods from their unwrought state into a new form, as a manufacturer; and also to the dealing with the goods as articles of trade, in their original or their wrought state as articles of commerce, as a factor. And the true principle seems to be, that where, in order to the exercising of such a public trade at the place in question, it is necessary that the goods should be delivered into the custody of the person carrying it on there, the law, in consideration of the benefit which the commonwealth derives from the carrying on of the trade, protects from distress the goods so delivered.

This is the reason assigned in *Simpson v. Hartopp*; and in *Wood v. Clarke* (2).

(2) 1 Cr. & Moo. 390; s. c. 9 Law J. Rep. Exch. 187.

(1) Willes, 512.

the principal ground which Lord Lyndhurst assigned why the loom was not privileged was, that it was not necessary for the protection of trade that such privilege there should exist. Here, also, it is not necessary for the protection of trade that the boat should be delivered into the custody of the person manufacturing and selling the salt. The trade may well be carried on at these salt-works without the possession of the boat being parted with at all by the owner. If he retains possession of it, there is no doubt that it is privileged; but then it is for a totally different reason, viz. that the taking it would lead to a breach of the peace, and then the case falls within another exemption before pointed out. The instances found in the books, of the horse in the smith's shop, of the cloth sent to the tailor, of the materials sent to the weaver, of the goods sent to the factor, of the beast sent to the carcass-butcher, are all cases of chattels delivered to be dealt with by the third person in the way of his trade, under circumstances in which his trade cannot be carried on at that place unless the goods are so delivered.

It is, however, proper to advert to the last of the two exemptions before pointed out, in addition to those mentioned by Lord C. J. Willes. That exemption is, where the thing distrained is the instrument of conveyance of goods which are themselves privileged, or which are brought to a public fair or market; and this is another instance of the same principle, viz. a protection for the benefit and convenience of trade. The article must be conveyed, and it is privileged from distress; therefore, all things necessary for that purpose are privileged also. Thus, the horse or carriage conveying goods is so privileged; and so also the basket or package in which they are enveloped, and the like. So, again, cattle going to, or at, a fair or market are privileged; and, as a consequence arising out of the necessity for their refreshment on their passage towards such fair or market, if distant, they have been held to be privileged during any temporary agistment on the road (3). But these are all instances of a privilege arising as accessory to another privilege; and although we are not

prepared to draw any distinction between the instrument of conveyance to, or that from, the place where the privileged goods to be thereby carried, are situate, yet we think that the privilege is not to be extended to the conveyance sent for goods, which are not themselves privileged from distress. Now, here, it is abundantly clear, that the salt which was to be conveyed by this boat was not itself privileged from the distress; for it was the property of Furnival himself, and was therefore, as his property, clearly liable to be distrained for the rent due from him to his landlord. Nor can this case fall within the rule exempting the horse or carriage conveying, or which has conveyed, goods to a fair or market. There the privilege arises out of the advantage derived to the public from the proper supply to that public place of resort and traffic. In *Fowkes v. Joyce* (4), it was held, that cattle in their progress towards London were privileged; but the Court appear to have proceeded on the ground, that there was no solid distinction between the supply of a great city, and the supply of a fair or market. I am not aware, however, that a shop carried on for the private profit of an individual, or that a horse bringing *home* goods from a fair or market, for the individual profit of the purchaser, has ever been held to be within this rule: nor can they, as I think, fairly be considered within the principles on which the rule appears to be founded.

I do not think we can or ought to decide this case upon what may appear to be expedient. If we adopt such principles of decision, we shall deprive the law of one great advantage, viz. certainty; for that which appears expedient to one, may be in the opinion of others very inexpedient. If this argument were well founded, it would have undoubtedly prevailed in the case of the livery stable keeper—*Francis v. Wyatt* (5); but the Court there adhered, against their own views of expediency, to the ancient decisions; and subsequent experience has shewn that the so much dreaded consequences did not afterwards arise in practice.

Upon the whole, therefore, this case seems to me not to fall within any decided

(3) 2 Saund. 290, a, n. 7.

(4) 3 Lev. 260.

(5) 3 Burr. 1498; s. c. 1 Bl. 483.

authority, nor within any of the principles upon which goods have hitherto been held privileged from distress; and that being so, I think that the replication is insufficient, and that the demurrer must be allowed.

BOLLAND, B.—The question for the opinion of the Court in this case is raised upon a demurrer to the replication; and the point upon which we are called upon to decide is, whether the boat, which has been taken as and for a distress for the arrears remaining unpaid of certain annuities and yearly sums mentioned in the plea of the defendant, was liable to be distrained.

It may be laid down as a general rule, that all goods that are found by a landlord on the premises demised to a tenant are liable to be distrained by the landlord for rent due to him in respect of such premises, whether the goods be the property of his tenant or of a stranger, provided they are not privileged by law from distress. Lord C. J. Willes in *Simpson v. Hartopp*, (a case that was twice argued, and fully considered by the Court of Common Pleas,) states, in delivering the judgment of the Court, that there are five sorts of things which at common law were not distrainable.

1. Things annexed to the freehold.
2. Things delivered to a person, exercising a public trade, to be carried, wrought, worked, or managed in the way of his trade or employ.
3. Cocks and sheaves of corn.
4. Beasts of the plough and instruments of husbandry.
5. The instruments of a man's trade or profession.

The three first sorts were absolutely free from distress, and could not be taken by the landlord though there were no other goods. The two last were only exempt *sub modo*, when there was distress enough without taking them. Let us then look to the circumstances under which the boat in question was taken, in order to ascertain whether it can be legally brought within either of the five grounds of exemption.

The plaintiff contends that the boat was not liable to be distrained; because he says in his replication that he is a manufacturer of and a trader and dealer in alkalis, and that such manufacture is a manufacture of great public benefit; that great quantities

of salt are required in the manufacturing such alkalis, and that he, as such manufacturer, requiring salt for the purpose of his manufacture, sent and took his said boat to the salt-works mentioned in his replication; and that at the time of the seizing and taking of the said boat, it was at the said salt-works for a temporary purpose only, and for the benefit of trade and manufacture, viz. the purpose of obtaining, receiving, and taking salt from such salt-works to his manufactory, and that the boat did not remain on the premises for any unreasonable time.

It appears to me to be clear that the boat of the plaintiff cannot be said to come within either the 1st, 3rd, 4th, or 5th rules of exemption; nor can it, but by an overstrained and forced construction, a construction that I do not think the Court can adopt, be brought within the 2nd rule of exemption. If this be correct, it follows then that the non-liability to distress must rest upon some other foundation; and it has been contended at the bar, that it can be put upon the benefit to trade alone. I cannot however find any authority to support that position, to the extent that is in this case contended for. Things used in the way of trade are under some circumstances not liable to distress:—a horse standing in a smith's shop to be shod, or in a common inn; cloth or garments in a tailor's shop; materials for cloth in a weaver's shop; corn or meal sent to the mill or market (6); goods delivered to any person in the way of his trade, or to a carrier for hire—*Gisbourn v. Hurst* (7); but in each of these cases the privilege from distress is put on other grounds than the mere benefit of trade. The reported cases that come nearest to the present are those of the yarn carried to be weighed at a private beam, if in the way of trade—*Rede v. Burley* (8); or of the horse that had carried corn to a mill to be ground, and, during the grinding of the corn, was tied to the mill door. In these cases, the goods and the horse taken were held to be privileged from distress for rent; but the Court, according to the reports, appears to have mainly proceeded upon the ground of the

(6) Co. Litt. 47, a.

(7) 1 Salik. 250.

(8) Cro. Elia. 596.

goods being under the personal care of their owner at the time of the taking. The boat in the present case had no such protection: it was left by the owner, and the privilege contended for is put, as attaching to the boat, upon the benefit to trade only. As, therefore, it does not appear to me that the boat comes within either of the five rules of exemption laid down in *Co. Litt.* 47, a, and pointed out by the Court in *Simpson v. Hartopp*, and as the owner had, by leaving the boat, taken away that protection, which, in *Rede v. Burley*, was thrown around the goods, and was the ground upon which the Court held them privileged from distress, I am of opinion that the boat was legally distrained, and that the judgment must be for the defendant.

PARKE, B.—The facts of this case, as they appear on the pleadings, and so far as they are necessary to be stated in order to raise the point discussed before us, are these:—

On the lands out of which the annuity issued, the manufacture of salt was at the time of the seizure carried on, and the produce of the manufacture was there sold generally, as an article of merchandise to all persons who chose to buy it and carry it away in their boats. The plaintiff's boat was lying in a canal on the same sands in the place where the salt was usually sold and delivered to customers, and for the purpose of receiving on board salt, by him intended to be bought, and, before the expiration of a reasonable time for that purpose, was distrained by the defendant. The fact, that the plaintiff himself carried on a trade, and wanted the salt for the use of that trade, as alleged in the replication, I do not think it necessary to consider. It does not appear to me to give the barge a greater privilege than if it were sent by a person not a trader, although it is to be observed, that in one case some of the Judges mention the trade of the owner of the chattel as material—*Rede v. Burley*.

The question then is, whether the boat was, under these circumstances, privileged from distress. It is a point of some importance, for this is only one amongst many instances which may occur; such would be the case of carts sent to be laden in a wholesale warehouse, or at a land sale

colliery; casks left in a brewery or a distillery to be filled, or the like.

It is admitted, on both sides, that there is no decided case which is expressly in favour of the privilege; and, on the other hand, that there is none expressly against it. In order, therefore, to decide the question, we must ascertain what the principle is, on which the exception is founded, as it is to be collected from the authorities, and decide according to that principle.

Upon consideration of these authorities it is clear, that the principle of the exemption is the *public good*, that is, that all men may freely, and without interruption or danger of the loss of their goods, deal with those who carry on trades or businesses for the benefit of all indiscriminately, or buy or sell in fairs or markets, and thus supply themselves with the commodities of life. Such being the principle, it appears to me that, in order to give it full effect, we ought to hold, that not merely chattels are privileged from distress, which are placed on the lands chargeable with it, in order to have something done with them by the person there carrying on his trade, but that all are exempt which are necessarily placed there, and whilst they are there, in order to enable their owner to enjoy the full benefit of the trade or business, as it is there carried on. It is not, I think, because the chattels are to be worked upon on the lands so chargeable (though that is the most familiar case), but because they are necessarily placed on those lands, that the privilege is allowed by the law; and if goods are necessarily placed there, in order to enjoy the benefit of the trade, it is immaterial what is to be done with them. I proceed to shew that this is clearly the principle on which the exemption is founded.

The proposition, which is referred to in some of the cases as a rule, and is first laid down in *Gisbourn v. Hurst*, and adopted by Willes, C.J., in *Simpson v. Hartopp*, is, that "those goods are privileged which are delivered to any person exercising a public trade or employment, to be carried, wrought, or managed, in the way of his trade or employ." This proposition, though perfectly correct, affirmatively, and quite comprehensive enough to include the cases then under consideration,

is confessedly too narrow, for it does not include in it many cases in which the privilege clearly obtains; as, for instance, goods sent to market, or a horse or vehicle sent with goods there, or sent to or waiting for goods to be brought from the place where the trade or employment is carried on. The rule, therefore, must be couched in more comprehensive terms. I would observe, however, that the present case may possibly fall within this narrower definition, if the boat was delivered to and to be loaded by the trader; but I incline to think it is not sufficiently averred in the replication, that the persons carrying on the salt-works were to load the boat, or to have possession of it, and therefore the boat cannot be said to be in any way delivered to the traders to be by them wrought or managed. I am also to observe, with reference to one part of this proposition, that there appears to be no dispute (9); but that the word *public* is to be understood to refer to every trade or employment carried on generally for the benefit of any persons who choose to avail themselves of it, as distinguished from a special employment, by one or particular individuals, although it be not public; in the sense that all the king's subjects have a right to insist on the trader accepting their goods, and that an indictment or action would lie if he did not, a predicament which is peculiar at this day to an innkeeper, or perhaps a carrier also, though Lord Holt (10) considered it to belong to all other trades which a man professed to carry on for all persons indiscriminately.

I now proceed to consider the authorities. The first is the *Year Book*, 22 Edw. 4. p. 49. Brian, C.J., seems to put the privilege from distress, on the ground, that the goods were with the trader by authority of law, that is, that the trader was bound to receive them, and had a lien on them—a rule which would unquestionably be too limited at this time; and indeed the Chief Justice was only citing the cases of exemption from distress, to shew that such chattels were not distrainable, however long they were left on the lands demised, on the

ground of the obligation to receive, and the consequent lien. In the next case, 7 Hen. 1, *b*, the Court say, that things in a common inn cannot be distrained, for the prejudice it would cause to the common weal: now, in a market or fair, where things are taken to be bought, there the benefit to the public, from free communication, and buying and selling, is clearly avowed to be the principle on which the exemption proceeds. So in the third case, which is *Bro. Abr.* 'Distress,' 251, pl. 71, which is as follows: "Vide in libro Rastall que stuff mise al tailor, fuller, shereman, weaver, miller, et hujusmodi, ne pourront distraire, car ceux artificers sont pour le common weale. *Et eadem lex alibi de equo in communi hospitio.*" It then goes on to say, that the artificers and innkeepers have both a lien on the goods. The rule laid down by *Co. Litt.* 47, *a*, is in these terms: after stating that a distress must be of things whereof a valuable property is in somebody—he says, that "valuable things shall not be distrained for rent, for benefit and maintenance of trades, which by consequent are for the common wealth, and are there by authority of law; as a horse in a smith's shop shall not be distrained for rent issuing out of the shop, nor the horse, &c. in the hostry, nor the materials in a weaver's shop for making of cloth, nor cloth or garment in a tailor's shop, nor sacks of corn or meal in a mill, nor in a market, nor anything distrained for damage feasant, for it is in custody of the law, and the like." This rule certainly does not confine the privilege to goods delivered to another, to be carried, wrought, or managed by him in the way of his trade. It states the principle of the exemption to be the *common good for the maintenance of trades*, and it there gives illustrations of that principle, many of which are cases of goods so delivered, but not all, for the horse in the hostry, and goods sent to a fair or market, are not so delivered.

Lord C.B. Gilbert, on *Distresses*, p. 35, states the rule to be as follows: "Things sent to public places of trade, as cloth in a tailor's shop, yarn in a weaver's, a horse in a smith's forge, and the like, are not distrainable, for it is of *public utility* that the shops of traders should be privileged from the lord's distress for his rent, for

(9) See *Adams v. Grane*, 1 Cr. & M. 380; s. c. 2 Law J. Rep. (N.S.) Exch. 105; *Browne v. Shevill*, 2 Ad. & El. 138; s. c. 4 Law J. Rep. (N.S.) K.B. 50.

(10) 12 Mod. 484.

otherwise no man could supply himself with the necessaries of life without the danger of losing them for another's debt, and therefore the landlord cannot distrain these things for the rent of the shop." Blackstone, J., in 3 *Comm.* 7, adopts pretty nearly the language of Gilbert, C. B.: "Valuable things in the way of trade shall not be liable to a distress: as a horse standing in a smith's shop to be shod, or at a common inn; or cloth at a tailor's house, or corn sent to a mill or market; for all these are protected and privileged for the benefit of trade, and are supposed, in common presumption, not to belong to the owner of the house, but to his customers." The principle upon which the exemption is founded appears, I think, therefore, with great distinctness from these authorities, to be the protection of trade, that is, not directly for the encouragement of the traders themselves, but in order that all the king's subjects may freely enjoy the benefit of trading with them, and supply themselves with the necessaries and commodities of life; and where the expression is used, that *goods are deposited by authority of law*, I take the meaning to be, that in case of trades which are *public*, in the sense in which I consider that term to be used, and of public markets, the law gives authority to all to bring those goods on the land in which such trade or market is carried on, by implication, from the fact of its being so carried on for the use and benefit of all persons; and that the principle of the rule is the *public good*. And the *freedom of commerce* is recognized in several modern cases, among others, those of *Gillman v. Elton* (11) and *Thompson v. Mashiter* (12), *Adams v. Grane*, *Brown v. Shevill*. If this be the principle of the rule of exemption, it seems to be inconsistent with the established mode of judicial decision, to lay down a rule which is to include one class of goods only, which fall within the mischief which the law is meant to remedy, and exclude another equally within the same mischief, merely because there is no case in which it has yet been held that such goods are privileged. A reference to the modern cases, as well as the language of the text books

themselves, shews that the early instances, those of innkeepers, smiths, tailors, fullers, weavers, and millers, are treated only as examples of the rule, not, as has been observed by Park, J., and Richardson, J., in 3 *Brod. & Bing.* 82, as limiting or comprehending the whole exemption, but merely by way of illustration; and accordingly the exemption has been allowed in cases within the same mischief, such as factors, wharfingers, auctioneers, and, finally, carcass butchers; in all which cases goods are *necessarily* placed in their hands,—*necessarily*, I mean, in this sense, that they must be placed there, if the public, who choose to become their customers, are to have the full benefit of those trades, in the mode in which the traders choose to carry on their trade, and have held themselves out to the public as carrying it on; for, in most of the established instances of exemption, it is not a matter of absolute *necessity*, that the customer should deliver his goods into the hands of another. He might send for a tailor, or smith, or weaver, or carcass butcher, to his own house; and he might sell his goods by auction or otherwise on his own premises; but if he chooses to employ the trader in the mode in which he carries on his trade, he cannot help placing the goods in his possession. If these goods, in the hands of such traders, are exempt when *necessarily* placed on the premises charged with the rent, in order to enable all persons to have the benefit of the trade there carried on by the working or managing of the goods, and that for the good of the public, and on the principle that it is to be protected, it seems to me that all goods ought equally to be exempt upon the same principle, when *necessarily* placed there, in order to secure to all persons the benefit of such trade, though it may not be received in the same way. The ground of the exemption is not that the goods are to be worked up or managed, but that they are necessarily to be placed on the premises of the trader in the way of his trade, if that trade is to be made available to the public. What is to be done with them is immaterial. In the present case, the carrying on of the trade, in the mode in which the salt-manufacturer held himself out as carrying it on, that is, by selling salt to all who should send their boats to his works,

(11) 3 *Brod. & Bing.* 75.

(12) 1 *Bing.* 225; s. c. 1 *Law J. Rep. C.P.* 104.

necessarily required, in order to enable the public to avail themselves of the trade, that they should send their boats there; and if so, it seems to me that, upon the principle of the protection of trade for the benefit of the customer, the boats sent for that purpose were not liable to be distrained. If they were, it would follow that the salt, if loaded on board, would be distrainable also, for no distinction could be made. It is no objection in my mind, that the owner of the boat might possibly, if he had pleased, have brought himself within another exemption from distress, founded on an utterly different principle, by keeping the boat in the actual possession of himself, or his servants, during the whole time it was placed on the premises charged with the rent. I can find no trace of authority for saying, that the privilege of exemption, for the benefit of trade, has ever been limited to those cases, in which the owner of the chattels could not have done so. On the contrary, in the case of the blacksmith, it is clear that the owner of the horse might have waited and kept watch during the time that his horse was shod, and yet that is one of the established cases of exemption. In other acknowledged instances of exemption the same might have been done, though with more inconvenience. If a coat were delivered to a tailor to be mended, would the privilege depend on the length of time which the repairs would require? and would it cease to exist if the time were so short that the owner might have conveniently waited? I conceive that this circumstance makes no difference, and nowhere is it said that the privilege is to be confined to those cases in which the owner could not conveniently have kept possession during the time that the chattel was deposited on the lands charged with the rent. The exemption was introduced for the freedom of trade and the benefit of the community; and that principle requires that the goods should be protected when placed on the premises of the trader, without imposing on the owner the inconvenience of keeping a constant watch over them. And I think, for the reason above given, it applies to every case in which a chattel is necessarily brought on the premises of the trader, in order to enable the owner to enjoy the benefit of the trade.

I have before observed, that there is no authority expressly deciding against the privilege, as I have stated it; nor is there any which is even impliedly against it. The only modern case in which the privilege has been held not to exist, was that of *Wood v. Clarke*, in which it was decided that stocking-frames, sent with materials to a weaver, were not exempt, for it was properly held, that the fact of the frame and materials being sent together made no difference, and that it was not necessary, for the protection of trade, that the privilege should exist with respect to implements of trade, whether sent by the employer, or hired or borrowed from another. For these reasons, I am of opinion that the plaintiff is entitled to our judgment.

LORD ABINGER, C.B.—I agree that the judgment ought to be for the defendant. By the general rule of law, all goods found upon the premises of a tenant who is indebted to his landlord for rent, are liable *prima facie*. That is the general rule. The courts of justice have engrafted upon that rule certain exceptions: by those which are clearly established, we are bound. The question in this case is, whether this is one of the exceptions. Now it is not the exception of the goods being in the personal possession of the party to whom they belong. That is one of the exceptions, and it is founded on a paramount rule, that there shall be no exercise of any right which is accompanied with the danger of breaking the public peace. In that respect, the goods are protected, not only if they belong to a stranger, but, if the tenant himself is riding a horse on his own premises, that is not the subject of distress, for the same reason. Another exception is, when the goods are going to, or perhaps coming from, a public fair or market, to which all mankind are invited, or supposed to go for the immediate purposes of their own advantage. A third exception, within which it is attempted to bring the present case, is where the trade is of such a nature as that the goods which are employed upon the premises are wrought, manufactured, or that something is done with them. Now looking at every one of the cases in which the exception has been acknowledged or established, it will be found that the trade itself consists in dealing with other men's

goods. Take the familiar example of the blacksmith's shop: the landlord there does not let to the blacksmith his shop that he may shoe his own horses only, but takes a rent from the man for exercising a trade which consists in shoeing other people's horses. If the landlord were allowed to distrain the horses sent to be shod in that shop, he would be, in fact, destroying the trade for which he was receiving rent. So in the case of a tailor. Formerly, the practice was not for tailors to furnish their customers with the goods themselves, but to receive the cloth and work it up into garments; therefore, a tailor was supposed to come within that rule, for his trade was understood to consist in working up other men's materials. So of the wharfinger, whose trade consists in receiving and accepting as a deposit other men's goods, and not his own. So of a factor, who has no goods of his own to carry on his trade, and whose trade, therefore, consists in dealing with other men's goods. Now, I cannot see that this case is similar to any one of those. This is the case of a boat being found upon the premises of the tenant. The boat is sent there for the purpose of receiving a cargo of salt, but, the cargo not being ready, the boat is left on the premises, not in the possession of the plaintiff. Then is it like any other goods on the premises? The boat was not sent there for the purpose of being repaired, in which case I do not know that the principle would not extend to a boat-builder, under certain circumstances. Neither did the trade which the tenant carried on consist in dealing with other men's boats or property. I do not agree that it was necessary to the trade that other men's boats should come there; nor do I see, that if the cargo of salt had been shipped into the boat, and allowed to remain on the premises, not in the possession of the plaintiff, it would have been free from distress. If the cargo itself would not, why should the boat be? There is no case that I know of, in which goods have been held to be liable to a distress, where the carriage is exempt. Therefore, in this case, as the salt itself was not exempt, so I say the boat was no more exempted, for the boat is but the adjunct, and follows the same rule as the goods loaded in the boat may

be bound by. It may be true that there might be more public convenience in the rule suggested by my Brother Parke, than in the other. I do not profess to have any opinion upon that subject, and I am afraid of trusting to my own judgment, with regard to the public good, as a principle upon which we are to make rules or to engraft exceptions. It appears to me that this case does not fall within any one of the exceptions, and that there is no case analogous to it. Every one of the excepted cases is a case in which the trade is one which consists in dealing with other men's goods. That being the principle, it appears to me that I must agree with the other learned Judges, that the judgment should be for the defendant.

1836. { FLEMING v. HECTOR, ESQ.,
M.P.
Nov. 11, 12. { ADAMS v. O'BRIEN, ESQ., M.P.
ADAMS v. RIPPON, ESQ., M.P.

Contract — Liability — Principal and Agent — Clubs.

Where a club was established under certain regulations, by which it was provided, that the members should pay an entrance fee and an annual subscription, and a committee should manage the affairs of the club:— Held, that the individual members were not liable to be sued by the tradesmen, for the goods supplied to the club.

Neither was a member who had been nominated on the committee, but had never accepted his nomination, nor acted in the committee.

The first case was debt for goods sold and delivered, and on an account stated.

Plea—Nunquam indebitatus.

At the trial, before the Lord Chief Baron, at the last Surrey Assizes, it appeared that in the year 1834, a society was established in the metropolis, under the title of The Westminster Reform Club, for the ordinary purposes of clubs now existing at the west end of the town; the members being chosen from persons professing liberal opinions. There were printed rules for the government of the society, of which the following became important:—

No. 6.—That the entrance fee on admission to the club, shall be 10 guineas, and the annual subscription 5 guineas.

No. 8.—That if the annual subscription be not paid within two months from the 14th of April, the defaulter shall cease to be a member of the club.

No. 16.—That certain persons, therein mentioned, should be trustees for the club.

No. 19.—That there should be a committee to manage the affairs of the club, consisting of thirty members, to be chosen by vote at a general meeting of the club.

No. 22.—There were to be two general meetings of the club in each year.

No. 23.—At both, an ample statement of the affairs of the club shall be presented, signed by the chairman of the committee and the secretary, and such statement shall be exhibited in the coffee-room for examination, seven days previous to the meeting.

No. 28.—That all members be expected to discharge their club bills day by day, the steward having positive orders not to open accounts with any individual, and being authorized to refuse to continue to supply parties neglecting to pay what they may owe, after payment is requested.

In April 1835, the defendant was elected a member of the club, paid his entrance money and subscription, and continued to frequent it until February 1836, when the club was dissolved. The plaintiff was a wine-merchant, who had supplied wines to the club, and not having been paid for what he had supplied, sued the defendant, as a member of the club, for the balance due to him. It was shewn that the defendant constantly attended the club, and was aware that the plaintiff supplied the wine, having occasionally called for "Flemyng's wine;" but there was no evidence of any express act of responsibility on his part. The plaintiff's account extended over the whole period of the club's existence, and it was proved, that, during the time that the defendant was a member, two sums of money had been paid to the plaintiff by order of the committee, but had not been specifically appropriated. These sums were more than sufficient to satisfy the amount claimed for the wine supplied while the defendant was a member, but the plaintiff had applied them in satisfaction of the earlier items of the account. It was contended on

the part of the defendant, that he was not responsible to the plaintiff at all; but if he was, that these payments were a satisfaction of the demand, and therefore the damages ought only to be nominal. His Lordship, however, expressed his opinion against the defendant on both points, and directed a verdict for the plaintiff, giving the defendant leave to move either to enter a nonsuit, or to reduce the verdict to nominal damages.

On a former day in this term—

Thesiger obtained a rule to shew cause, in the alternative, citing, on the last point, *Thompson v. Brown* (1).

The second case was similar to the first; it was an action of debt brought by the ironmonger to the club, who had supplied certain goods and had let others on hire. Mr. O'Brien was a member of the club, and had attended very frequently, but had nothing to do with the tradesmen. It was in evidence, that the committee of management made out a statement of the concerns, and inserted in it the plaintiff's claim, and that this statement was hung up in the coffee-room. This case was also tried at the Surrey Assizes, before the Lord Chief Baron, who directed the jury to find their verdict for the plaintiff.

Platt had obtained a rule to shew cause why a nonsuit should not be entered.

The third case was tried at the Sittings in Westminster, before Bolland, B., in this term. It was an action by the ironmonger against Mr. Rippon, who, besides being a member of the club, had also been named and appointed one of the committee, but was not proved to have acted in that capacity, or to have taken any part in the proceedings of the club. He had consented to become one of the trustees, but was not appointed. It further appeared, from the evidence of the secretary, that at the time when the defendant was admitted a member, there were no written or printed rules, but that from time to time resolutions had been passed by the committee, as to the regulation of the club; and that the printed rules were read and agreed to at a general

(1) *Moe. & Mal.* 40. This point did not ultimately become material, but the Court, in the course of the argument, intimated a clear opinion that the plaintiff had a right to appropriate the payments to the earlier items of the account.

meeting on the 23rd of May 1835. The secretary also stated, that the number of members of the club never exceeded 120, and that the rent agreed to be paid for the club-house, furnished, was 1,000 guineas per annum. Two questions, independently of the general one, as to the liability, were raised, namely, whether Mr. Rippon had been a member at all, and if so, whether he continued so for two years, over which the plaintiff's claim extended; viz. after the 14th of April 1835. Evidence was given of a conversation between the defendant and the plaintiff's attorney, in which he stated that he knew he was a member and was liable, but that he had paid a sum of money, and would pay no more. The learned Judge said, he felt bound, by the previous decisions, to hold, that the defendant was liable in this action, if the jury were of opinion that he was a member; and he left that and the other question to them. They found that he was a member for one year only, and gave a verdict for 7*l.* 10*s.*, the amount of goods furnished within that period. Thereupon, his Lordship gave the defendant's counsel leave to move to enter a nonsuit, and—

Platt had obtained a rule accordingly.

Cause was now shewn against these rules, by—

Andrews, Serj., Sir W. W. Follett, and Montagu Chambers, in the case of *Fleming v. Hector*; by *Andrews, Serj. and Montagu Chambers*, in the case of *Adams v. O'Brien*; and by *Erle and Montagu Chambers*, in that of *Adams v. Rippon*.

The rule in the first case was supported by *Thesiger and Platt*, and in the others, by *Platt*.

For the plaintiff, it was contended, that the practice at Nisi Prius for a number of years clearly established the rule laid down by the Lord Chief Baron at the trial, that every member of a club was *primæ facie* liable for goods supplied for the common benefit; and that, if a defendant were proved to be a member at the time when such goods were supplied, the onus lay upon him to shew that he had not contracted. The case was either a case of partnership and joint liability, or one of principal and agent. Here the members, being all associated for one common pur-

pose, were all partners, and the act of one bound all the others; therefore, each member was responsible for the orders given by the committee. But if it was not strictly a partnership, it was a case of principal and agent; the committee who managed the affairs of the society, acting on the account of the different members. Considering the nature of the institution, it was clear that a discretionary power was reposed in the committee, which authorized them to make contracts with the tradesmen, on account of the members, and to pledge the credit of the association; for it was obvious that such an establishment could not be carried on without dealing on credit, and the amount of the rent for the club-house, when compared with the number of members, shewed that the funds were insufficient to meet the liabilities which, in the management of the club, it was essential the committee should incur, and it certainly could not have been intended that they should be personally responsible. Even if they had not such authority originally given to them, yet, as the accounts had been published to the society, and it appeared thereby that they had made those contracts, and no objections were made by the members, the members must be taken to have ratified the acts so done. As to Mr. Rippon, it was argued, that as he was actually one of the committee, he must be bound by their acts; that there was an implied contract on his part as a member of the club to be answerable for goods supplied; or that, at all events, as the printed rules were not in existence whilst he was a member, a nonsuit could not be entered, but the question whether there was such an implied contract must be decided by a jury. *Keasley v. Codd* (2), *Maudslay v. Le Blanc* (3), *Braithwaite v. Schepfeld* (4), *Delanway v. Strickland* (5), *Raggett v. Musgrave* (6), *Vice v. Lady Anson* (7), and *Burls v. Smith* (8), were referred to.

For the defendants, it was urged, that

(2) 2 Car. & Pay. 408, n.

(3) Ibid. 409, n.

(4) 9 B. & C. 401; s.c. 7 Law J. Rep. K.B. 247.

(5) 2 Stark. 416.

(6) 2 Car. & Pay. 556.

(7) 7 B. & C. 409; s.c. 6 Law J. Rep. K.B. 409.

(8) 7 Bing. 705; s.c. 5 M. & P. 733.

there was no partnership. This was not the case of a joint stock or trading company, but a number of gentlemen had subscribed to form a society for a particular purpose. There was to be no profit nor loss. Each member supplied his subscription. Neither was it a case of principal and agent. The committee were appointed to manage the affairs of the society, but they had no authority to incur debts upon the credit of the individual members of the society. They ought not to have made contracts beyond the limit of the subscriptions which were paid to them. Then the exhibiting of the accounts was immaterial, because they did not shew that the committee had pledged the credit of the members. The real question was, did the plaintiffs give credit to the defendants? and were they justified in doing so? It was incumbent upon the plaintiffs to make out the liability of the defendants. As to the cases cited, they were mostly cases of partnerships or joint stock societies. In *Delaunay v. Strickland*, it was decided, that a member who managed the affairs of the society, was responsible, and the case was put upon the concurrence or approbation of the defendant in the order, and *Raggett v. Musgrave*, and *Raggett v. Bishop* (9), did not apply to the present case, or to a society constituted as the present. With regard to Mr. Rippon, although elected one of the committee, he did not accept the office, nor in any way interfere in the management of the affairs of the club.

LORD ABINGER, C.B.—I own, when the cases came before me at Guildford, I was disposed to entertain an opinion that the defendants were liable, but I did not consider the case so clear as to be unworthy of further consideration. I then thought that these sort of societies were in the nature of partnerships, and therefore that the consequences of partnerships incidentally followed. They are formed for one common object, and appoint a committee to act for them. The cases, however, which have been cited do not apply to the present. Trading associations stand on a very different footing. In those, persons engage for a communion of profit and loss: each

has a right of property over the whole of the estate, and is authorized to bind the partnership: he might accept a bill of exchange in the name of the partnership, and to strangers the partnership would be liable. But the present is reduced strictly to one of principal and agent; and I am the more induced to consider it as such, by the observation which has been made regarding a bill of exchange drawn by a member of the society. I might put a case where such an instrument might be necessary, as, if a pipe of wine were purchased for the club, but a member who should accept a bill drawn for such a purpose could not bind the members of the club. It is therefore a question here, how far the committee, who are to conduct the affairs of the club as agents, have authority to bind the individual members: that depends upon the constitution of the club, which is contained in their written rules: and when they are looked at, it seems to me impossible to construe them as giving a power to the committee of dealing on credit for the purposes of the club. Each member is to pay a subscription of five guineas annually: as far as that provision goes, there is a fund in hand to bear the expenses. Again, every member who makes use of the club is to pay ready money; which also shews that it was not intended that the club should have any transaction on credit. Every means seem to have been taken to ensure a supply of ready money to meet the current expenses; for even if any member had ordered what the club did not contain, he was to pay for it at the time. There was no necessity, therefore, to pledge the credit of the club, or even that of the committee themselves for any purpose. As the rules form the constitution of the club, and their construction is a matter of law, I do not see what there was to go to the jury. No facts can explain the rules. The committee are to manage the affairs of the club; they are to receive the subscriptions of the members; and it appears as though the body of members at large intended to provide a fund for them. We cannot infer that they are to take up goods on credit. It is very true, that an order was made that Mr. Flemyng should be paid; but that is not enough to affect the defendants. The mo-

(9) 2 Car. & Pay. 343.

ment you state this to be a case of principal and agent, something more becomes requisite to fix the defendant than the mere fact that the committee did not pay for the wine as soon as they ordered it. It has been decided, that if a principal gives his agent money to buy goods, he is not liable if the latter purchase on credit; as in the case of a servant; though, if his master order him to purchase goods, and do not supply him with money, it is presumed that he has authority to pledge his master's credit. Here, then, there is no evidence that the committee had not abundant funds, or that the defendants had any means of knowing that they had not. I think, that in all the cases a nonsuit ought to be entered. In the case before my Brother Bolland, the only difference is the admission of Mr. Rippon, which is no more than this, that he might be liable, but would take the opinion of a court of law upon it. That evidence was left to the jury, upon the question, as to the continuance of the defendant as a member of the society beyond the first year, and the jury found for him. But there was nothing to leave to the jury in his case, if I am right in holding that the mere fact of his being a member of the club does not make him liable. It has been argued, that it never could have been intended by the members of the club that the committee should be personally responsible; but the consequence of our decision will be, that if the committee of such a society find that they have not funds sufficient to carry on the club, they ought to call the members together, and represent the state of the club, and call for a new subscription. Great expenses are incurred in the building of a new club house, but they cannot be incurred until the sense of the general body has been taken upon the subject: so, if the members of the club are not adequate, or the funds be exhausted, the committee ought to call the club together, and state to them that it was not intended that they should be personally responsible, and that they cannot go on; but the omission to do this, in the particular case, cannot alter the liability of the members.

PARKE, B.—I must own, that since I have heard the report, and have had an opportunity of considering the rules of the

Westminster Reform Club, on the true construction of which the whole question depends, I entertain no doubt. These are actions on contracts, and the plaintiffs must prove that the defendants have entered into them. Now, the defendants not having actually ordered the goods, the plaintiffs must fail, unless they can shew that the persons who did make the contracts were the agents of the defendants, and authorized by them to make the contracts on their behalf. The question then is, was there evidence to go to the jury, that the party who made them was authorized by the defendants? It is a case of principal and agent, as indeed are all cases of this kind, whether arising between partners or master and servant. It is said, that the committee were the agents of the members; but the question is, whether there was any sufficient evidence that they were authorized to make these contracts. In *Fleming's case* it was argued, that the defendant was liable, because he was a member of the club; that, however, depends upon the construction of the rules of the club, and, as they were in writing, the question is one of law. It is contended, that the committee entered into these contracts on credit, with the sanction of the defendant, but that is not established by the evidence. It appears to me, that the intention of the rules was to provide a fund, to be managed by the committee. [His Lordship here referred to the 5th, 6th, and 28th, as shewing clearly that it was contemplated that there should be a fund in hand to meet the expenses.] Then the 19th rule, which, it is said, gives the committee authority to bind the defendants, only provides that they shall manage the affairs of the club. It is impossible to construe the rule any other way than that the committee were to manage the fund so supplied. If they chose to enter into contracts on credit, when they had not sufficient funds in hand, they did so on their own responsibility. Either they were bound to pay ready money, or not to enter into contracts until they had funds in hand to satisfy them; if they did, they could not make the members of the club responsible. If this be the state of the case, and the defendant only authorized the committee to advance to the extent of the

subscription, funds which they had in their hands, unless the defendant sanctioned their dealing on credit, he would not be responsible. But it ought to have been shewn affirmatively, that he sanctioned the committee's dealing in a different manner from that pointed out in the rules. Of this, however, there is no evidence, except the two orders to pay part of the plaintiff's bill. The defendant is not shewn to have sanctioned them, and there is no proof that he knew that the committee were not in funds; and, if he did not, it amounts to nothing; because it is evident the committee might have entered into the contracts at a time when they had funds in their hands to meet them. If this is to be admitted as varying the written regulations, it must be shewn *affirmatively*. In the two cases of *Fleming v. Hector* and *Adams v. O'Brien*, there must be a nonsuit. In regard to the other, which was tried before my Brother Bolland, it appears that Mr. Rippon was nominated a committee man; but it was not shewn that he ever acted or sanctioned his being so nominated. All that appears is, that he became a member at the commencement, and there is no proof that there were any parole rules different from the written ones. The only piece of evidence against him was his admission; that only imports that he knew he was a member, and was only an expression of his opinion that he was liable. He was wrong in that, but at that very time he said he would defend the action. All the cases, therefore, ultimately resolve themselves into a question of law, as to the construction of the rules.

ALDERSON, B.—The question turns on the authority which the parties making the contract had to bind the defendants. Take it that the committee had made the contract in their own name, and that they are authorized to manage the affairs of the club, it may be assumed, that the defendants have given them authority to discharge it out of the funds in their hands. But it is said, they had authority to pledge the personal credit of the members:—I think they had not. When the rules of the club, which are to be the guide, are looked at, there is nothing which leads me to conclude that the committee may pledge the personal credit of the members of the club.

On the contrary, a fund is provided, to be collected from the members on admission; and the conclusion to be drawn from that provision is, that the committee are to manage that fund: if they choose to deal on credit, they do so on their own individual credit. There was no pretence for suing the defendant in *Adams v. Rippon*; and I agree in the opinion of the Court, as to the general principle applicable to all the cases, in which, also, my Brother Bolland entirely agrees.

GURNEY, B.—I had at first been under an impression that the defendants were liable, but that proceeded upon decisions which, upon examination, appear to have been founded upon an erroneous application of the law upon the subject of partners. These, however, are cases of principal and agent. That being so, it ought to have been shewn that the committee were authorized to pledge the credit of the members; but I have not heard anything which does satisfy me of that. Taking it on the rules of the club, there is no such authority; a fund is provided to meet the expenses, and if that does not prove to be sufficient, the committee can apply for an additional subscription.

Rule absolute.

1836. }
Nov. 22. } MARSTON v. HALES.

Practice.—Charging in Execution.

After a writ of error has been allowed, and while it remains unquashed, the defendant cannot be charged in execution though the writ be irregular.

Petersdorff moved to charge the defendant in execution, which was opposed by—*Wordsworth*, on the ground that a writ of error had issued and been allowed.

Petersdorff.—But that is irregular.

PARKE, B.—That is immaterial; so long as it remains unquashed it paralyzes everything.

Per Curiam—

Rule refused.

1836. } TARBUCK, ADMINISTRATOR OF
Nov. 5. } JAMES TARBUCK, v. BISPHAM.

Account stated—Lunatic—Limitations.

A banker stated the balance of the account with his customer, who became a lunatic; during the lunacy balances were struck in the pass book from time to time; a lucid interval occurred, and after a relapse, there was an unsigned statement, in writing, of the balance, and a memorandum of payment to the son of the committee. The customer never subsequently recovered his reason:—Held, in an action by the administrator, on an account stated with the lunatic, that there was no evidence of an account stated with him, and that the statement, not being signed by the banker, could not operate as a revival of the original debt, so as to prevent the application of the Statute of Limitations.

Quære—whether an account stated with a lunatic can be available for his representatives?

Assumpsit. The first count stated, that whereas the intestate had been in the habit of employing the defendant as his banker, thereupon, on the 1st of August 1810, in consideration that the said intestate, at the request of the defendant, would continue to employ the defendant as his banker, and from time to time deposit his monies with the defendant as his banker, the defendant promised to render to the intestate, his executors or administrators, a just and true account of all monies which should have been so deposited with him, and to pay such money with interest on the balances, from time to time, in his hands, to the credit of the intestate, whenever he should be thereunto reasonably requested. Averments, that the intestate continued to employ the defendant, and that the defendant received various sums of money on account of the intestate, and that, after the death of the intestate, he was reasonably requested to account to the plaintiff, but refused to do so; second count, on an account stated with the intestate; third count, on an account stated with the administrator.

The first plea was non assumpsit; the second did not become material. The third was the Statute of Limitations; to which the plaintiff replied, that, before the accru-

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ing of the cause of action, the said James T., the intestate, was *non compos mentis*, and continued to be so from the time of the accruing of the cause of action until within six years from the commencement of this suit, when he died, and the said intestate was never after the accruing of the cause of action of sane memory. The defendant, in his rejoinder, denied that the intestate was continually insane from the accruing of the cause of action until his death.

At the trial, before Coleridge, J., at the last Lancashire Assizes, it appeared that the intestate, in 1811, had become a lunatic, and was sent to a lunatic asylum in 1812. There he remained until 1814, when he recovered, but suffered a relapse in 1815, and returned to the asylum, and remained there until his death. A commission of lunacy was taken out against him in 1823, and a committee of his person and estate was then appointed. The intestate had been in business, and had banked with the defendant, who was a banker at Prescott, in Lancashire. The plaintiff put in evidence the intestate's pass book, which contained an account dated 1811, and signed by the defendant, admitting a balance of 1,039*l.* 19*s.* due to the intestate. The accounts were carried on until 1823, when there was an entry in the book of a balance of 175*l.* 14*s.* 5*d.* due to the intestate. This was not signed by the defendant, but there was an acknowledgment of the payment of that sum to the son of the committee on behalf of his father. This being the only evidence against the defendant, the learned Judge proposed to nonsuit the plaintiff, but his counsel refusing to be nonsuited, his Lordship charged the jury to find their verdict for the defendant, telling them, that as to the first balance, the statute was an answer to the claim, as the intestate had become sane subsequently to the time when it was struck; and as to all the other balances, which were stated, they were struck while the intestate was insane, and as they were only evidence of an account stated, and an account could not be stated with a lunatic, there was no evidence in the case for their consideration. Accordingly, the jury found a verdict for the defendant.

Atcherley, Serj. now moved for a new

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trial, on the ground of misdirection. Although the larger balance cannot be claimed, the plaintiff is entitled to recover the smaller sum. The direction of the learned Judge was erroneous, when he told the jury that an account could not be stated with a lunatic. He cannot be in a different situation from an infant, who cannot indeed state an account, because he may misreckon, but may recover on an account stated with him—*Co. Lit.* 26; *Holt v. Ward* (1).

[ALDERSON, B.—There, there is an actual contract, though there is a legal incapacity in the party. Here, there is none in fact.]

So, an accounting with a married woman may be available for her husband, though she could not render him responsible (2).

[PARKE, B.—That proceeds upon the principle of a married woman being the agent of her husband.]

Is it to be said that a lunatic cannot state an account? Suppose one of the partners of a firm be a lunatic, cannot the partnership be responsible on an account stated?

[ALDERSON, B.—A party may be bound, though not on the account stated; but here there is no account stated with the lunatic. You contend that it was stated with his agent; but he could not appoint an agent. It does not however follow, that a lunatic may not be bound by the actual statement of an account, as he may be estopped from setting up his lunacy.]

[PARKE, B.—If the balance in 1823 be a part of the old balance in 1811, there might have been evidence of a promise within Lord Tenterden's Act, but the defendant has not signed the statement of that balance.]

The plaintiff's argument is, that the accounting with the committee is, in law, an accounting with the lunatic.

PARKE, B.—No rule ought to be granted in this case, though, if there had been evidence of any actual settlement of an account between the defendant and the lunatic, it would have been right to grant a rule, in order to have that point considered. But there is no evidence of any accounting here.

(1) 2 Stra. 850, 937.

(2) Bull. N.P. 129, citing *Styart v. Rowland*, 1 Show. 215.

The lunatic, at the time, was in a lunatic asylum; and if there was any accounting at all, it was with some part of the lunatic's family, or with his committee, as his agent; but a lunatic is incapable of appointing an agent. There was, therefore, no accounting with any one on his behalf. If this settlement had taken place with the lunatic himself, in the terms which have been used by the defendant, I should have doubted whether any action could have been maintained upon it. There is but an acknowledgment of the existence of a part of the old debt. If that is not declared upon as a new promise, it cannot be received in evidence, unless there be a memorandum in writing, signed by the party to be charged thereby. No action can be maintained upon it, it not having been stated with the lunatic, but with a person incompetent to act as his agent.

BOLLAND, B.—I am of the same opinion. In the report of the case of *Styart v. Rowland*, it does not appear that the question, as to the power of the husband to avail himself of the accounting with his wife, was raised: it was only a question as to whether, on the evidence, there was any accounting at all. Here I have looked to see if any account was actually stated, but I cannot perceive any. The party at the time was incapable of stating or settling an account. On the other point in the case, if it had stood as a proper memorandum in writing, the plaintiff might have recovered, as on an admission of the debt in writing.

ALDERSON, B. and GURNEY, B. concurred.

Rule refused.

1836. }
Nov. 7. } ELSWORTH v. COLLE.

Stock-jobbing—Illegal Contract.

Time bargains in foreign funds are not within the prohibition of the Stock-jobbing Act, 7 Geo. 2. c. 8; nor illegal at common law.

Assumpsit for money paid to the defendant's use.

Plea—alleging, that the money was due on an illegal contract for time bargains.

At the trial, before the Lord Chief Baron,

at Guildhall, it appeared, that the action was brought by the plaintiff, a stock-broker, to recover the differences on transactions in foreign stock paid by him for the defendant, his customer. It was objected, that these transactions were illegal, and the plaintiff was not entitled to recover. His Lordship, however, held that he was.

Sir W. W. Follett now moved for a new trial, on the ground of misdirection. The question is, whether this Court will support the decision of the Court of Common Pleas in *Wells v. Porter* (1), and *Oakley v. Rigby* (2), that time bargains in foreign stock are neither within the prohibition of the Stock-jobbing Act, 7 Geo. 2. c. 8, nor void at common law, upon the principle intimated by Lord Tenterden in *Bryan v. Lewis* (3).

LORD ABINGER, C. B.—We do not think those decisions unsatisfactory in either respect.

Rule refused.

1836. }
Nov. 21. } ALDERSON v. JOHNSON.

Pleading—Declaration.

A declaration which begins and ends in the old form in the Exchequer is not bad on special demurrer.

Special demurrer to declaration, on the ground that it was framed in the old form, alleging that the plaintiff was a debtor to our sovereign lord the king, and concluding that he was the less able to pay his debt to the king.

Crowder, for the demurrer, urged, that the Courts had specified a form by the new rules (4), in which the declaration should be framed, and any departure therefrom was not merely an irregularity, but a defect in pleading.

Wallinger, contra, was stopped by the Court.

(1) 2 Bing. N.C. 722; s.c. 5 Law J. Rep. (N.S.) C.P. 250.

(2) 2 Bing. N.C. 732; s.c. 5 Law J. Rep. (N.S.) C.P. 256.

(3) R. & M. 386. See also the observations of the same learned Judge in *Lorymer v. Smith*, 1 B. & C. 3; s.c. 1 Law J. Rep. K.B. 7.

(4) Mich. 3 Will. 4. No. 15.

Per Curiam.—This is but a fiction, and therefore surplusage. The defendant might have applied to a Judge at chambers to have it struck out, but it is no ground of demurrer.

Judgment for the plaintiff.

1836. }
Nov. 23. } LEWIS v. JONES.

Interpleader Act—Sheriff.

Where the execution creditor did not appear, and it was doubtful whether the sheriff, who had acted under his express direction, had not misconducted himself subsequent to the seizure, the Court ordered the former to be barred as against the claimant, and the property to be restored to the latter, and permitted him to sue the sheriff in an issue to try whether any damage had been caused by his misconduct subsequent to the seizure, the execution creditor remaining liable for the seizure.

This was an interpleader rule, which had been obtained on behalf of the sheriff of Carmarthenshire, calling upon the execution creditor and a claimant named Jones to appear before the Court.

Chillon appeared for the claimant, but no one appeared for the execution creditor. He prayed that the latter might be barred, but that the claimant might not be precluded from proceeding against the sheriff. His affidavits stated, that the writ was indorsed "Levy 106l. 9s. 8d. The defendant resides at or occupies Plas Newyd," and the goods were seized in that place; that the defendant had been a bankrupt a few years ago, and the under-sheriff knew of the bankruptcy. His son, the present claimant, had entered into possession of the farm in 1834, and had continued therein ever since, and had been in the sole occupation of the premises. The sheriff, therefore, ought not to have seized the property, and the Court will not relieve him from his liability for the wrongful taking — *Bishop v. Hinzman* (1), *Baynton v. Harvey* (2).

(1) 2 Dowl. P.C. 166.

(2) 3 Dowl. P.C. 344.

E. V. Williams, for the sheriff.—Both parties ought to be barred from proceeding against the sheriff. This was a case of great suspicion as concerned the claimant, a young man scarcely of age. He had obtained possession of his father's farm and the effects under an auction, where the goods had been bought in. The sheriff received precise directions, and neither party would indemnify him. He ought not, therefore, to be left liable to an action at the suit of the claimant.

LORD ABINGER, C. B.—By our interference, the claimant receives the benefit of an immediate return of the property, and the execution creditor is barred of his claim. If he has given any authority to the sheriff for taking these goods, he must be liable in an action at the suit of the claimant; and if the sheriff has misconducted himself in any way since the taking of the goods, he is responsible to that extent. If we were to allow an action of trespass to be brought, the jury would give damages for the original taking of the goods. Therefore, first, the execution creditor must be barred. Secondly, the property must be restored to the claimant. Thirdly, he may have an action; in the form of an issue, to try whether the claimant has sustained any, and, if so, what damages through the misconduct of the sheriff subsequent to the seizure, being still entitled to bring his action against the execution creditor.

Rule absolute, on these terms.

1836. }
Nov. 24. } CARDWELL V. LUCAS.

Covenant—Assignee.

A lease for eleven years was prepared and executed by the lessee, but was not signed by the lessor. The lessee entered under it, and occupied the premises during the whole term. The intended lessor died, after having devised the premises:—Held, that the devisee could not maintain an action of covenant as assignee of the reversion of the term of eleven years.

Covenant. The declaration stated that, whereas one John Hodson being seised in fee of the premises thereafter mentioned,

on the 25th of March 1825, by a certain indenture, with the consent and approval of the said John Hodson then given, made between the said J. H. of the one part, and the said defendant of the other (which indenture, sealed with the seal of the said defendant, the said plaintiff brought into court), the said J. H. demised a messuage and certain premises to the defendant, for the term of eleven years, at a certain rent, and it contained certain covenants on the part of the defendant respecting the cultivation and management of the land; by virtue of which said indenture, and by the permission and consent of the said J. H., the defendant afterwards entered upon the said premises, and was possessed thereof for the term therein mentioned; that J. H. afterwards devised the lands to the use of R. T. and W. E. for a term of 1,000 years, upon certain trusts, remainder to the use of his wife for life, remainder to the use of the plaintiff for life; that J. H., on the 8th of February 1828, died so seised of the reversion of and in the premises, whereby his wife became seised for her life, subject to the said term of years, which determined on the 1st of February 1829, and on the same day she died; whereupon and whereby the plaintiff became seised of the said reversion of and in the premises for his life, under and by virtue of the said devise; and although the plaintiff performed all things in the said indenture to be performed on his part, the defendant committed several breaches of his covenants,—which were set forth. The defendant cravedoyer of the lease, and then pleaded, that though the deed was his deed, and the said J. H. died, as was alleged, yet that the said indenture was not signed by the said J. H., or by any agent thereto lawfully authorized by writing; nor was any lease of the premises, for the said term of eleven years, in the declaration mentioned, put in writing and signed by the said J. H., or his agent thereunto lawfully authorized in writing.

Replication—that the said J. H. was in possession of the said premises, and demised them to the said defendant, to hold them as tenant thereof, according to the terms of the said indenture, and the said defendant took and received possession of

the premises of the said J. H., under and by virtue of the said demise and delivery up of the possession, and became tenant thereof, to hold the said premises according to the terms of the said indenture, and held and enjoyed them accordingly, as such tenant, during the whole of the said term in the indenture mentioned, continually, until the determination thereof. Verification.

Special demurrer.

Cresswell, in support of the demurrer.—The plaintiff claims as assignee of the reversion of a term of eleven years, but, inasmuch as the lessor never executed his part of the lease, no term was created, and the plaintiff cannot be the assignee of the reversion of that term. The Statute of Frauds prevents the creation of such a term without some note in writing. The defendant, it will be said, has taken possession, and has paid rent; the law will thence infer a tenancy from year to year, but no more; and all the reversion which has vested in the plaintiff is one which is expectant on the determination of the yearly tenancy. If he has any remedy it must be in assumption, but he cannot maintain covenant—*Webb v. Russell* (1).

[LORD ABINGER, C.B.—Your plea then would amount to this, that the reversion did not come to the plaintiff.]

It rather signifies that there was no such demise as that set forth in the declaration. Again, the replication is a departure. The declaration alleges a demise, which is denied in the plea, and the replication sets up a parol tenancy.

[LORD ABINGER, C.B.—The question will be, whether the plea be good. Suppose it had been that the lessor had not demised, could that plea have been supported when the defendant had acknowledged it under seal?]

That might have been replied by way of estoppel.

[PARKE, B.—The question of an estoppel is not free from doubt—*Wilson v. Woolfryes* (2).]

This is a better plea for the defendant than *non est factum*, as he might have been estopped on that plea; but there is no estoppel at present.

(1) 5 Term Rep. 393.

(2) 6 Mau. & Selw. 341.

Cowling, contrà.—The plea is bad. If an indenture be executed by one party, but not by the other, still covenant may be maintained upon it. *Clement v. Henley* (3), which case is the converse of *Petrie v. Bury* (4), where it was decided, that all the parties, whether they have sealed it or not, must join in the action. Then it is laid down in *Bac. Abr.* 'Leases,' (O), that both parties need not execute a lease, as is the ordinary case of a bond, which is only sealed by the obligor. Here, also, the doctrine of estoppel does apply; the defendant, having executed his part, is prevented from denying the existence of the counterpart, as he could not have objected to its want of a stamp—*Paul v. Meek* (5). The objection of a variance would not arise as in *Wilson v. Woolfryes*, because it is not stated absolutely, but by way of recital, that Mr. Hodson demised the land. Then if the defendant would have been estopped, with reference to Mr. Hodson, he is not the less estopped as regards the plaintiff, who represents him—*Palmer v. Ekins* (6).

[PARKE, B.—That case only decides that a plea of *nil habuit in tenementis* is bad against the assignee of the reversion.]

In *Com. Dig.* 'Covenant,' (F), it is laid down, that if a lease be agreed on, and the lessee executes his part, but the lessor does not execute his part, whereby there is no lease, the covenants fail. That proceeds on the ground of a failure of the consideration. The consideration has not failed in the present case; the defendant has enjoyed the land which was to have been demised to him.

[LORD ABINGER, C.B.—He would be liable on all his covenants, but would have no remedy against the other party.]

In *Rose v. Poulton* (7), the Court put it on the ground, that there was no lease, as in *Soprani v. Skurro* (8); but the defendant is estopped from saying, that there was no lease here, for he has entered upon the land, and enjoyed it. And it appears that even though there be no lease, or if it be

(3) Rolle's Abr. 'Fait,' (F), pl. 2.

(4) 3 B. & C. 353; s. c. 3 Law J. Rep. K.B. 29.

(5) 2 You. & Jer. 116.

(6) 2 Lord Raym. 1550.

(7) 2 B. & Ad. 322; s. c. 1 Law J. Rep. (N. S.) K.B. 5.

(8) Yelv. 19.

void, still covenant may be maintained on the collateral covenants—*Walter v. the Dean and Chapter of Norwich* (9). In the present case there is not a claim for rent, but the action is for the breach of collateral covenants. Then, as to the description of the demise, if there be a holding from year to year for eleven years, it may be stated at once that there was a demise for eleven years—*Legg v. Hackett* (10). As to the case of *Webb v. Russell*, it is not applicable, because it was clear that there was no estoppel there.

Cresswell replied.—Unless the plaintiff be the assignee of the reversion, he cannot avail himself of the covenants; and all that is contended for is, that he is not the assignee of the reversion of that term. The covenants may be valid, though he may have no right to sue upon them. The estoppel is relied on by the plaintiff in his declaration, a very unusual circumstance; and it must be held, that the demise is distinctly averred therein, otherwise there can be no reversion. If the lease be void, the allegations of the enjoyment, which are stated in the replication, cannot set it up.

[LORD ABINGER, C.B.—It has been held, that if a party occupies land for seven years, as tenant from year to year, it may be stated in pleading, as though it had been originally demised to him for seven years.]

That is to avoid a variance.

[PARKE, B.—The object of the Courts was to keep alive the power of distress. By something which savours of refinement, the landlord would not have had his right to distrain, if it had been held to be only a tenancy from year to year.]

Cur. adv. vult.

The judgment of the Court was now given by—

LORD ABINGER, C.B.—[who, after stating the pleadings, continued]—This action being brought by the plaintiff as assignee of the reversion, it is quite clear, that it cannot be maintained unless he be assignee of the reversion to which the covenants in the instruments declared upon are annexed. If the intended lessor had signed and executed the lease, the covenants would have

been annexed to the reversion expectant on the determination of a term for eleven years, which reversion would have been duly assigned to the plaintiff; but as the intended lessor did not execute nor sign the lease, one of these two consequences necessarily follows: either the covenants in the lease are void, on the ground that they were entered into in contemplation of a lease for eleven years, and that the foundation of them was the existence of such a lease, which foundation has failed, according to the doctrine laid down in *Soprani v. Skurro*, *Com. Dig.* 'Covenant,' (F.), and *Rose v. Poulton*; or, if the lease for eleven years must be considered as not essential to the validity of the covenants, because the defendant executed the indenture and took possession, without having that lease; and so the covenants were not void; still, they were annexed to the reversion, expectant upon a mere lease at will, for such was the only interest that passed to the defendant by the parol demise of Mr. Hodson, implied by his assent to the lease. On the latter supposition, the tenancy was determined by the death of the lessor. In either view of the case, therefore, the plaintiff cannot recover. If a tenancy from year to year can be taken, upon these pleadings, to have existed at any time, it arose subsequently, from the occupation for more than a year, and the covenants are certainly not annexed to a reversion expectant on the expiration of that tenancy. For these reasons, this action cannot be maintained, and our judgment must be—

For the defendant.

1836. { BECKE, ASSIGNEE OF WILLIAM
Nov. 25. { ASHTON, AN INSOLVENT DEBTOR, v. SMITH.

Insolvent Debtor—Voluntary Conveyance.

A voluntary conveyance by an insolvent debtor, executed by him at any time with a view of petitioning the Insolvent Debtors Court for his discharge, is void by the 1 Geo. 4. c. 57. s. 32.

Money had and received.

Plea—Non assumpsit.

At the trial, before Bolland, B., at the

(9) Owen, 136; s. c. 1 Brownl. 21.

(10) Bac. Abr. 'Lease,' (L), 2.

last assizes for Northampton, it appeared that, in 1833, one Wright brought an action against the insolvent, which came on for trial at the Spring Assizes for that county in 1834, and was undefended. The commission day was March 1, and on that day the insolvent gave a bill of sale of all his effects to the defendant in satisfaction of a *bond fide* debt. Under that bill of sale the defendant sold the effects. The insolvent went out of the way, but returned in March 1835, when he went to prison. He petitioned for his discharge under the Insolvent Debtors Act, and was opposed. The commissioner who heard the case ordered him to be detained for eight months, and the plaintiff was appointed his assignee. The action was brought to recover the proceeds of the sale by the defendant, the plaintiff contending, that that bill of sale was void by the 7 Geo. 4. c. 57. s. 32, being a voluntary conveyance made with the view of petitioning the Court for his discharge. The learned Judge thought that as it was made more than three months before the insolvent went to prison, it was not impeachable under that section. The plaintiff then opened a case of fraud under the statute 13 Eliz. c. 5, which was submitted to the jury, and they found a verdict for the defendant.

Humfrey, on a former day in this term, obtained a rule for a new trial, on the ground of a misdirection by the Judge; against which, cause was shewn by—

Adams, Serj. and Whately.—The direction of the learned Judge was correct. The case turns upon the 7 Geo. 4. c. 57. s. 32, which, after enacting, "That if any prisoner, who shall file his petition for his discharge, shall *before or after* his imprisonment, being in insolvent circumstances, voluntarily convey his property, such assignment shall be fraudulent and void," provides, "that no such conveyance shall be so deemed fraudulent and void, unless made within three months before the commencement of such imprisonment, or with the view or intention by the party conveying, of petitioning the said Court for his discharge." Now, upon the whole construction of that section, it appears that the assignment, to be avoided, must be made either within three months before the insolvent goes to prison, or, if he have gone

to prison, then with the intention of petitioning for his discharge—that is, *reddendo singula singulis*. Thus a limit is put on the operation of the act, which is not unreasonable.

[*ALDERSON, B.*—Then if there were strong evidence to shew that, three months and a day before he went to prison, an insolvent made a voluntary conveyance of his property, you would say it could not be impeached.]

That may be the consequence. But still the object of the party is to be discharged from custody under the act: which could not be unless he was in custody at the time. So also he is to be a person filing his petition to be discharged.

[*PARKE, B.*—I cannot help thinking, that the framers of the act thought that all the property had passed to the assignee, from the time when the insolvent went to prison.]

Then as the jury have negatived the fraud, and it is clear that there was pressure, the Court will not disturb the verdict.

Humfrey, Waddington, and White, in support of the rule.—This point has been already decided in *Wainwright v. Miles* (1), against the construction contended for on the other side. The legislature intended that all voluntary conveyances by insolvent debtors should be avoided, provided they are fraudulent. And to obviate the difficulty of proof, it is particularly enacted, that if the conveyance be executed within three months of his going to prison, it shall be deemed fraudulent and void, but if it be beyond that period, then it must be shewn that it was executed with the intention of the party's petitioning the Court for his discharge. Then if the Judge was wrong in his construction of the statute, there must be a new trial, because the question upon this section of the statute was never submitted to the jury. They were called upon to consider a case of fraud upon creditors, whereas it ought to have been submitted to them to consider whether the party was insolvent,—whether he executed this deed voluntarily, and with the view of petitioning the Court for his discharge.

Cur. adv. vult.

(1) 3 Moo. & Sc. 211.

The judgment of the Court was now delivered by—

PARKE, B.—The only question which remained for consideration after the argument against the rule for a new trial in this case was, as to the true construction of the 32nd section of the 7 Geo. 4. c. 57. It occurred to my Brother Bolland on the trial, that the section applied to such assignments and transfers only as were made within three months before the commencement of the imprisonment, or during its continuance; and the assignment in question having been made more than a year before the insolvent went to prison, he thought that this section could not render it void. The plaintiff is entitled to a new trial if that view of the subject was incorrect, and, upon consideration, we all agree that it was. It is a very useful rule (2), in the construction of a statute, to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified, so as to avoid such inconvenience, but no farther. Let us adopt that rule in this case. [His Lordship here read the section, and continued]—By the first part of the clause, every voluntary conveyance to a creditor, by one who afterwards petitions for his discharge, made either before or after his imprisonment, whilst he is in insolvent circumstances, is avoided. Then comes the proviso, by way of qualification of the foregoing provision, which enacts, "that no such conveyance shall be void unless made within three months before the commencement of the imprisonment, or with a view of petitioning the Court for his discharge." If either of these circumstances occur, the voluntary conveyance by an insolvent is rendered null: if made within the three months it is void; if made at any time with a view of petitioning the Court it is void, for there is not a word expressly to confine the last alternative within any

limit of time; and though, at first sight, the words, "with a view of petitioning for his discharge," might strike the reader as applying to persons then in custody, such is not necessarily their meaning. In reality, they are just as applicable to a person out of prison as to one in prison. The construction contended for by the plaintiff is therefore according to the words of the clause; it is, besides, a very reasonable one. The effect is this: as voluntary preferences are usually given on the eve of taking the benefit of the act, a time is fixed (three months), within which, to prevent any questions, *all* voluntary conveyances to a creditor, made when the debtor is in insolvent circumstances, are avoided; before that time all such conveyances are avoided where the actual intent to give a preference to a particular creditor is proved; and thus the same effect is given to the insolvent as to the bankrupt law, with reference to all anterior transactions. On the other hand, in order to give to the clause the meaning contended for on the part of the defendant, the grammatical construction must be altered by introducing some words for the purpose of limiting the operation of the latter alternative; and the clause must be read as if it had been written thus: "provided, that no such assignment, if made before imprisonment, shall be void, unless made within three months before, &c., or, if made after, unless made with the view or intention by the party conveying of petitioning the Court for his discharge." But if this were done, this incongruity would arise, that a stronger case would be required to avoid an assignment made *after* imprisonment than one made *before*. Besides, if this construction were adopted, every assignment made more than three months before the commencement of the imprisonment would be valid, however clear the intention to give a preference might be, and thus the whole object of the act might be defeated by a fraudulent insolvent, who, after conveying all his property to favoured creditors, would only have to go out of the way for three months, and then take the benefit of the act, after which no one assignment of his property could be questioned on the ground of fraudulent preference. It appears to us, therefore, that the true construction of the

(2) Per Burton, J., in *Warburton v. Loveland*, 1 Hudson & Brooke, 648, Irish Rep., referred to in *Tolderry v. Colt*, 5 Law J. Rep. (N. S.) Exch. Eq. 25, 34.

clause is, that every voluntary assignment, made by one in insolvent circumstances, is void, whenever made with intention to take the benefit of the act. And this was the clear opinion of the Court of Common Pleas, in the case of *Wainwright v. Miles*, though the point was not fully argued. It is true that, upon the plaintiff's view of the case, in order to give full effect to the intention of the legislature, and to embrace all cases of voluntary transfers, both before and after imprisonment, the language of the clause (not very accurately drawn) must, in one respect, be understood not according to its strict sense; and the words, "within three months before the commencement of the imprisonment," which, strictly construed, exclude the time of imprisonment, must be read so as to include it, and taken to mean within a period commencing three months before the imprisonment; otherwise one of the inconveniences above pointed out, as necessarily resulting from the defendant's construction, would follow, namely, that a conveyance after imprisonment, though voluntary, would be protected, unless made with the view and intention of petitioning. To obviate each incongruity, common to both the constructions, according to the strict grammatical sense, the words must be thus slightly varied. We are of opinion, for these reasons, that the rule must be made absolute for a new trial, when the questions to be submitted to the jury, with reference to this section, will be, whether the assignment was made by the insolvent, when in insolvent circumstances, voluntarily, and with the view and intention by him of petitioning the Insolvent Court for his discharge from custody. If all these circumstances concur, the plaintiff will be entitled to a verdict, but otherwise he will not.

Rule absolute.

1836. }
Nov. 23. } JONES v. PRITCHARD.

Witness—Competency—Co-contractor.

In an action on a contract, an alleged co-contractor with the defendant is a competent witness for him after a release by the defendant.

NEW SERIES, VI.—EXCHEQ. PL.

This was an action for work done to a vessel, of which the defendant was one of the part owners.

At the trial, before the under-sheriff of Carnarvon, the defendant called a person named Hughes, who was also one of the owners. It was objected, that he was not a competent witness, whereupon the defendant released him, but the under-sheriff nevertheless refused to admit his evidence. The plaintiff recovered a verdict; and on a former day in the term—

R. V. Richards obtained a rule *nisi* to set that verdict aside, on the ground that the witness was improperly rejected. Even if, as a joint contractor, he be really incompetent, yet the release rendered him a competent witness—*Goodacre v. Breame* (1), *Young v. Bairner* (2), *Simons v. Smith* (3), and *Wilson v. Hirst* (4); or if the witness be notwithstanding incompetent, his name might have been indorsed on the record, under the 3 & 4 Will. 4. c. 42. s. 26.

Jervis, this day, shewed cause.—There has been a difference in the decisions on this point. Besides the cases cited on the motion for the rule *nisi*, there is also the case of *Cheyne v. Koops* (5), where Lord Alvanley held, that a co-contractor was not competent, though released. In *Wilson v. Hirst* there were mutual releases, which certainly is the only distinction between that case and the present. But here there is nothing for the release to operate upon; the contract between the parties could not arise until after the judgment.

Richards, in support of the rule, was stopped by—

The COURT, who said, that the under-sheriff would do well, on another trial, to admit the witness after the release, and made the

Rule absolute.

- (1) *Peake*, N.P.C. 174.
- (2) 1 *Esp.* 103
- (3) *R. & M.* 29.
- (4) 4 *B. & Ad.* 760.
- (5) 4 *Esp.* 112.

1836. }
Nov. 24. } HARRIES v. THOMAS.

Withdrawing Juror—Staying Proceedings—Arbitration.

By an order of Nisi Prius, a juror was withdrawn, and it was referred to an arbitrator to settle the matters in difference between the parties, with power to have the defendant's bills of costs, which were the subject of a plea of set-off, taxed, but no question of liability to be raised. The arbitrator, on an objection raised against the defendant's right to claim his bills of costs, on the ground that the defendant was not an attorney of the court in which the business had been done, refused to allow them, and his award was set aside by the Court for an excess of jurisdiction in entertaining the question, liberty being given to the parties to go before him again. The Court restrained the plaintiff from proceeding to another trial in the action.

Quære—Whether he could be restrained from commencing another action.

The plaintiff, in 1834, commenced an action against the defendant, who had been his attorney, for negligence and also for money had and received, to which the defendant pleaded, as to the charge of negligence, the Statute of Limitations, and to the other counts, a set-off for business done.

The cause came on for trial, before Parke, B., at the Summer Assizes in that year for Carmarthenshire, when his Lordship was of opinion that the Statute of Limitations was an answer to the charge for negligence. Thereupon a juror was withdrawn, and it was referred to a barrister to settle all matters in dispute between the parties, with power to the arbitrator to have the bills of the defendant taxed; the arbitrator was to ascertain the balance, *but no question of liability was to be raised*. The arbitrator proceeded on the reference, and sent the bills to be taxed, and while they were before the taxing officers, it was discovered that the defendant was not an attorney of the Court of Exchequer at the time when the principal part of the business charged for, which was done in that court, had been performed. It was then contended before the arbitrator, that his demand could not be maintained for that business. It was answered, that the question could not be

gone into under the reference, as no question of liability was to be raised. The arbitrator, however, decided otherwise, and made an award in the plaintiff's favour, disallowing so much of the defendant's bill as applied to that business. That award was set aside by this Court in last Easter term, on the ground that the arbitrator had exceeded his jurisdiction in entertaining the question of the plaintiff's liability, but liberty was given to both parties to go again before the same arbitrator. The plaintiff thereupon entered a *nolle prosequi* to the special counts, and prepared to try his cause on the money counts at the last assizes. The defendant obtained an order of Baron Parke during the vacation, staying all proceedings until the eighth day of this term; and—

J. Evans, at the beginning of the term, obtained a rule to shew cause why the proceedings in this action should not be stayed, citing *Moscatti v. Lawson* (1); against which, cause was shewn this day by—

Maule and E. V. Williams.—The proceedings cannot be stayed by the Court, unless, in point of law, they have been put an end to by some act of the parties. Here, there has been no such act. A juror was withdrawn, but only for the purpose of the cause being referred. The reference has been futile, but not through the plaintiff's act; he was willing to abide by the award. *Sanderson v. Nestor* (2) and *Everett v. Youells* (3) shew, that the withdrawal of a juror or the discharge of a jury does not operate as a determination of the dispute or a bar to any farther proceedings. In *Moscatti v. Lawson*, the proceeding in the second action was a breach of good faith, and therefore the Court of King's Bench interfered. They also contended, that it had never been intended by the plaintiff to abandon all question of his non-liability in consequence of the defect in the defendant's title.

J. Evans, in support of the rule.—The defendant is ready to go again before the arbitrator, and have the accounts fairly investigated; but that the plaintiff refuses, and proposes to proceed with this action. But this cause has been terminated—the withdrawal of the juror was a determina-

(1) HART. & W. 572.

(2) R. & M. 402.

(3) 3 B. & Ad. 349.

tion of it, and the reference was not of the cause itself, but merely for a settlement of the accounts between the parties. The purpose of that withdrawal was the termination of this suit. *Moscato v. Lawson* is in point: a trial for a libel had taken place in the Court of Exchequer, and the plaintiff was about to be nonsuited, when it was agreed that a juror should be withdrawn; and the Court of King's Bench would not allow him to continue an action, in that court, on the same libel and against the same defendant.

LORD ABINGER, C. B.—I agree in the proposition, that the mere withdrawal of a juror does not necessarily put an end to the cause. It is well known, that in cases of special juries, where there is a defect of jurors, and neither party will pray a *tales*, that it is the practice, in case the jurors who appear shall have been actually sworn, to discharge them, and yet the action is not determined. But we must look at all the circumstances of the case. If the intention be to put an end to the cause to avoid some particular consequences, the Court might not interfere to stay another action; but there may be such circumstances as will preclude a party from bringing another action; as, if the object has been to obtain peace, the Court would not allow another action to be brought after a *set processus*. I thought at first that, in this case, there had been a reference of the action, and that the arbitrator had failed in making his award, and then it would have been too much to say that the plaintiff should have been prevented from proceeding; but, here, the juror was withdrawn under such circumstances as shew that it was intended that the particular cause should then be determined, in order that the plaintiff might be saved from paying costs, and this order was made—[His Lordship here read the order.] The object of the reference was, that the defendant's bills of costs might be taxed; so that there were pecuniary demands on one side and on the other, which were referred to the arbitrator, and he had no power over the cause at all. That is put an end to, and he is only to enter into a pecuniary inquiry—he is to determine who is to receive the balance. The order recites, that no question as to

liability was to be raised: he could not, therefore, entertain it; it is only a question of *quantum* on both sides. It matters not what was the understanding of the parties: they did agree, when the order was made, that no question as to the liability of the defendant to the plaintiff, or of the plaintiff to the defendant, on the bills of costs, should be raised. The parties go before the arbitrator as on a specific reference, as though they had entered into separate bonds. The plaintiff insists upon raising before him a question as to his liability to the defendant; the defendant says it is contrary to the agreement; but the arbitrator entertains it and makes his award. The defendant seeks to set it aside, but there is no wilful misconduct on his part, and the Court did set the award aside, with liberty to go again before the same arbitrator. That power still exists—the parties may still go before him. The question is, whether the circumstances of this case are such as to warrant the plaintiff in proceeding in the particular case. We think that the cause was put an end to; that there was a general reference of the matters in difference, and that it was the plaintiff's own fault that the arbitrator did not decide them. We do not say whether or not he may bring another action: the question before us is, whether he shall be allowed to go on in this. The real intention of the parties was, that this should be determined, and that there should be a reference of the pecuniary demands. If the plaintiff do not choose to go on with that reference, he must abandon this action; and if he commence another, it will then be time to determine whether *Moscato v. Lawson* can be applied to such a case. The rule must be made absolute, with liberty to the parties to go again before the same arbitrator.

Rule absolute, accordingly.

1836. }
Nov. 24. } DOR d. GEORGE GORD v. NEEDS.

*Devise of a Chattel Interest to Trustees—
Parol Evidence.*

A. devised his freehold lands held in fee simple to two trustees, without using words of inheritance, in trust to suffer his wife to enjoy the rents and profits for her life, and after her death to pay, out of the rents, an

annuity of 10*l.* to his brother for ten years. He also bequeathed several pecuniary legacies to various legatees, and directed the trustees to pay them when the legatees came of age, and appointed his widow his executrix. He devised land to George Gord the son of George Gord, and a house to George Gord the son of Gord; and he bequeathed pecuniary legacies to George Gord the son of George Gord, and to George Gord, the son of John Gord:—Held, first, that the trustees took a chattel interest till the annuity and legacies were paid; and, secondly, that evidence of the testator's declarations was admissible to explain the will, and to shew who was meant to take under the devise to George Gord the son of Gord.

Ejectment tried at the last Devon Assizes, before Littledale, J. The lessor of the plaintiff claimed, under the will of John Spark, dated the 21st of March 1807, which contained a bequest of his freehold lands held in fee simple, situate in the parish of Burliscombe, and called Harris or Moor's Croft, to R. Corner and Henry Bond, in trust, to permit and suffer his wife to enjoy the same, and to take the rents and profits to her own use during her own life; and, after her decease, on further trust, that the trustees, or the survivors or survivor of them, should pay out of the rents and profits an annuity of 10*l.* to his brother for the term of five years. Also he devised unto John Gord a dwelling-house, for life, remainder to his wife Mary Gord, remainder to John Gord, the son of George Gord, and his assigns. Also a bequest of the aforesaid land, called Moor's Croft, to John Gord and Jane Needs for their lives as tenants in common; and after their decease to George Gord the son of George Gord, and his heirs. Also the testator's dwelling-house to Jane Needs for life, and after her decease to her daughter Ann Needs and her assigns. Also he gave to Ann Needs, until the decease of George Needs and Jane Needs, the lower house and garden, and after their decease to George Gord the son of Gord, and his assigns. He bequeathed unto George Gord the son of John Gord 10*l.*, and to Jane and Elizabeth, the two daughters, the sum of 5*l.*, and to Mary Gord the daughter of George Gord, the sum of 5*l.*, and to George Gord

the son of George Gord, the sum of 10*l.*, and to John Gord, another son of George Gord, 30*l.*; and he also bequeathed a legacy to George Needs; which legacies he ordered to be paid by the trustees or survivors* when they came to the age of twenty-one; and in case of the decease of any of them before the legacies therein given to them,* the share was to go to the survivors. The trustees were not to answer or make good any loss or losses that should happen in consequence of this his will. He appointed his widow to be his sole executrix.

The testator died in 1812, and his widow in 1819. The brother died in 1836; Ann Needs in 1832, and Jane in 1834; George Needs before the testator; and George Gord the son of George Gord, to whom the Moor's Croft was devised, was the lessor of the plaintiff, and claimed the lower house and garden under the devise to George Gord the son of Gord. The learned Judge, after objection, received parol evidence of the testator's declarations as to the devise intended by him, and directed a verdict to be entered for the lessor of the plaintiff, giving the defendant leave to enter a nonsuit.

Ball, in Easter term, obtained a rule on two objections: first, that the legal estate was in the trustees; and, secondly, that parol evidence was inadmissible; and therefore the will being insensible, the property did not pass under the devise to the lessor of the plaintiff. Against this rule, cause was shewn in Trinity term by—

Bompas, Serj. and Moody.—First, the trustees did not take the fee, as contended for on the other side. The devise to them does not contain words of inheritance; and when the trusts of a will can be answered by a less estate, the Court will not imply a devise in fee to them—*Doe d. White v. Simpson* (1), *Doe d. Player v. Nicholls* (2).

[PARKER, B.—The trustees take a chattel interest for payment of the legacies.]

The legacies are not charged on the land. The trustees are not directed to take the rents and profits except to pay the annuity to the brother. They must pay the legacies out of the personality, unless the contrary be expressly provided.

* So in the will.

(1) 5 East, 162.

(2) 1 B. & C. 356; s. c. 1 Law J. Rep. K.B. 194.

[PARKE, B.—They have no other fund from which to pay them, except this land. It makes no difference whether the legacies be charged exclusively on the land or in aid of the personality.]

There is an implied bequest of the personality to the trustees. But, supposing that a chattel was granted, it must have expired by this time. The legacies were all due in 1828, eight years before the trial, and must have been satisfied.

[ALDERSON, B.—Was not that a question for the jury?]

The Court will presume that they have been satisfied. This objection, however, was not taken at the trial; otherwise it could have been shewn that the legacies had been paid off. Then, secondly, the devise, though ambiguous, is not uncertain, and the ambiguity may be removed by the admission of parol evidence. This is a case in which parol evidence may be admitted to remove the ambiguity. Where the meaning is ambiguous, and cannot be ascertained without reference to some extrinsic matter, parol evidence is admissible; as when there is a blank for the christian name—*Price v. Page* (3), or a mere initial is given for the name—*Abbot v. Massie* (4), or a wrong name is used—*Fell v. Beaumont* (5). Here, on the will, nothing appears to shew any uncertainty in the person of George son of Gord. The uncertainty is only created by extrinsic evidence, which may be met by evidence, and the ambiguity may be thus removed. As, suppose a devise to George son of Gord, and it were shewn that there were two Georges sons of Gord, evidence might be given to shew which was intended—*Doe d. Mergen v. Mergen* (6). The ambiguity here is in the application of the devise to its proper object, and that may be removed by evidence, which ascertains that object—*Still v. Hoste* (7), *Miller v. Travers* (8), *Richardson v. Watson* (9),

Masters v. Masters (10), *Smith v. Coney* (11), *Careless v. Careless* (12). It cannot be contended, on the will itself, that the testator had not determined who should have the land.

Ball, in support of the rule, contended, that the trustees took an estate in fee, and cited 2 Wms. Saund. 11, n., *White v. Parker* (13); and, secondly, that parol evidence was not admissible, but the will was void for uncertainty. He referred to *Stark. Evid. 'Parol Evidence'* (14), *Castleton v. Turner* (15), *Baylis v. Attorney General* (16), and *Doe d. Freedy v. Holton* (17).

The Court expressed a decided opinion that the trustees took the legal estate, though not in fee; but, whether their interest, being a chattel interest, terminated at the end of twenty-one years or not, and whether the will was wholly uncertain or open to explanation by parol evidence,—

Curr. adv. vult.

The case stood over till this term; and the judgment of the Court was now delivered by—

PARKE, B.—In this case, which was heard before my Brothers Bolland, Alderson, Gurney, and myself, a rule for a new trial was obtained, on the grounds:—first, that upon the true construction of the will of John Spark, under which the lessor of the plaintiff claims the legal estate in the land in question, was not in the plaintiff, but in the trustees: and secondly, that evidence of the deviser's declarations was improperly received on the trial, to shew what he meant by a particular description in the will.—[His Lordship here read the will.]—Upon shewing cause against the rule for a new trial, it was contended on the part of the lessor of the plaintiff, that the trustees took only a chattel interest till the annuity and legacies were paid, and these having been satisfied, the legal estate of the trustees ceased; and the case of *Doe*

(3) 4 Ves. 680.

(4) 3 Ves. 148.

(5) 2 P. Wms. 141.

(6) 1 C. & M. 235; s. c. 2 Law J. Rep. (N.S.) Exch. 81.

(7) 6 Madd. 192.

(8) 8 Bing. 244; s. c. 1 Law J. Rep. (N.S.) Chanc. 157.

(9) 4 B. & Ad. 800; s. c. 2 Law J. Rep. (N.S.) K.B. 134.

(10) 1 P. Wms. 425.

(11) 6 Ves. 42.

(12) 1 Mer. 381.

(13) 1 Bing. N.C. 573; s. c. 4 Law J. Rep. (N.S.) C.P. 178.

(14) Vol. 2, p. 925.

(15) 3 Atk. 257.

(16) 2 Atk. 239.

(17) 5 N. & M. 591; s. c. 5 Law J. Rep. (N.S.) K.B. 10.

dem. *White v. Simpson*, and the authorities there cited, were referred to in support of the proposition; and the first objection on the part of the defendant was no further insisted upon. The only point, therefore, remaining to be considered is, whether evidence was properly admitted of the deviser's declarations, to shew what person he meant to designate by the description of "George Gord the son of Gord," and we are of opinion, that such evidence was properly admitted. If, upon the face of the devise it had been uncertain whether the deviser had selected a particular object of his bounty, no evidence would have been admissible to prove that he intended a gift to a certain individual: such would have been a case of *ambiguitas latens*, within the meaning of Lord Bacon's rule, which ambiguity could not be holpen by averment, for, to allow such evidence, would be with respect to that subject to cause a parol will to operate as a written one, or, adopting the language of Lord Bacon, "to make that pass without writing which the law appointeth shall not pass but by writing." But, here, on the face of the devise, no such doubt arises. There is no blank before the name of Gord, the father, which might have occasioned a doubt, whether the deviser had finally fixed on any certain person in his mind. The deviser had clearly selected a particular individual as the devisee. Let us then consider what would have been the case, if there had been no mention in the will of any other George Gord the son of a Gord.* On that supposition, there is no doubt, upon the authorities, but that evidence of the deviser's intention, as proved by his declarations, would have been admissible. Upon the proof of extrinsic facts, which is always allowed in order to enable the Court to place itself in the situation of the deviser, and to construe his will, it would have appeared, that there were at the date of the will two persons, to each of whom the description would be equally applicable. This clearly resembles the case put by Lord Bacon, of a latent ambiguity, as where one grants his manor of S. to J. F. and his heirs, and the truth is, that he has the manors both of North S. and South S, in which case Lord Bacon says, "it shall be holpen by averment, whether of them was

that which the party intended to pass." The case is also exactly like that mentioned by Lord Coke, in *Alham's case* (18). "If A. levies a fine to William his son, and A. has two sons named William, the averment that it was his intent to levy the fine to the younger, is good, and stands well with the words of the fine." Another case is put in *Counden v. Clark* (19), which is in point, "if one devise to his son John, where he has two sons of that name;" and the same rule was acted upon in the recent case of *Doe v. Morgan*. The characteristic of all these cases is, that the words of the will do describe the object or subject intended, and the evidence of the declarations of the testator has not the effect of varying the instrument in any way whatever; it only enables the Court to reject one of the subjects or objects to which the description in the will applies, and to determine which of the two the deviser understood to be signified by the description which he used in the will. This subject has been most ably discussed by Mr. Wigram, in his excellent treatise "On the rules of law respecting the admission of extrinsic evidence in the interpretation of Wills."

There would, then, have been no doubt whatever of the admissibility of evidence of the deviser's intention, if the devise to George the son of Gord had stood alone, and no mention had been made in the will of George the son of John Gord, and George the son of George Gord. But does the circumstance, that there are two persons named in the will, each answering the description of George the son of Gord, prevent the application of this rule? We are of opinion that it does not. In truth, the mention of persons by those descriptions in other parts of the will, has no more effect for the purpose than proof by extrinsic evidence of the existence of such persons, and that they were known to the deviser, would have had. It shews, that there were two persons to either of whom the description in question would be applicable; and that such two persons were both known to the testator; and this case really amounts to no more than this, that the person to whom the imperfect descrip-

(18) 8 Rep. 155

(19) Hob. 32.

tion appears on the parol evidence to apply, is described in other parts of the same will by a more full and perfect description, which excludes any other object than himself; still he is pointed out in the devise itself, by a description which, so far as it goes, is perfectly correct. In the case of *Doe v. Morgan*, above referred to, precisely the same circumstance occurred.

We are, therefore, of opinion, that the lessor of the plaintiff is entitled to recover; and the—

Rule must be discharged.

1836. }
Nov. 25. } COPE v. ROWLANDS.

Illegal Contract—Unlicensed Broker.

A broker who has not been admitted to practise in the city of London, by the Lord Mayor and Aldermen, can recover for brokerage and commission, on contracts made by him as a broker within the city of London.

Assumpsit for work and labour as defendant's agent, and for commission due to the plaintiff from the defendant.

The third plea was, that the work and labour was done, performed, and bestowed by the plaintiff within the city of London, as a broker, to wit, as a stock-broker, in and about the purchasing and selling for and on account of the defendant, and bargaining for and on account of the defendant, for interests and shares in public stocks, &c., and that the commission in the declaration mentioned is commission claimed by the plaintiff in respect of such work and labour as a broker, and that the plaintiff was not, at the time of performing the work, a broker, duly licensed, authorized, or empowered to act or practise as a broker in the premises, within the city of London.

Replication—De Injuria.

The defendant having recovered a verdict on this plea, at the trial, before Parke, B., at the Sittings in London, after last term—

Bompas, Serj. obtained a rule nisi to enter a verdict for the plaintiff *non obstante veredicto*; against which—

Platt and Petersdorff shewed cause. —

There are two questions in this case. First, whether a stock-broker is a broker within the provision of the statute 6 Ann. c. 16.

[PARKE, B.—The Court of King's Bench have already settled that, by the case of *Clarke v. Powell* (1).]

The other question is, whether he can recover commission, not having been admitted by the court of the Mayor and Aldermen to practise as a broker, according to the statute 6 Ann. c. 16. s. 4 (2): and the defendant contends that he cannot. By the ancient statute, 13 Edw. 1 (3), no brokers were allowed to practise in the city of London, until they had been sworn before the Mayor and Aldermen; and that statute, although of ancient date, is still in force, having never been repealed, and, indeed, it is expressly referred to in the 1 Jac. 1. c. 19. It appears, that the object of that statute, as also of the statute of Anne, was the prevention of fraud; and though the legislature may have also intended to increase the revenues of the city of London, yet the provision which requires brokers

(1) 4 B. & Ad. 846; s. c. 2 Law J. Rep. (n.s.) K.B. 145.

(2) Which enacts, "That all persons that shall act as brokers within the city of London and liberties thereof, shall from time to time be admitted so to do by the court of Mayor and Aldermen of the said city for the time being, under such restrictions and limitations for their honest and good behaviour, as that court shall think fit and reasonable, and shall, upon such their admission, pay to the chamberlain of the said city for the time being, for the uses therein-after mentioned, the sum of 40s., and shall also yearly pay to the said uses, the sum of 40s. upon the 29th of September every year, all which monies shall in the first place be applied for and towards paying and satisfying the said William Stewart the sum of 967l. 10s. for a compensation for his interest in the said office, (*abolished by the act,*) and that from and after the full payment of the said sum of 967l. 10s., to the said William Stewart, all the monies arising by such admission and yearly payments, shall go to and be enjoyed by the said Mayor and commonalty and citizens of the city of London."

Sec. 5.—"That if any person or persons from and after the determination of this present session of parliament shall take upon him to act as a broker, or employ any other to act as such within the said city and liberties, not being admitted as aforesaid, every such person shall forfeit and pay to the use of the said mayor and commonalty and citizens of the said city, for every such offence, the sum of 25l., to be recovered by action of debt, in the name of the chamberlain of the said city."

(3) Printed in the Appendix to the Statutes, by the name of 'Statuta Civitatis London.'

to be duly admitted, is one for public purposes. Therefore, even the distinction pointed out in *Johnson v. Hudson* (4), and *Law v. Hodson* (5), between prohibitions or restrictions, for purposes of revenue, and those for public purposes, would be inapplicable in the present case.

[PARKE, B.—That distinction has been much doubted lately: if the legislature prohibit any act, it cannot be material for what purpose it is prohibited.]

Green v. Weaver (6), and *Ex parte Dyster* (7), are authorities to shew the opinion of two eminent Judges in equity, that these statutes were enacted for general public purposes. And in *Gibbons v. Rule* (8), where it was decided that a ship-broker was not a broker within the statute, it was not contested, that if he had been, he could not have recovered his commission without having been duly admitted.

Bompas, Serj., in support of the rule.—It is not disputed that a stock-broker is within the statute of Anne, and ought to have been admitted by the court of Mayor and Aldermen. By neglecting to be so admitted, he has rendered himself liable to pay certain penalties, but he is, nevertheless, entitled to recover for the labour which he has bestowed upon the defendant's business. First, the statute of Anne is not a general provision; it is an enactment for the city of London alone. It does not prohibit a broker from acting without a licence, though a temporary act was passed in the 8 & 9 Will. 3. c. 32. for the regulation of brokers, which did contain such a provision, but it was allowed to expire; and hence an inference arises, that the legislature did not intend that the statute of Anne should have such an effect. If it had been so intended, there would have been an express enactment to that purport.

[PARKE, B.—The provision of the statute 13 Edw. 1. is not expired, and the statute 1 Jac. 1. c. 21. shews that the city had anciently a custom of selecting the brokers.]

[ALDERSON, B.—The statute of Queen

Anne applies generally to all persons who seek to practise as brokers in the city of London.]

Then, inasmuch as this provision of the statute was for the purpose of raising a revenue to the city of London, and not with any view to the general regulation of brokers, the plaintiff was not prevented from entering into this contract with the defendant. It is not sought to be argued that there is any distinction between a prohibition by the legislature of a contract for revenue or for other purposes, but that the contract itself in the present case is not prohibited. A distinction, however, does prevail between a prohibition, and a mere imposition of a penalty. In *Gremare v. Le Clerc Bois Valon* (9), it was held by Lord Ellenborough, that a person practising in London without a licence, though subject to a penalty under 3 Hen. 8. c. 11, was, nevertheless, entitled to recover for his skill and labour. Now, the regulations regarding the bricks and the coals, are for the purpose of preventing frauds, and, therefore, the contracts were held to be illegal—*Law v. Hodson*, and *Little v. Poole* (10). So long as the act itself is not illegal, but the illegality arises from something altogether collateral, a party shall not be prevented from recovering—*Bronne v. Duncan* (11). Such is the present case; and accordingly in *Ex parte Dyster*, where a broker was alleged to have traded contrary to the provision of his bond, the Lord Chancellor, nevertheless, allowed him to prove for a debt incurred in such trading.

[PARKE, B.—It is difficult to support *Gremare v. Le Clerc Bois Valon*, and deprive the plaintiff of his right of action.]

There is an objection to the form of the plea. The statute merely requires that the broker shall be *admitted* to practise by the Mayor and Aldermen; whereas, the plea is, that the plaintiff was not duly licensed, authorized, or empowered to practise as a broker.

[PARKE, B.—*Admitted* is the same as *authorized*.]

[ALDERSON, B.—The question might

(4) 11 East, 180.

(5) 11 East, 300.

(6) 1 Sim. 404; s. c. 6 Law J. Rep. Chanc. 1.

(7) 1 Mer. 155; s. c. 2 Rose, B.C. 349.

(8) 4 Bing. 301; s. c. 5 Law J. Rep. C.P. 176.

(9) 2 Campb. 144.

(10) 9 B. & C. 192; s. c. 7 Law J. Rep. K.B. 165.

(11) 10 B. & C. 93; s. c. 8 Law J. Rep. K.B. 60.

have been raised on special demurrer, but it is now after verdict.]

[GURNEY, B.—When the broker is admitted to practise, he is licensed, authorized, and empowered to do so.]

On the general question,

Cur. ado. vult.

On the last day of term, the judgment of the Court was delivered by—

PARKE, B.—In this case, which was argued a few days ago, the plaintiff moved for judgment *non obstante veredicto*, on the ground, that a plea in bar was bad in law. The plea was, that the work and labour, in respect of which the action was brought, was performed by the plaintiff as a stock-broker in London, and that he was not licensed, authorized, and empowered to act as a broker, by the court of Mayor and Aldermen, pursuant to the statute; we are of opinion, that the plea is good in substance, and consequently the rule must be discharged.

It is perfectly settled, that where the contract, which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no Court will lend its assistance to give it effect. It is equally clear, that a contract is void if prohibited by the statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition (12); and it may be safely laid down, notwithstanding some dicta apparently to the contrary, that if the contract be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object. The sole question is, whether the statute means to prohibit the contract. In the cases of *Brown v. Duncan* and *Wetherell v. Jones* (13), both cases of violation of the revenue laws, the particular contract sued upon was held not to be interdicted; and in *Johnson v. Hudson*, as explained in the judgment of the Court of King's Bench in *Foster v. Taylor* (14), the provision of the

statute, which required persons dealing in tobacco to take out a licence, was held to be a regulation attaching to the plaintiff personally, and affecting him with the penalty for the purpose of securing the licence duty only, and not forbidding the contract itself; though it is to be observed that some little doubt has been thrown on the particular case in a very learned work (15). The principle, however, of that decision, as above explained, is correct; and the question for us now to determine is, whether the enactment of the statute 6 Ann. c. 16, (altered as to the amount of the penalty, 57 Geo. 3. c. 60,) is meant *merely* to secure a revenue to the city, and for that purpose to render the person acting as a broker liable to a penalty if he does not pay it; or whether *one* of its objects be *not* the protection of the public, and the prevention of improper persons acting as brokers. On the former supposition, the contract with a broker for his brokerage is not prohibited by the statute; in the latter, it is; for it cannot be permitted to a person to recover a compensation for an act which the law interdicts him from doing. In order to decide this point, it is only necessary to look at the statute itself. If its object had been simply the pecuniary advantage of the mayor and corporation, it would have been wholly unnecessary to have made any provision for securing the good conduct of the persons admitted. The more that should be allowed to practise, the larger the revenue to the city; but the enactment, that all persons who shall act as brokers should be admitted by the court of Mayor and Aldermen, under such restrictions and limitations for their honest and good behaviour as the court should think fit and reasonable, shews clearly that the legislature had in view, as one object, the benefit and security of the public in those important transactions which are all negotiated by brokers. The clause, therefore, which imposes a penalty, must be taken (in the language of Lord Holt, above referred to) to imply a prohibition of all unadmitted persons to act as brokers, and consequently to prohibit, by necessary inference, all contracts which such persons make for compensation to themselves for

(12) For Lord Holt, in *Bertlett v. Vinor*, Carth. 252.

(13) 3 B. & Ad. 221; s. c. 1 Law J. Rep. (N.S.) K.B. 139.

(14) 5 B. & Ad. 698; s. c. 3 Law J. Rep. (N.S.) K.B. 137.

(15) 2 Stark. Evd. 886, 2nd ed.

so acting, and this is the contract on which this action (so far as it relates to brokerage) is brought. This provision of the statute, so construed, is in affirmance of the right of the mayor and aldermen to admit brokers, which appears to have existed in the earliest times; and that, for the convenience of trade and the public good, as may be collected from the statute 13 Edw. 1. st. 5, and the recitals in the 1 Jac. 1. c. 21, and in the 8 & 9 Will. 3. c. 32. The distinction between this and the case of *Ex parte Dyster*, which was cited on behalf of the plaintiff, is very clearly explained by Lord Eldon in his judgment. The prohibition to act without admission is statutory: the regulations adopted by the mayor and court of aldermen, in the case of admitting brokers, are not; they are purely municipal, and have not the force of a general law: the only consequences of their violation are those which the regulations prescribe.

One other case cited for the plaintiff remains to be noticed; it is that of *Gremare v. Le Clerc Bois Valon*, in which Lord Ellenborough held, that the plaintiff could recover for surgery and medicines, though he had not been admitted pursuant to the statute 3 Hen. 8. c. 11, and it is certainly difficult to reconcile this case with the rule above laid down: for the provisions of that statute were clearly meant to secure to the public skilful practitioners in surgery and medicine; but on a motion for a new trial, the Court of King's Bench do not appear to have sanctioned the doctrine of Lord Ellenborough, for they disposed of the case on another ground, viz. that there was no proof that the plaintiff had not been duly licensed. We therefore think that case is not a binding authority, and, for the reason above given, are of opinion that the rule must be

Discharged.

1836. }
Nov. 15. } CHANDLER v. BEZWARD.

Writ of Trial—Re-sealing.

Where a trial before the sheriff does not take place on the appointed day, but on one subsequent, it is not necessary to have the writ of trial resealed, unless the return day be passed before the trial.

This was a trial before the under-sheriff of Worcester. Notice of trial had been originally given for August the 12th; it was not tried then, but afterwards, on the 19th, when the defendant did not attend, and the plaintiff recovered a verdict.

R. V. Richards, on a former day in the term, had obtained a rule for setting aside this trial as irregular, the writ of trial not having been resealed.

Humfrey shewed cause on affidavits, from which he contended that the defendant had waived this objection, having agreed to the trial taking place on the 19th. It did not appear that he had agreed to waive the re-sealing; and—

The Court, having ascertained that the trial took place after the return of the writ, said, that the Master informed them that it was not necessary to have it resealed, unless the return day of the writ had elapsed before the trial, and made the

Rule absolute.

1836. }
Nov. 17. } BARDEN v. MARY DE KEVERBERG.

Coverture—Wife of a Foreigner.

To a plea of coverture, the plaintiff replied that the husband was an alien, born abroad, who was never a subject of the king, and was never within the kingdom, and that the promise of the defendant was made in England, while she lived apart from him as a single woman; that the plaintiff contracted with the defendant as a feme sole, and she promised as such. The rejoinder denying this:—Held, that it was incumbent upon the plaintiff to prove affirmatively that the defendant represented herself as a feme sole, and it was not enough to shew that she dealt with the plaintiff and other shopkeepers, without declaring herself to be a married woman.

Assumpsit for goods sold and delivered.

Plea—That the defendant was, and still is, the wife of one Charles Louis William Joseph Baron de Keverberg.

Replication—That the said C. L. W. J. Baron de K. is an alien, born in foreign parts, out of the allegiance of the king, within the allegiance of a foreign state, and never was, nor is, a subject of the king

by naturalization, denizenation, or otherwise, and that the said C. L. W. J. Baron de K. never was, nor is, within the kingdom of Great Britain and Ireland, and that the causes of action accrued, and *the promise was made by the said defendant* within the realm of England, whilst the defendant lived in the realm separate and apart from the said C. L. W. J. Baron de K, *as a single woman*, and that *the plaintiff* did not give any credit to the said Baron, but *contracted with the defendant as a feme sole*, and on her sole credit and responsibility, and the defendant promised as such *feme sole*.

The rejoinder denied that the Baron was an alien born, and averred that the causes of action did not accrue to the plaintiff, nor did the defendant promise as a single woman, nor did the plaintiff contract with the defendant or give credit to her as a *feme sole*.

At the trial, before Gaselee, J., at the last Sussex Assizes, it appeared that the defendant was, in fact, the wife of a Dutch nobleman, whose husband was living abroad. She was residing in England with her children, and it was shewn that she had lived in different lodgings at Worthing and at Littlehampton, and in one only had she represented herself as a married lady. She had purchased the goods, for the price of which this action was brought, at the shop of the plaintiff, who was a linen-draper at Worthing, and had also dealt at various other shops, without expressly representing herself as a married woman, and, indeed, without saying anything about her situation. It was objected, that her conduct towards other tradespeople was not admissible in this cause; but the learned Judge overruled the objection, and the plaintiff recovered a verdict. On a former day in this term—

Platt obtained a rule for a new trial, on the grounds that this evidence ought not to have been admitted, and that the verdict ought not to have been for the plaintiff.

Thesiger and *Channell* now shewed cause, and contended, that the defendant, by dealing for these articles, her husband being abroad, must be taken to have contracted as a *feme sole*. If she did not intend to be personally responsible, she should have given express notice that she was a married woman, and did not intend

to be answerable for the goods. The law gives a woman, in the situation of the defendant, the power of rendering herself liable for the contracts which she may enter into.

[*ALDERSON, B.*—It does, but she must exercise it.]

[*LORD ABINGER, C.B.*—The law gives her the capacity of doing something which shall render her liable, but she has not done it here. She must promise as a single woman, but the evidence does not prove that she has done so.]

The doctrine that the wife of an alien may be sued as a *feme sole*, is only qualified by Lord Ellenborough, in *Kay v. Duchesse de Piennes* (1), to this extent, that her husband must have always lived abroad; and, according to the evidence, that was the case here.

Platt and *Ogle*, in support of the rule, were stopped by—

The COURT, who held that it was incumbent upon the plaintiff to prove affirmatively that the defendant entered into the contract as a *feme sole*, and represented herself to be an unmarried woman. The plaintiff was bound to make out that her husband was living abroad, that she represented herself to be a single woman, and that the plaintiff believed her to be so: whereas, there was nothing to shew that she had made any such representation. Therefore, intimating a doubt whether the replication was good, they made

The rule absolute for a new trial.

1836. }
Nov. 19. } *SALTER v. YATES.*

Arbitration—Certificate, Time of making.

In assumpsit on a builder's bill, the defendant pleaded payment of 30l., and payment into court of 45l. The cause was referred to a surveyor, at Nisi Prius, to certify for what amount the verdict should be entered. He certified, that 74l. 7s. was the fair value to be paid for the work:—Held, that this amounted to a verdict for the defendant.

The jury process was returnable in Trinity term, and the certificate was made in October.

(1) 3 Campb. 123.

The Court refused to set it aside, the party not having withdrawn from the reference on this ground.

Assumpsit for work and labour on a builder's bill, amounting, according to the particulars of demand, to 104*l.* 12*s.*

Pleas, as to 30*l.* payment, and payment of 45*l.* into court, to which the plaintiff replied damages *ultra*. The cause came on for trial in Easter term last, and was then referred to a surveyor to certify for whom and for what sum the verdict was to be entered. No order of Nisi Prius was drawn up. In the October following, the arbitrator certified in these terms:—"I hereby certify that I am of opinion, that 74*l.* 7*s.* was and is the fair value of the same to be paid by Mr. Yates to Mr. Salter." The Associate entered a verdict for the plaintiff for 29*l.* 7*s.*, and delivered the *postra* to his attorney.

Kelly had obtained a rule to shew cause why the verdict should not be entered for the defendant, on the ground, that the certificate meant that 74*l.* 7*s.* was the entire value of the work done.

Humfrey shewed cause.—The certificate states, that 74*l.* 7*s.* is to be paid; and means that 74*l.* 7*s.* is to be paid besides what has already been paid; that is, in addition to the 30*l.*

[PARKE, B.—If that be the correct interpretation, the award would include the 30*l.* also, and the two sums would exceed the amount claimed in the action.]

The Court were clearly of opinion, that the arbitrator meant that the defendant had paid enough; and, therefore, the defendant was entitled to a verdict; but—

Humfrey urged a second objection.—The certificate was not made in time. The jury process was returnable in Trinity term, and the cause was referred in the Easter vacation; the certificate was not given until the Trinity vacation. There was no order of Nisi Prius authorising an enlargement of the time, and it has always been considered, that a certificate must be made before the *distringas* is returnable.

[PARKE, B.—Here the writ of *distringas* was returnable a few days after the reference; it never could have been the intention of the parties that the arbitrator should have made his certificate within that time.

He was to value and measure the work done. Is there not a decision, that where no time is mentioned, it is sufficient if the award be made within a reasonable time?]

Kelly was stopped by the Court.

LORD ABINGER, C.B.—I think we could not set this certificate aside without an affidavit, that this objection was taken, and the plaintiff withdrew from the reference on that ground.

Rule absolute.

1836. } EDWARDS, ADMINISTRATOR, v.
Nov. 21. } GRACE.

Executor and Administrator—Joinder of Counts.

Counts for work and labour by the intestate, alleging promises to him, may be joined with a count for work and labour, by the administrator alleging a promise to him.

Assumpsit for work and labour, goods sold, &c., alleging promises to pay the intestate. There was also a count for work done by the plaintiff as administrator, and alleging the promise to the plaintiff as administrator. Special demurrer and joinder therein.

Thomas, in support of the demurrer.—There is a misjoinder of counts in this declaration. Work done by the administrator could not be assets of the intestate, and that is the rule which governs the determination as to what counts can be joined—*Cornell v. Watts* (1), and *Ord v. Fenwick* (2).

Platt, *contra*, was stopped.

LORD ABINGER, C.B.—Then, if a man undertake to perform a specific contract, as a garden wall, for a specific sum, and die before he completes it, there can be no recovery of the price; but if the administrator is bound to complete the contract, the price will be assets.

PARKE, B.—If there be any case in which an administrator is bound to go on with the contract of his intestate, the counts

(1) 6 East, 410.

(2) 3 East, 104.

may be joined. *Marakall v. Broadhurst* (3) shews, that there may be such a case. And how do we know but that this work was done by workmen paid out of the intestate's estate?

ALDERSON, B.—The defendant must make out, that in no case can an administrator carry on business for the benefit of the intestate's estate.

Judgment for the plaintiff.

1836. }
Nov. 24. } WOODTHORPE v. LAWES.

Bill of Exchange—Notice of Dishonour.

An attorney, in whose hands a bill indorsed in blank was lying at the time when it became due, and was dishonoured, wrote to the drawer a letter, stating that it had been dishonoured, and remained unpaid. His letter contained his address, but did not state on whose behalf he applied, or where the bill was lying, or to whom it was to be paid:—Held, sufficient notice of dishonour.

Assumpsit. The declaration stated, that, on the 6th of May 1836, in consideration that the plaintiff would take a bill of exchange, accepted by one J. Watson, for the sum of 31l. 3s., the amount due to the plaintiff on a prior acceptance of the defendant, without the defendant's indorsement, the defendant guaranteed the regular payment of the said bill when due; that the plaintiff received a bill of exchange, drawn by one G. Millen, upon and accepted by the said J. W., payable to the drawer's order three months after date. Presentment to Watson was alleged, and non-payment by him, and notice thereof to the defendant, who had not paid the amount of the bill.

Pleas—First, that the bill was not presented to Watson for payment; secondly, that no notice of its non-payment was given to the defendant; thirdly, that due notice of dishonour was not given to the drawer, which was traversed by the plaintiff in his replication.

At the trial, before Bolland, B., at the London Sittings in this term, the present-

(3) 1 Cr. & J. 403; s. c. 9 Law J. Rep. Exch. 105. See also *Siboni v. Kirkman*, 1 Moe. & W. 418; s. c. 5 Law J. Rep. (N.S.) Exch. 212.

ment and dishonour of the bill were proved; and to establish the notice of dishonour to the defendant and to the drawer, the following letters were given in evidence. The one addressed to the defendant was:—

"Sir,—I beg to inform you that a bill of exchange by Joshua Watson for 31l. 3s., and due yesterday, is returned dishonoured, and remains unpaid; and I am desired to give you notice thereof, and to request that you pay the same immediately.

"I am, yours, &c.

"H. D. Rushbury.

"15, Fish Street Hill,

"10th August 1836."

And the other, addressed to Millin, the drawer, was:—

"15, Fish Street Hill,

"10th August 1836.

"Sir,—A bill drawn by you, and accepted by Mr. Joshua Watson for 31l. 3s., due yesterday, is dishonoured and unpaid; and I am desired to give you notice thereof, and to request that the same may be immediately taken up.

"I am, yours, &c.

"H. D. Rushbury."

Mr. Rushbury was the plaintiff's attorney; and at the time when the letters were written, the bill was lying at his office indorsed in blank, the indorsee having left it with him to be presented. It was objected, that the notices of dishonour were insufficient in this case; and the learned Judge reserved the point, but directed the jury to say, whether notice had been given to Mellin, and they found a verdict for the plaintiff.

Cresswell now moved to enter a nonsuit. —The notices were insufficient in point of form. They do not state the name of the party who was the holder, nor for whom Mr. Rushbury applies. It appears also that he was not the holder of the bill; and he does not say to whom it is to be paid.

[PARKER, B.—The implication is, that it was to be paid to the writer of the letter.]

Solarte v. Palmer (1) certainly shews the great importance of the form of the notice of dishonour, though it is not necessary to go the length of the decision in that case. In *Chapman v. Keane* (2) it has certainly

(1) 7 Bing. 529.

(2) 3 Ad. & El. 193; s. c. 4 Law J. Rep. (N.S.) K.B. 185.

been decided, that the holder of a bill may avail himself of a notice of dishonour given by any party to the bill; but it is not shewn that Rushbury was such a party.

[GURNEY, B.—He was the actual holder of the bill.]

[PARKE, B.—The bill was indorsed in blank, and *prima facie* he was the holder, and had a legal right to it, though his right might have been qualified by evidence.]

LORD ABINGER, C. B.—I really think there is no ground for the objection.

Per Curiam—

Rule refused (3).

1836. }
Nov. 25. } GOODEY v. GOLDSMITH.

Costs—Nolle prosequi.

The defendant pleaded to a declaration in assumpsit for money had and received, as to all except 3l. 5s. non assumpsit; as to all except 3l. 5s. a set-off; and as to 3l. 5s. payment into court. The plaintiff admitted the set-off, replied that he would not farther prosecute his suit in respect thereof, and took the 3l. 5s. out of court:—Held, that the defendant was entitled to his costs on the first and second issues.

Assumpsit for money had and received, and on an account stated. The plaintiff, by his particulars, claiming 28l. 5s., the defendant pleaded, except as to 3l. 5s., parcel, &c., non assumpsit;—secondly, except as to 3l. 5s., parcel, &c., a set-off;—thirdly, as to 3l. 5s., payment into court. The plaintiff, in his replication to the second plea, admitted that he owed the money to the defendant, except the 3l. 5s., and agreed

(3) See *Houzeo v. Cowne*, post.

to allow it to the defendant, and not farther to prosecute his suit in respect thereof: and he accepted the 3l. 5s. out of court. On taxation, the Master allowed the plaintiff all his costs, and refused to allow the defendant any, upon the authority of *Coates v. Stevens* (1).

Kelly, on a former day, had obtained a rule nisi, for the Master to review his taxation; against which, cause was now shewn by—

Ogle.—The Master's taxation was right, and the defendant is not in this case entitled to any costs. The plaintiff was bound to proceed for the whole 28l. 5s., because he could not tell that the defendant would plead the set-off; indeed, if he had declared for the 3l. 5s., he would still have been open to the defendant's plea of set-off.

[ALDERSON, B.—It appears, then, that the plaintiff has made several demands, of which he can sustain one, but not the others. You would distinguish between a plea of payment and a plea of set-off.]

The defendant ought not to have pleaded non assumpsit at all, but should have relied upon his other pleas in the manner pointed out in *Coates v. Stevens*.

Kelly was stopped by the Court.

PARKE, B.—If there be a *nolle prosequi* to the whole or a part, the costs follow by the statute (2). The plaintiff will be entitled to all the costs arising from that part of the cause of action on which the money had been paid into court. But the plaintiff's replication amounts to a *nolle prosequi* as to the residue. The—

Rule must be absolute.

(1) 2 Cr. M. & R. 118; s. c. 4 Law J. Rep. (N.S.) Exch. 167.

(2) 3 & 4 Will. 4. c. 42. s. 33.

END OF MICHAELMAS TERM, 1836.

CASES ARGUED AND DETERMINED

IN THE

Court of Exchequer of Pleas.

HILARY TERM, 7 WILL. IV.

1837. }
Jan. 26. } BLUNDELL v HANSON.

Practice.—Time for signing Judgment.

Where the time of pleading expires on one day, the plaintiff having previously made a demand of a plea, the plaintiff may sign judgment for want of a plea, at the opening of the office in the afternoon of the next day.

In this case, a declaration had been delivered on the 9th of January, indorsed with a notice to plead in four days. There was a demand of a plea at the same time. On the 14th, the plaintiff signed judgment for want of a plea, at 1 o'clock. The defendant delivered a plea after the judgment had been signed, but before 3 o'clock of the same day.

R. V. Richards had obtained a rule to shew cause why the judgment should not be set aside as having been signed too soon; against which—

Jervis this day shewed cause.—The judgment was regular. The time for pleading having expired on the 13th, the plaintiff had a right to sign judgment on the opening of the office in the afternoon of the 14th.

There is, however, a case of *Kemp v. Fyson* (1), in which the Court held, that the judgment ought not to be signed until the evening. But the rule of court of Hilary term, 2 Will. 4. No. 66, is, "that judgment for want of a plea after demand may, in all cases be signed at the opening of the office in the afternoon of the day after that on which the demand was made, but not before." And the decision in that case has been considered in general as incorrect, unless, indeed, it proceeds upon the fact, that the demand of the plea was not proved in the case.

R. V. Richards, in support of the rule, relied upon that case, and upon two decisions before Alderson, B., at chambers.

ALDERSON, B.—I proceeded upon the decision of the Court.

PARKE, B.—That case was decided upon the representation of Master Walker, as to the practice of the court. We understand that the practitioners consider that he was in error; and, indeed, Mr. Walker now thinks so too. We ought to abide by the rule, and that case cannot be supported.

(1) 3 Dowl. P.C. 265.

GURNEY, B.—The effect of the decision is really to give the defendant another day for pleading.

Rule for setting aside the judgment discharged, without costs.

1837. }
Jan. 21. } HILL v. ALLEN.

Pleading—General Issue.

In assumpsit on an attorney's bill, and for money paid to defendant's use, and an account stated, the defendant pleaded, first, that the work was done negligently and carelessly, and was useless;—secondly, that it was done under an engagement to indemnify the defendant against all costs and charges, and that these were costs incurred under that engagement:—Held, that both pleas were bad on special demurrer, as amounting to the general issue.

Assumpsit for work and labour by the plaintiff as an attorney; second count, for money paid to the defendant's use; third, on an account stated. The defendant pleaded, first, that the said sums of money in the second and third counts mentioned, were monies expended by the plaintiff, and charges made by him in respect of the work and labour in the first count mentioned; and that in the performing of the said work and labour, the plaintiff, as such attorney, conducted himself so negligently, carelessly, unskillfully, and improperly, that the same became wholly ineffectual and useless to the defendant. Verification. Secondly, that the defendant is an illiterate person, wholly unacquainted with the legal requisites to entitle any person to strike a docket against another, or with the legal consequences of such a proceeding; and that the plaintiff, being an attorney, advised him, that by virtue of a certain promissory note then in his possession, he was legally entitled to strike a docket against one Joseph Hall the younger, and requested him to strike the docket, and to authorize the plaintiff to act as his attorney, and promised him, if he would strike such docket, to indemnify him against all costs occasioned thereby, and to take care that

he should incur no risk or loss in any way; that the defendant did strike the docket, and that the sums of money in the declaration mentioned are the costs occasioned by the striking of the said docket. These pleas were specially demurred to, on the ground that they amounted to the general issue.

Lumley, in support of the demurrer, was stopped by the Court, who called on—

M' Mahon.—The pleas in this case are good. They admit the contract alleged by the plaintiff, and which results from his employment as an attorney; but they set up answers to that contract—first, that the work done was useless; and secondly, that there was another contract, which meets that which is alleged in the declaration.

[PARKE, B.—There is no confession and avoidance here. The case is within those which have already been determined in this court; and I understand there was a similar decision in the King's Bench.]

Lumley.—That was probably *Hayelden v. Staff*, in Trinity term last, where, to an action for work and labour, the defendant pleaded, that the work was bestowed in the curing of a smoky chimney, under an agreement, that unless the chimney were cured, nothing was to be paid, and it was averred that it was not cured. To this plea there was a special demurrer; and the Court held that it was bad, as amounting to the general issue.

M' Mahon.—That decision is certainly conclusive of this case.

Per Curiam.—The present pleas negative the facts out of which the contracts stated in the declaration arise, and, therefore, amount to the general issue. There must be—

Judgment for the plaintiff.

[See *Jones v. Nanney*, 1 Moo. & W. 336, s. c. 5 Law J. Rep. (N.S.) Exch. 135; *Jones v. Reed*, 1 Nev. & P. 18; *Grosvenor v. Lamb*, 1 Moo. & W. 352, s. c. 5 Law J. Rep. (N.S.) Exch. 134; *Dieben v. Neale*, 1 Moo. & W. 556, s. c. 5 Law J. Rep. (N.S.) Exch. 265; *Worrall v. Grayson*, 1 Moo. & W. 166, s. c. 5 Law J. Rep. (N.S.) Exch. 101; *Gregory v. Hartnoll*, 1 Moo. & W. 183; s. c. 5 Law J. Rep. (N.S.) Exch. 131.]

1837. }
Jan. 15. } LADD V. LYNN.

Baron and Feme—Necessaries.

Where, a husband having turned his wife out of his house, it was agreed that a deed of separation should be prepared and executed:—Held, that the husband was not liable to pay the expenses incurred by his wife's trustee in procuring a counterpart to be prepared and executed, without an express promise by him to bear that expense.

Semble—that a person who lends money to a wife living apart from her husband, to enable her to buy necessaries, is not entitled to recover it from him.

Assumpsit. The first count alleged that differences existed between the defendant and his wife Martha, and they were living apart from each other, and it was desired by them, and particularly by the defendant, that they should live separate, and that a deed of separation should be prepared; and for effectuating the said desire and purposes, it was expedient and necessary that some person should join in and become a party for the said Martha; and thereupon, in consideration that the plaintiff would join in and become a party to such deed, as such trustee, the defendant promised to pay the plaintiff all such costs as he might and should reasonably incur in arranging the proper terms of the deed, and causing a proper deed to be prepared and settled on his part as such trustee, and in and about the execution thereof by him. **Averment**—that the plaintiff did arrange the terms of the deed of separation, and procure a deed to be prepared on his part as such trustee, which he executed: that costs were incurred, but that the defendant had not paid them. There were counts for money lent, money paid, and on an account stated.

At the trial, before the Lord Chief Baron, at the Middlesex Sitings after last term, it appeared that the defendant and his wife having separated, it was agreed that a deed of separation should be drawn up between them, and the plaintiff was appointed a trustee for the wife. The defendant's attorney prepared one deed, which he sent for perusal to the attorney of

the plaintiff, who acted as the friend of Mrs. Lynn. The defendant refused to pay any expenses to be incurred by her respecting the deed of separation as a matter of right, but agreed to pay, and did pay, the sum of 4*l.* for the expense of the plaintiff's attorney's perusal of the deed. A counterpart deed was, however, prepared by the plaintiff's attorney, and executed by the parties; and the action was brought to recover the expenses of that deed, and also a small sum of money advanced by the plaintiff to Mrs. Lynn before the deed of separation. It appeared that the defendant had turned his wife out of his house, for some alleged misconduct, and notice was given to the plaintiff and his attorney not to give credit to her, as the defendant would not be responsible. On these facts his Lordship nonsuited the plaintiff.

Sir F. Pollock now moved for a rule to set that nonsuit aside.—The husband was bound to pay the expenses incurred in the preparation of this deed of separation. He had turned his wife out of his house; he is, therefore, liable to pay the debts she may incur for necessaries—*Shepherd v. Mackoul* (1), and *Williams v. Fowler* (2). And if she does contract a debt for necessaries, it is quite immaterial that the husband has given notice that he will not be responsible for her. *Jenkins v. Tucker* (3) shews that a person may contract debts on account of a wife deserted by her husband, and if he pay those debts, the latter is bound to repay. On the same principle the husband must be bound to refund money advanced to a wife to enable her to procure necessaries. Therefore the plaintiff was entitled to recover for the money lent to Mrs. Lynn. But the copy of the deed was also a necessary. The deed of separation was a benefit to the husband and the wife; if it had not been executed, the latter must have commenced a suit for alimony, and the defendant must have incurred costs in the Ecclesiastical Court. Then if the deed be necessary, the plaintiff, who was the trustee, required a counterpart; it was not right that one deed only

(1) 3 Campb. 326.

(2) M'Cl. & Y. 269.

(3) 1 H. Bl. 90.

should be executed, to remain in the hands of the husband or his attorney. The plaintiff was not to pay the costs of that copy, but the charge must fall on the defendant.

LORD ABINGER, C.B.—The necessities for which a husband is responsible, mean things necessary for the subsistence of the wife.

PARKE, B.—Or for her personal protection. I confess I think a deed of separation cannot be called a necessary at all. And if so, the question must turn upon the particular contract entered into by the husband, and you must take it altogether. Then it appears that the husband in this case has not made himself responsible.

BOLLAND, B.—I think that this deed was not a necessary. If there had been an agreement that the deeds should be prepared at the husband's expense, and he had not withdrawn from that agreement, it might have been considered that he would have been liable for the expenses incurred upon that agreement.

Rule refused.

1837. } POOLE v. THUMBRIDGE.
Jan. 16.

Bill of Exchange—Tender.

To an action by an indorsee against the acceptor of a bill of exchange, the defendant pleaded, that, after the bill became due, he tendered the amount of the bill with the interest, and had always been ready and willing since that time to pay the same; concluding with a profert in curiam:—Held bad on special demurrer.

Assumpsit on a bill of exchange drawn by one J. Channon on the defendant, dated July 28, 1836, for 16*l.* 0*s.* 4*d.*, payable three months after date to the order of the drawer, who indorsed it to the plaintiff.

Plea—That, after the bill of exchange was due, the defendant was ready and willing and then tendered and offered to pay the said plaintiff the sum of 16*l.* 0*s.* 6*d.*, being the amount of the said bill, together with the interest then due for the same for the time which had then elapsed between the day it became due and the day of the

tender, which the plaintiff refused, and that the defendant hath always, according to his promise, been ready and willing to pay the bill; concluding with a *profert in curiam* of the sum of 16*l.* 0*s.* 6*d.*

Special demurrer.

Humfrey, in support of the demurrer.—This is a plea of tender to a bill of exchange after default of payment: it is, however, no answer. It was not made until after the bill was overdue. *Hume v. Peploe* (1) is precisely in point against this plea.

R. V. Richards, contra.—It will be very inconvenient to hold such a plea as the present bad. When bills of exchange have been accepted and negotiated, the acceptor does not know into whose hands they pass. The holder need not communicate to the acceptor where the bill is; and it is hard upon the latter if, not knowing where it is, he cannot protect himself from an action by a tender the day after it is due.

[LORD ABINGER, C. B.—It is not averred that the acceptor did not know where the bill was.]

[PARKE, B.—The acceptor has bound himself to pay absolutely without notice. It is his duty to find out the indorsee and pay him.]

The case of *Hume v. Peploe* was decided on the ground of the omission of the allegation of *tout temps prist*, which is inserted in the present plea. And in *Jackson v. Clay* (2) it was held, that, in covenant for non-payment of rent, a tender after it became due might be pleaded. There can be no distinction between a covenant for rent and a bill of exchange in this respect.

Humfrey replied.

LORD ABINGER, C. B.—I am of opinion that this plea is bad, on the general ground stated in *Hume v. Peploe*; and also on another ground. I am not prepared to say, that the acceptor might not make out a case against a claim on a bill; as, if he were to allege that, on the day when the bill became due, he went to the holder's house to pay it, and could not find any person there to receive payment. I cannot say that the technical rules of law

(1) 8 East, 168.

(2) 7 Taunt. 486.

ought to be pressed against him, if he shews that he did not know who was the holder of the bill at the time when it became due: it seems hard to say, that he should be liable to an action for not paying at the day. But then the plea should allege, not merely that the acceptor was ready and willing to pay the bill, but that he had gone to the holder's house to pay him and had not found him. The present plea does not go that length. It is quite consistent with all that is alleged therein, that the defendant knew where he lived, but that he did not take the trouble to go and find him; whereas, if the defendant knows where he lives, he is bound to go and pay him. This plea does not answer the declaration. It shews, that there has been a breach of the defendant's contract, which he has not satisfied.

PARKE, B.—I have no doubt that this is a bad plea. The declaration states the contract to be, that the defendant promised to pay the plaintiff the amount of this bill according to its tenor and effect, and of the said acceptance and indorsement; and the law is correctly stated therein, that the plaintiff has a right of action by virtue of the indorsement. If a person accepts a negotiable instrument, though he cannot find the holder, he must suffer the consequences. He has bound himself to pay a precise sum on a stated day, and must do so. The meaning of a plea of tender is, that the party has always been ready to perform his part of the contract; and his contract, in the present case, is to pay on a certain day. Nothing will answer that contract but his being ready to pay on the day. But that is not the plea here. There must be some inaccuracy in the report of the case in the Common Pleas, or some mistake by the Court. The Judges seem, indeed, to have considered there, that there must be some damage alleged to have been sustained by the plaintiff; but if there be a covenant to pay on a certain day, nothing will relieve the covenantor but a payment or a tender on that day. That case ought not to govern our decision.

BOLLAND, B. and GURNEY, B. concurred.

Judgment for the plaintiff.

1837. }
Jan. 18. } LEWIS v. KER.

Attorney—Privilege.

Since the 2 Will. 4. c. 39. an attorney has still the privilege of being sued in his own court.

Assumpsit against the defendant, as the drawer of a bill of exchange.

Plea—That, at the commencement of this action, the defendant was one of the attornies of the Court of King's Bench, and during all that time prosecuted and defended, and still prosecutes and defends, divers suits and pleas for divers subjects as their attorney; and that he and all the other attornies of that court ought, by ancient custom and the liberties and privileges of the court, to be free and exempt from being compelled against their will, and have not been accustomed to be compelled, to answer pleas in any action before any Justices, except in the Court of King's Bench; and that the defendant was not an attorney of this court. Verification. And the plea concluded with a prayer of judgment, if the Court would take cognizance of the suit.

General demurrer.

Platt, in support of the demurrer.—The Uniformity of Process Act, 2 Will. 4. c. 39, which has taken away the attorney's right of suing by bill, has also, in effect, taken away the custom and privilege of attornies, of being sued in their own court. The whole custom must be taken together; and if part be removed, the rest also falls. Certainly, there is no reason why the custom should continue. *Wright v. Skinner* (1) will probably be cited on the other side, but it is no authority on this point.

Barstow, contra, was stopped.

LORD ABINGER, C.B.—There is nothing in the objection to this plea. I apprehend that the legislature did not intend to repeal any ancient privilege by a side wind, either the privilege of an attorney or the privilege of parliament. The statute only gives this form of process in lieu of the ancient forms.

PARKE, B.—The statute only substitutes the writ of summons for the bill, and leaves the privilege of the attorney as it was before:

(1) 1 Moo. & W. 144; s. c. 5 Law J. Rep. (N.S.) Exch. 90.

BOLLAND, B. and GURNEY, B. concurred;
and—

Judgment for defendant.

1837. }
Jan. 19. } HARDING v. STOKES.

Bribery—Municipal Corporation.

Under the 5 & 6 Will. 4. c. 76. s. 54, there are three distinct offences: the procuring a voter to be corrupted; the corrupting him; and the offering to corrupt him; and, to constitute the second, there must be the offer of a bribe on the one side, and the acceptance of it by the other, though it is immaterial whether the agreement be afterwards performed or not.

It is for the jury to say, whether the offer has been accepted, and the parties have entered into any agreement as to the vote.

Debt for a penalty on the 5 & 6 Will. 4. c. 76. s. 54.

The declaration, which was demurred to, is set out in the report of the argument on the demurrer (1). After judgment on the demurrer, which was given for the plaintiff, the defendant pleaded that he did not corrupt the said J. W. in manner and form.

The cause came on for trial, at the last Summer Assizes for the county of Somerset, before Alderson, B., when the plaintiff's case rested on the evidence of a witness who stated, that during the canvass for the election of councillors for the borough of Bristol in 1835, the defendant called upon him to ask him for his vote. He had already promised to vote for the candidates in the opposite interest, and told the defendant so. The latter offered, if he would vote for him, to employ him in hauling some stones. The witness said it was a very good offer, but he did not know what he could do; he would, however, see the other party. The witness and the defendant then separated, and did not meet again on the subject, the witness voting according to his first promise. It was objected, that this evidence did not support the declaration, which imported that the voter had been bribed, whereas, at the utmost, this was only an offer to bribe. The

learned Judge at first overruled the objection, and the case went to the jury upon the credit of the witness. The jury could not agree in their verdict, and were locked up all night. In the morning his Lordship nonsuited the plaintiff, on the objection taken during the trial.

Erle, in last term, obtained a rule to set that nonsuit aside, and to have a new trial, on the ground that the offence was complete by the defendant, who procured the party to vote by means of the bribe. The agreement of the party was enough to constitute the offence of corrupting.

Butt this day shewed cause.—Since the case of *Henslow v. Fawcett* (2), it must be admitted, that it is not necessary to be proved that the voter did vote according to the bribe; and it may be also admitted, that under the 2 Geo. 2. c. 24, the attempting to corrupt is the same offence as the corrupting; but the language used by the legislature, in the present statute is different. It is there made a specific offence "to offer to corrupt" a voter. To corrupt a voter is one offence, to offer to corrupt is another. Now, there was no evidence of a corrupting of the voter here; to constitute that offence there must have been some contract or agreement expressly entered into between the parties. In *Sulton v. Norton* (3), and in *Henslow v. Fawcett*, the agreement was complete; the bribe was taken, though the voter did not vote according to his agreement. Here, the voter did not assent to the proposal at the time, but took time to consider. If he had voted for the defendant's party, it might have been considered that he had assented to the proposal, but he did not.

[ALDERSON, B.—Is there not a question for the jury on that point? If so, the nonsuit was wrong.]

Erle, in support of the rule, was stopped by the Court.

PARKE, B.—I am of opinion that the rule for the new trial must be made absolute. The question before the next Judge who tries the case will be, what offence has been committed. There are three

(2) 3 Ad. & El. 51; s. c. 4 Law J. Rep. (N.S.) K.B. 147.

(3) 3 Burr. 1235.

(1) See 5 Law J. Rep. (N.S.) Exch. 178.

different offences pointed out in this section of the statute. First, the complete offence of procuring the party to vote, when the bribe is accepted, and the party votes accordingly; the second in point of order, as regards the enormity of the offence, is that of corrupting when a bribe is offered and accepted. Such appears to be the offence of corrupting, according to *Henslow v. Fawcett*, where two of the Judges (4) gave their opinion, that if the party means to procure the other to vote, and there is an agreement between them that he shall give his vote for the bribe, the offence of corrupting is committed; and I confess that it appears to me, that that decision is correct. Lord Denman and Little-dale, J. gave no opinion upon the point. Then, if the agreement for the vote be entered into, it is immaterial whether the agreement be afterwards executed or not. There is also a third offence created by this statute, which did not exist under the former Bribery Acts, and it is the offering to bribe the voter, though the party refuse it, or do not assent to the offer at the time. Now, certainly there is some evidence to go to the jury in this case of the offer having been accepted by the voter; and if the jury should be of opinion that it was, then the second offence, namely, that of corrupting, is complete; but if they should think that it was not accepted, that offence is not complete; but the defendant would have been guilty of the offence of offering to corrupt.

BOLLAND, B. concurred.

ALDERSON, B.—I have accomplished the object which I had in view at the trial, namely, of ascertaining the opinion of the Court as to the construction of this statute; and now the next Judge will know the question which he is to try. If the parties here have agreed, the one to offer and the other to accept the employment on condition of his voting for the defendant, the offence of corrupting is complete, whatever afterwards may have occurred, whether he did not vote at all, or voted for other candidates. There is abundant evidence of an offer to corrupt here, but not of its being accepted at the time.

GURNEY, B. concurred.

Rule absolute.

(4) *Patteson, J. and Coleridge, J.*

Erle applied for leave to add a count charging an offer to corrupt, but the Court refused it.

1837. }
Jan. 21. } WILKINS v. PERKINS.

Taxation of Costs—Rule, Michaelmas, 1 Will. 4. No. 10.

The taxation of costs where a copy of the bill of costs, and the affidavit of increase has not been delivered with the notice of taxation, pursuant to the rule Michaelmas, 1 Will. 4. No. 10, is irregular, unless the party waive it by attendance or otherwise.

In this case, the plaintiff's attorney obtained an appointment to tax costs, and served it on the defendant's attorney. On the proper day he attended the Master, and sent a clerk to the defendant's attorney to inform him that the Master was ready, but the latter did not attend, and the bill was taxed *ex parte*.

Martin obtained a rule to set this taxation aside, on the ground, that no copy of the bill of costs and affidavit of increase had been served with the notice of taxation, as required by the rule of this court, Mich. 1 Will. 4. No. 10.

Humfrey now shewed cause.—It is not usual to deliver it unless it is required; if not required, it is given to the party before the Master.

PARKE, B.—In that case, there is a waiver of the rule. But how can you get over it without a waiver? And as the party did not attend the taxation, the rule has not been waived.

Per Curiam—

Rule absolute.

1837. }
Jan. 21. } POOLE'S BAIL.

Bail—Notice of Justification by Prisoner.

When two days' notice of justification of bail is given, it must appear by the notice itself that the defendant is a prisoner.

In this case, *Clarkson* applied to justify bail, which was not opposed; but the

Master pointed out to the Court, that the notice was only a two days' notice, and that it did not appear therein, as the case really was, that the defendant was a prisoner.

GURNEY, B., who was sitting alone, was about to reject the bail; when—

Clarkson stated, that in a case before Littledale, J., in the Bail Court, the objection had been overruled, on the ground, that the plaintiff must know the fact of the defendant being a prisoner.

GURNEY, B. referred to the cases of *Creighton's bail* (1), and *Frith's bail* (2), and desired this motion to be made to the full Court; accordingly—

Clarkson moved again when the Court was full; but—

PARKE, B. said, that the notice ought to contain this fact. They had made some inquiry about the case, referred to, but were not satisfied as to its circumstances. The plaintiff does not necessarily know that the defendant is in custody, as he may render without any information being given to the plaintiff; therefore, this notice is irregular.

GURNEY, B.—There is also this difference. Here, the rule of allowance operates as a supersedeas, and discharges the prisoner out of custody: not so in the King's Bench.

Bail rejected.

1837. }
Jan. 21. } TAYLOR v. MONTAGUE.

Practice.—Judgment as in case of a Nonsuit.

Where, after issue joined, the plaintiff became bankrupt, and his assignees refused to prosecute the suit, the Court discharged a rule for judgment as in case of a nonsuit, on a peremptory undertaking, only on the terms of his finding security for costs.

Godson had obtained a rule for judgment as in case of a nonsuit.

Knowles shewed cause, on an affidavit, from which it appeared, that since issue was joined, the plaintiff had become bankrupt; and the assignees had refused to go

on with the action. He alleged as an excuse, that the plaintiff had been unable to procure several material witnesses, and offered a peremptory undertaking.

Per Curiam.—The bankruptcy has put an end to the plaintiff's right of action, and vested it in the assignees, who refuse to prosecute the suit. The rule can only be discharged on a peremptory undertaking, the plaintiff finding security for the costs of the cause within a month; otherwise the—

Rule to be made absolute.

1837. }
Jan. 24. } ALLEN v. WALKER.

Bill of Exchange—Judgment for want of a Plea.

In an action against the indorser of a bill of exchange, drawn by a third party, the defendant pleaded, that he did not make and draw the said bill as in the declaration alleged:—Held, that the plaintiff could not treat this plea as a nullity, and sign judgment for want of a plea.

The plaintiff declared in assumpsit against the defendant, as indorser of a bill of exchange, drawn by a third person, indorsed to the defendant, and by him to the plaintiff. The defendant's attorney having failed in an application to obtain further time to plead, delivered two pleas, one to the plaintiff's attorney at the Judge's chambers, the other at his office. One was a plea of non assumpsit, and the other was a plea that the defendant did not make or draw the said bill of exchange, as in the said first count is alleged. He then served a notice to withdraw his plea first delivered. The plaintiff's attorney, not knowing to which the notice referred, signed judgment.

R. V. Richards, on a former day, obtained a rule to set this judgment aside.

J. Evans shewed cause.—The judgment is regular. If the defendant's attorney intended that the plea of non assumpsit should remain, that is no plea. If he intended the other plea, it is equally a nullity. It is a traverse of that which is not alleged in the declaration—namely, that the defendant made and drew the bill of exchange. It is only alleged that he indorsed it.

(1) 1 Cr. & M. 335.

(2) 2 Dowl. P.C. 229.

PARKE, B.—The plea is bad in point of form; but, as every indorser is in law a drawer, the plea is good, if the declaration be considered with that view; and you cannot treat it as a nullity. That can only be done when no sense can be made of the plea.

ALDERSON, B.—The plea is, that the defendant did not draw the bill of exchange *modo et formâ*; now the *modus et forma* stated in the declaration, is by indorsement. There is a traverse, and the plea cannot be treated as a nullity.

Per Curiam—

Rule absolute.

1837. }
Jan. 27. } ROY V. BRISTOWE.

Striking out Counts—Rule, How to be drawn up.

A rule for striking out counts, was drawn up without reading the declaration, or any affidavit. The Court discharged it.

This was a declaration containing two counts. The first count charged, that one Edward Thompson was the owner and proprietor of divers shares in the Manchester, Bolton, and Bury Canal Navigation Railway, and the said plaintiff dealt with the defendant, as the agent of the said E. T., authorized by the said E. T. to sell the said shares, and the plaintiff entered into a contract with the defendant, as such agent of the said E. T., so authorized by him, and agreed to buy the said shares; and it alleged that the defendant promised that he was then authorized by the said E. T. to sell the said shares, yet the defendant was never authorized by E. T. to make the contract, and E. T. refused to be bound by it, and repudiated the same, by reason whereof the plaintiff was prevented from buying other shares, which he would have done. The second count stated, that in consideration that the plaintiff, at the request of the defendant, agreed to buy of and from the defendant eleven shares in the Canal and Railway, the defendant promised the plaintiff to cause the said shares to be transferred to the plaintiff in a reasonable time in that behalf. It then alleged,

that although the plaintiff was ready to buy the said shares, and accept such transfer, the defendant would not cause the said shares to be transferred to the plaintiff, but wholly failed, and made default, and the plaintiff lost the shares. On a former day—

Cowling had obtained a rule to strike out one of these counts, on the ground that the declaration was contrary to the rule Hil. 4 Will. 4, No. 5, citing *Jenkins v. Treloar*(1); against which—

Crompton now shewed cause, and objected that the rule could not be supported. It was simply a rule to strike out one of the counts, and was not drawn up on reading the declaration, or any affidavit stating the nature or effect of the separate counts.

Cowling said this rule was drawn up in the same manner as in *Jenkins v. Treloar*, but—

The COURT held, that it was insufficient, and

Discharged the rule.

1837. }
Jan. 31. } GRIFFITH V. HARRIES AND
ANOTHER.

Justices—Conviction—Game Act.

By the 1 & 2 Will. 4. c. 32, (the Game Act,) all penalties were to be paid to the overseer of the poor of the parish, in aid of the county rate; but by the 5 & 6 Will. 4. c. 20. s. 21, it is directed that the penalties shall be paid one moiety to the informer, and the other to the overseer of the parish, to be by him applied in the manner before directed:—Held, that a conviction under the first act, directing the whole penalty to be paid to the overseer, to be by him applied according to law, was bad; and that the Justices who signed it, were liable to an action for false imprisonment.

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 29.]

(1) 1 Mee. & W. 16; s. c. 5 Law J. Rep. (N.S.) Exch. 113.

1837. }
Jan. 27. } CASLEY v. BINNS.

Practice.—Bail—Attachment against the Sheriff.

Bail were excepted to on the 11th, when a declaration was delivered de bene esse. On the 13th, notice of justification was delivered for the 16th, when further time was given for justifying bail until the 21st, on payment of costs, which were not paid, but on the 20th the defendant was rendered. On the 21st, a rule nisi for an attachment against the sheriff, for not bringing in the body, was obtained, against which, cause was shewn on the 28th. It was a town cause, and the last sittings were on the 28th:—Held, that the attachment was regular, and that the plaintiff had lost a trial; consequently, it was ordered to stand as a security.

The defendant was arrested on the 31st of December. On the 5th of January the sheriff was ruled to return the writ. On the 7th of January, bail was put in, which were excepted to on the 11th, the plaintiff at the same time delivering a declaration *de bene esse*. On the 13th, there was a notice of justification for the 16th, when the body rule expired. The bail did not justify on the 16th, but obtained further time until the 21st, the defendant paying the costs, and putting the plaintiff in the same situation as he would have been in, if the bail had justified in time. Instead of the defendant's justifying at the time so enlarged, he was rendered on the 20th. It was a town cause.

A rule nisi was obtained for an attachment against the sheriff on the 21st.

Jervis now shewed cause.—The attachment cannot issue in this case, as the defendant was at liberty to put in bail, or to render before the 21st.

Humfrey.—The rule was conditional upon the payment of the costs, and they have not been paid.

[The COURT were of opinion that the sheriff was liable to the attachment.]

Jervis.—Then, on payment of costs, the sheriff may be relieved, and the plaintiff cannot insist upon the bail-bond standing as a security. He has not lost a trial, for

two reasons; first, because the defendant was not bound to plead until the 26th, that is, four days after the body rule expired, when the defendant would be in court. That being the case, issue could not have been joined before the 21st, and then eight days' notice of trial must have been given; that would have expired on the 29th, and this day, which is the 28th, is the last sittings in London.

Humfrey.—But, by the practice, the time to plead dates from the delivery of the declaration.

[PARKE, B.—That is so.]

Jervis.—The other answer is, that the plaintiff has, by his conduct, extended the time for the defendant to proceed. He ought to have moved for an attachment on the 21st; then the sheriff might have come and shewn cause, and the case would have been disposed of before this day.

Humfrey.—It is immaterial when the discussion takes place on this rule. The simple question is, whether, supposing the proceedings were regular on each side, the plaintiff could have gone to trial this day. Now, it appears, that in this case he could have done so. The rule of Trinity Term, 2 Will. 4, No. V., is, "that upon staying proceedings upon an attachment against the sheriff, the attachment shall stand as a security, if the plaintiff shall have declared *de bene esse*, and shall have been prevented for want of special bail being perfected in due time from entering his cause for trial, in a town cause, in the term next after that in which the writ is returnable, and in a country cause, at the ensuing assizes." Now, supposing that bail is not perfected until the last day of the term, so that no discussion can take place until the ensuing term, can it be said that the plaintiff would not have lost a trial, if he cannot try at the assizes?

PARKE, B.—That corrects an impression which I had formed, and I now think that the time of the discussion is not of importance.

Per Curiam.—The attachment must stand as a security.

1837. }
Jan. 11. } JONES v. BARNES.

Costs—Writ of Trial.

A sheriff, or Judge of an inferior court, to whom a writ of trial is sent, has no power of certifying to deprive a plaintiff of costs, pursuant to the 43 Eliz. c. 6. s. 2.

After verdict for a sum under 40s., the Court refused to stay proceedings on payment of the debt without costs.

This was a case, which had been tried before the under-sheriff of Gloucester, on a writ of trial, when the plaintiff recovered a verdict for 1*l.* 15*s.* 9*d.*

Francillon now moved for a rule calling upon the plaintiff to produce the writ of trial to the under-sheriff, that the latter might certify, under the 43 Eliz. c. 6. s. 2, that the damages were under 40*s.*, or that, upon payment of the debt, without costs, all proceedings might be stayed.

[PARKE, B.—Has the sheriff any power to certify under that statute?]

That act authorizes the Judges of the Court, and the Justices before whom the action is tried, to certify. The sheriff, though not strictly a Justice, is a Judge before whom the cause is tried. He has the like powers as a Judge, for he can nonsuit, and directs the jury. In *Wardroper v. Richardson* (1), indeed, the point has been decided against the defendant; but it is submitted, that that decision is not correct.

[LORD ABINGER, C. B.—The sheriff is not made a Judge by the statute—he is only an officer or commissioner of this court for the purpose of trying the cause. As to the power of nonsuiting, a party has a right to be nonsuited, if he is not prepared with his evidence.]

Then the Court will grant the other part of the rule.

[PARKE, B.—It must appear that the debt was under 40*s.*, and was one which could be sued for in the county court.]

The verdict shews, that the debt was under 40*s.*; and it appears, from the venue, which must be taken to be correct, that the debt, which was for goods sold and delivered, was contracted within the county of Gloucester.

(1) 1 Ad. & Ell. 79; a. c. 4 Law J. Rep. (N.S.) K.B. 67, n.

[PARKE, B.—The goods may have been sold in one county and delivered in another. Have you any instance of the Court's interfering, except in an earlier stage of the cause, and except where it appears clearly from the pleadings or from the plaintiff's own admission, that he is not going for more than 40*s.*?]

Certainly not. Previously, the Courts were not called upon to interfere after verdict, because the Judge, at the trial, could certify.

PARKE, B.—If the debt be really under 40*s.*, and the plaintiff is proceeding vexatiously in the superior court, that should have been shewn to the Judge as an answer to the application for a writ of trial.

Per Curiam—

Rule refused.

1837. }
Jan. 15. } DUNCAN v. CAPE.

Vendor and Purchaser—Auctioneer.

By an agreement of reference, pursuant to a Judge's order, between G. and H, professing to be administrator cum testamento annexo of A, all matters were referred to an arbitrator, who directed certain premises to be sold by an auctioneer, assented to by both parties, and the purchase-money to be applied in a particular manner. G's attorney, who knew that administration had not been taken out by H, became the purchaser at the sale, and paid a deposit to the auctioneer, it being understood at the time of the sale, that H. would take out such letters of administration. This he refused to do:—Held, first, that the purchaser could recover his deposit from the auctioneer without notice of his rescinding the contract; secondly, that he was not prevented from taking the objection by his previous knowledge of the defect; and, thirdly, that an attornment of one of the tenants to the purchaser, was no answer to this action.

Assumpsit for money had and received.

Plea—non assumpsit.

At the trial, before the Lord Chief Baron, at the London Sittings after last term, it appeared that the defendant was an auctioneer, who had sold a leasehold estate

at Pentonville, by public auction, at which the plaintiff had been the highest bidder, and was declared the purchaser. He paid a deposit on that purchase into the hands of the defendant, and the action was brought to recover that deposit and interest thereon, the vendor not having made a good title. The sale took place under these circumstances:—it appeared that the legal estate in the premises had vested in one Adams, who died intestate, and administration had never been taken out to his effects. The plaintiff was the attorney of a person named Griffin, who claimed the property; and one Hayward, an attorney, represented the interest of the intestate's estate. There were proceedings in ejectment pending between Adams and Griffin; and on the 14th of February 1832, by an order of Parke, B., the matters in difference between Griffin and Hayward were referred to arbitration, and the order directed that Hayward should take administration. An agreement of reference was then executed, wherein Hayward described himself as administrator with the will annexed. The arbitrator awarded that the premises should be forthwith sold by the defendant, an auctioneer, which was assented to by both parties. After the sale, Hayward refused to take out administration, and the plaintiff thereupon brought this action to recover the deposit. For the defendant it was contended, first, that he was not liable until the plaintiff had given notice of his having rescinded the contract, and no such notice was proved; secondly, that in this case the plaintiff was aware of the defect of title when he purchased; and, thirdly, it was shewn that an attornment had taken place by one of the tenants to the plaintiff, subsequent to the purchase. His Lordship overruled the objections, giving the defendant leave to move to enter a nonsuit, and the plaintiff recovered a verdict for 87*l.* 10*s.*, the amount of the deposit.

Sir W. W. Follett now moved, pursuant to leave, upon the several objections. On the second objection, he cited *Hunt v. Silk* (1), and contended, that after the attornment, which was equivalent to a taking possession of the estate, the plaintiff could

not rescind the contract: such also is the doctrine in courts of equity.

[*PARKE, B.*—Do you mean to say that the purchaser is bound to take the estate with a bad title? This is not a case of the rescinding of the contract, but the money has been deposited in the hands of the auctioneer, to abide the event of a good title being completed; and the only question here is, whether that event has happened? If the title cannot be completed, it is to be paid back to the purchaser. How is that question affected by the taking possession?]

The objection cannot be taken in this case by the plaintiff: he knew that administration had not been obtained at the time he agreed to purchase the property, and has therefore no right to complain of that defect, especially as, in fact, he authorized the sale.

[*LORD ABINGER, C.B.*—At the time of the sale, however, all parties relied upon Hayward's taking out administration, and thus completing the title.]

Then the defendant ought to have had notice. He was authorized by the award and by both parties to sell their property, and therefore he received this money as a stakeholder, to be paid over in the manner directed by the award; and there can be no alteration of the manner in which it is to be applied, at least without notice.

[*PARKE, B.*—You have not arrived at that stage of the case, in which the award would become applicable. Until the sale of the estate has been completed, and the purchase-money has been paid, the directions in the award do not apply.]

The defendant was not simply an auctioneer in this case, but a stakeholder; and in that character was entitled to notice. It is very hard upon him if he is not.

LORD ABINGER, C.B.—The whole case depends upon its own circumstances. On the plaintiff's evidence it stood that the defendant was an auctioneer, holding a deposit on a purchase, where the title had not been completed; and it was objected that he ought to have had notice of the contract having been rescinded. I was inclined to nonsuit on this objection. But the defendant proved that he was something more than an auctioneer, and that he

(1) 5 East, 449.

was a stakeholder. That being the case, I thought he was not entitled to notice. All the parties had a due knowledge of the defect, and the money was paid on a full understanding, that a certain act would be performed, which would remedy it. That was not performed. If the defendant had held the money simply as an auctioneer, he might have been entitled to notice; but I think that the defendant must be taken to have been a stakeholder, and then the plaintiff is entitled to recover without notice. I remember cases have occurred where the auctioneer has been called upon after he has paid over the deposit to the vendor, and then it may have been held that he was not liable.

PARKE, B.—It seldom happens that an action is brought against an auctioneer without notice that the contract has been rescinded. But ought not the auctioneer to take notice of the event, on the happening of which the money is to be paid over either to the one party or to the other? This is but the common case of a sale of a house by auction, where the payment of the deposit depends on the event; and the vendee was here entitled to his deposit, since no title was completed. The law does not require any notice to be given.

BOLLAND, B. concurred.

Sir W. W. Follett, with reference to the last observation of the Lord Chief Baron, referred to *Gray v. Gutteridge* (2), where it was held by Lord Tenterden, that an auctioneer was a stakeholder, and not the agent of the vendor; consequently, he was liable for the deposit, though he had paid it over to the vendor before notice.

Rule refused.

1837. }
Jan. 16. } WESTBURY v. ABERDEIN.

Insurance—Concealment of a material Fact.

Two vessels sailed from Malaga for London, one, the Fruiter, on the 9th of October, the other, the King George, on the 10th; they passed through the Straits of Gibraltar

in company, and thus completed the more dangerous part of the voyage. On the 21st, the Fruiter saw the King George off Oporto, and arrived in the port of London on the 30th. The captain communicated the fact of his having seen the King George off Oporto to the owner, who effected an insurance on that vessel on November 3, without informing the underwriters of that fact:—Held, in an action on the policy, that it was a question to be submitted to the jury, whether that fact did increase the risk, and was, under the circumstances, material to be communicated to the underwriters.

This was an action on a policy of insurance, dated the 3rd of November, on a ship called the *King George*, at and from Malaga to London.

There were two pleas not material; the third was, that after the *King George* had sailed from the port of Malaga, and had completed more than half her voyage, she was seen at sea by the captain of a ship called the *Fruiter*, which had arrived five days before the policy was executed, of which fact the plaintiff had notice, but did not disclose the circumstance, which was a material one, to the underwriters.

At the trial, before the Lord Chief Baron, at the London Sittings after Trinity term, the facts proved in evidence were these: Two ships, the *Fruiter* and the *King George*, sailed from Malaga in October 1835, the former on the 9th, the latter on the 10th. They passed through the straits of Gibraltar, on the 14th were both in company off Cape St. Vincent, and then separated. On the 21st the captain of the *Fruiter* saw the *King George* off Oporto. A gale of wind came on, and they again parted. The *Fruiter* arrived in London on the 30th. The captain, in the evening of that day, saw the plaintiff, who was the owner of the *King George*, and communicated these facts to him. On the 3rd of November, the policy was effected; the time when the ship sailed was communicated to the underwriters, and the arrival of the *Fruiter* was also known to them, but the plaintiff did not communicate the fact of the *Fruiter* having seen the *King George* off Oporto on the 21st. It appeared that the *Fruiter* had arrived within the average time of such voyages, and that the principal part of the

(2) 1 Man. & R. 614; 2 C. 6 Law J. Rep. K.B. 134; 3 C. & P. 40.

risk is between Malaga and Gibraltar. The premium taken was 60s., the ordinary premium being only 20s. The vessel was lost on the 25th. His Lordship left it to the jury to say, whether the fact of the *Fruiter* having seen the *King George* on the 21st, off Oporto, was material to be communicated to the underwriters, expressing a strong opinion of his own, that it was not, saying that, as the more dangerous part of the voyage was over, the knowledge of their having passed through the straits would have diminished rather than have increased the risk; and that, as the *Fruiter* had arrived within the average voyage, there was no cause of alarm, merely because the *King George* had not also arrived. The jury found a verdict for the plaintiff.

Sir F. Pollock, in last term, obtained a rule to set this verdict aside, on the ground that the jury ought to have been told that the fact was a material one, and ought to have been communicated to the underwriters,—citing *Kirby v. Smith* (1), and *Bridges v. Hunter* (2); against which, cause was shewn this day by—

Sir W. W. Follett and *Channell*, who contended that the verdict was right, and that this fact was not, under the circumstances of the case, material to be communicated to the underwriters. It could not have increased the risk. They did know of the storm, and of the arrival of the *Fruiter*, and had full means of calculating the risk.

Sir F. Pollock and *R. V. Richards*, in support of the rule.—It was, no doubt, a chance whether the vessel was exposed to the storm or not, and the underwriters took a premium to cover that risk; but they would have required a higher premium if they had known the fact of the two vessels being together so late as the 21st, a short time before the storm, and that one had arrived. This is not a case of a long voyage from India, when it may be of no importance that the two vessels were together at an early period of the voyage; but it certainly becomes very material when the vessels come near to this country, and it is ascertained that, being so near, one has arrived, and the other has not. The assured is bound to commu-

nicate the latest intelligence which he possesses respecting his vessel, if material to the risk, when he effects the insurance. It was put to the jury, that the greatest part of the danger was over, because the *King George* had passed the Straits; but upon the facts of this case, that is no test of the materiality. In *Kirby v. Smith*, the concealment was of the fact of the two vessels having sailed together from their port, and that one of them which left the latest had not arrived, and it was held to be material. Here, the voyage may be considered as a voyage from Oporto, and then the circumstances of the case are the same as in *Kirby v. Smith*.

LORD ABINGER, C.B.—As the defendants must pay the costs of a new trial, and as the point which has been now discussed was not brought before the jury, there must be a new trial. As the storm occurred after the 21st, and as it appears that the underwriters knew that the *Fruiter* had arrived, and also knew the time of her sailing and that of the *King George*, they took upon themselves the risk of the storm in the high premium which they charged. If, however, it is to be considered as a voyage from Oporto, and that the prior voyage is to be excluded, I cannot say that the next jury might form the same conclusion as the last. My Brother Parke thinks that question ought to be submitted to them. It will be manifest that, in that view, the storm will be of no importance; because, as the argument is urged, if the two vessels were at Oporto at the same time, and one had arrived, and the other not, though there were no storm at all, yet the fact ought to be communicated, as it increases the risk. There must, therefore, be a new trial.

PARKE, B.—I think that question ought to have been submitted to the jury.

BOLLAND, B. concurred.

Rule absolute.

1837. }
Jan. 24. } **GARDEN v. CRESSWELL.**

Witness—Attachment.

It is a sufficient answer to a rule nisi for an attachment against a witness for not obeying a subpoena, that the affidavit on which

(1) 1 B. & Ald. 672.

(2) 1 Mau. & Selw. 15.

the motion was made does not allege that the original subpoena was shewn to the witness.

A rule nisi for an attachment had been obtained in this case against a witness for not obeying a subpoena, whereby the plaintiff did not recover the full extent of his demand.

Barstow shewed cause, and objected, that it did not appear on the affidavits used for obtaining the rule, that the original subpoena had been shewn to the witness. *Wadsworth v. Marshall* (1) is an authority for the necessity of that allegation. It is true that, there, the negative was shewn by the party against whom the application was made, but in *The King v. Wood* (2) it was decided by Little Dale, J., that the affirmative must be shewn by the party applying. So, in *Wilton v. Chambers* (3), the principle is stated to be this, that, where it is sought to punish any person for a contempt, it must be shewn clearly to the Court that the contempt has been committed, and the party complaining must come with proper materials.

Erle, contrà, contended that it was incumbent upon the party complained of to shew that the writ had not been shewn to him.

LORD ABINGER, C. B.—That is not necessary; the party may shew cause on the affidavits used against him, and whoever seeks to bring a party into contempt must make out that he has been guilty.

Rule discharged, with costs.

1837. }
Jan. 24. } WHITE v. FARRER.

Writ of Trial—Date of Writ of Summons.

Where the date of the issuing of the writ of summons was untruly stated in a writ of trial, the Court set aside a verdict which had been recovered thereon in a case where the defendant had not appeared at the trial.

In this case, a writ of trial had gone to the sheriff, on which there had been a verdict for the plaintiff.

(1) 1 Cr. & M. 87; s. c. 2 Law J. Rep. (N.S.) Exch. 10.

(2) 1 Dowl. P.C. 509.

(3) 5 N. & M. 431; s. c. 5 Law J. Rep. (N.S.) K.B. 72.

Swann, on a former day, had obtained a rule to set that verdict aside.

Hindmarsh now appeared to shew cause; but having stated that he did not know what was the objection, the Court called on

Swann, who pointed out various irregularities, upon which the Court pronounced no judgment, and also that the writ of summons was untruly stated in the writ of trial, it being alleged to have been issued on the 13th of September, whereas it was issued on the 30th, and the defendant did not appear at the trial.

Hindmarsh.—The application ought to have been, to set aside the writ of trial, and not the verdict.

PARKE, B.—The writ is void, and all the proceedings under it are irregular, which irregularity has not been waived.

Per Curiam—

Rule absolute (1).

1837. }
Jan. 27. } ATTWILL v. BAKER.

Practice.—Rules—Judge's Order.

Where a rule is drawn up on reading a Judge's order, and an affidavit which does not verify the order, nor refer to it, the Court will, nevertheless, allow the order to be read in support of the rule.

The plaintiff had delivered an issue in the regular form for trial at the Sittings, and a notice of trial before the Secondary.

Humfrey had obtained a rule to set aside the issue and notice of trial, for irregularity, upon the authority of *Ward v. Peel* (2).

Lumley now shewed cause, and objected that it did not appear that there had been any Judge's order; the affidavit on which the rule was obtained, only stated that the issue and notice of trial had been delivered. He admitted that the notice of trial was bad, but contended that the issue was not shewn to be irregular.

Humfrey.—The rule is drawn up upon reading the Judge's order, and the Court will take judicial notice that it is an order in the cause.

(1) See *Whipple v. Manley*, 1 Mee. & W. 437; s. c. 5 Law J. Rep. (N.S.) Exch. 191.

(2) 1 Mee. & W. 743.

PARKE, B.—That is enough. The plaintiff must amend on payment of the costs of this application.

Rule discharged on those terms.

1837. } LINDUS v. POUND.
Jan. 30. }

Practice.—Special Demurrer.

The rule Hilary, 4 Will. 4. No. 2, requiring a marginal note of the point intended to be argued in every demurrer, applies to special demurrers.

In this case, the defendant specially demurred to a count on an account stated, for want of the word "then," and delivered a demurrer, stating the cause of the demurrer, but without any marginal note.

Humfrey on a former day obtained a rule to set this demurrer aside as irregular, relying upon the rule Hilary, 4 Will. 4. No. 2. (1).

Mansel shewed cause, and urged, that as this was a special demurrer, there could be no need of stating in the margin the same thing that was already expressed in the body of the demurrer: he referred to two cases before Patteson, J., at chambers, where he had overruled a similar objection.

PARKE, B.—The rule of court is, that in the margin of every demurrer there shall be a note. It is a sound rule of construction to understand persons to mean what they say. You ought to have stated, that the objections intended to be argued are those stated in the demurrer itself. Mr. Justice Taunton doubted whether this was sufficient, and there was a discussion among the Judges on the point, but it was considered to be sufficient.

Per Curiam—

Rule absolute.

(1) Which is, "In the margin of every demurrer, before it is signed by counsel, some matter of law intended to be argued shall be stated, and if any demurrer shall be delivered without such statement, or with a frivolous statement, it may be set aside as irregular, by the Court or a Judge, and leave may be given to sign judgment as for want of a plea."

1837. } CHARRINGTON v. MEATHER-
Jan. 31. } INGHAM.

Treble Costs—Highway Rate—Statute.

The 5 & 6 Will. 4. c. 50. repealed the 13 Geo. 3. c. 78, which gave treble costs to persons sued for acts done in pursuance thereof:—Held, that where a plaintiff was nonsuit at a trial, which took place before, but the judgment was not signed until after the former act came into operation, the defendant was not entitled to treble costs.

After this case had been decided, as reported *ante*, p. 23, it was discovered, that the trial took place a few days before the 20th of March 1836, when, according to section 119, the 5 & 6 Will. 4. c. 50. was to come into operation; whereupon

N. R. Clarke, on a former day, obtained a rule nisi to open and discharge the former rule; against which—

Miller and Hurlstone shewed cause.—It is true that the statute 13 Geo. 3. c. 78. was in force at the time of the trial, and warranted the nonsuit; yet, when the Court were called upon to give the judgment, the statute was repealed, and the defendant could not have a judgment for treble costs; such a judgment would have been erroneous, and this judgment is set out on the record—*Tidd's App.* 343. The judgment must be given according to the law which exists at the time when it is given. That an act of parliament has no force after it has been repealed, even though proceedings commenced under it, appears from *Miller's case* (1). So also where an offence is committed while a statute is in force, which is repealed before the trial, the party cannot be convicted—*The King v. McKearie* (2). And there are various decisions on the Bankrupt Act, in which it has been held, that it has no operation where acts of bankruptcy have been committed previous to its being passed, and which would have been affected by the former statutes which were repealed by it—*Maggs v. Hunt* (3), *Surtees v. Ellison* (4), and *Worth v. Budd* (5).

(1) 1 W. Bl. 451.

(2) R. & R. C.C. 429.

(3) 4 Bing. 42; s. c. 5 Law J. Rep. C.P. 130.

(4) 9 B. & C. 750; s. c. 7 Law J. Rep. K.B. 335.

(5) 2 B. & Ad. 173; s. c. 9 Law J. Rep. K.B. 237.

Clarke, in support of the rule.—The proceedings, having been commenced while the former statute was in force, are not affected by its repeal. The defendant obtained an inchoate right to the judgment for the treble costs. If the proposition contended for on the other side be correct, the most serious consequences will follow. As there are various acts of parliament, which repeal previous statutes by which protection has been afforded to persons who have acted under them, and the repealing statutes only provide the like protection for acts done under them, and not for acts done under the prior and then repealed statute, it surely could not be intended by the legislature, that the party should thereupon lose the protection to which he was entitled when he did the act complained of; but it is rather to be considered, that the legislature, in truth, believed that the protection still continued, though the statute was repealed. There are many examples; but instances may be found in the 3 Geo. 4. c. 126, which repealed the General Turnpike Act, and the 5 & 6 Will. 4. c. 63, the Weights and Measures Act, which repealed the 4 & 5 Will. 4. c. 49.

[LORD ABINGER, C.B.—The act done will be justified by the statute in force at the time it is done, though the other intentions of the legislature may not be carried into effect after it ceases to be in force.]

It would be hard upon persons who have relied upon these clauses in the statutes, if the repeal is to have such an effect. Suppose a party had pleaded only the general issue, and the statute which authorized him to do so were repealed before the trial, would he be precluded from giving the evidence? That must follow from this decision.

[LORD ABINGER, C.B.—Suppose a man do an act in America, which is justified by the law there, which also gives him particular protections, he will be justified for the act, if sued in this country; but he cannot claim those protections.]

There is another illustration of the legislature to be derived from the statute 7 James 1. c. 5, which gave protection to officers acting under it. It was only a temporary act, and expired at the end of seven years. At that time there was no Statute

of Limitations; so that, if the protection given by the act ceased when it expired, the act itself would have been of no avail. The more reasonable construction therefore is to hold the protection to be continuing. Indeed, it is admitted that the nonsuit was right; if so, it must draw after it the treble costs as a necessary consequence. As to the cases in bankruptcy, they clearly turn upon the construction of the statute, and have no application to the present.

[PARKE, B.—Have there not been cases on the right of a party to prove for the costs of a nonsuit when a bankruptcy occurs subsequently?]

The older cases certainly were in favour of the creditor—*Hurst v. Mead* (6); but the later authorities have been the other way—*Ex parte Charles* (7), *Walker v. Barnes* (8), *Scott v. Ambrose* (9), *Birt v. Moreau* (10).

Cur. adv. vult.

LORD ABINGER, C.B. now delivered the judgment.—The Court are of opinion that they cannot award the treble costs in this case. It seems to us that the treble costs are in the nature of a penalty. It does not follow that, though a party may have the right to the protection afforded him by the statute, the statute can be extended to a penalty. The statutes (11) which give costs on a nonsuit require judgment of the term to be given. Here, the trial took place before the statute was repealed, and therefore the defendant was entitled to all the protection which the law then afforded. It is not necessary to give any opinion as to what would have been the effect of a repeal of the statute before the trial.

Rule discharged (12).

(6) 5 Term Rep. 365.

(7) 14 East, 197.

(8) 5 Taunt. 778.

(9) 3 Mau. & Selw. 326.

(10) 4 Bing. 57; a. c. 5 Law J. Rep. C.P. 61.

(11) 23 H. 8. c. 15; 4 Jac. 1. c. 3.

(12) In the former report of this case, it was noticed, that the double costs might have been recovered under 7 James 1. c. 5; but that statute requires, that the Judge who tried the cause shall allow the double costs; and there had been no certificate in the present case.

1837. }
Jan. 31. } JONES v. JONES.

Attorney's Costs,—where not an Attorney of the Court.

Where the London agent, an attorney of this court, was the attorney on the record, and conducted all the business of the suit in town in his own name, and corresponded with the country attorney respecting the suit:—Held, that the plaintiff, who had obtained a verdict, was entitled to recover from the defendant the costs incurred by him in employing the country attorney, who was not an attorney of this court.

Semble—The statute 2 Geo. 2. c. 23. s. 10. does not apply to cases where a country attorney employs an agent in town, who conducts the business in court and in London.

The plaintiff having recovered a verdict against the defendant, taxed his costs, and—

Jervis had obtained a rule to set that taxation aside, on the ground that the plaintiff's attorney was not an attorney of this court during the time that the greater part of the business was done, and had not the consent in writing of any attorney of this court to his practising in his name, as required by 2 Geo. 2. c. 23. s. 10.

R. V. Richards shewed cause.—The proceedings were carried on by the London agent; his name appears in the declaration as the attorney on the record; he sued out the writ and conducted all the London business in the suit. The plaintiff's attorney was an attorney of the Court of King's Bench, and a correspondence took place between him and his town agent, from which the Court will infer a consent by the latter.

[*PARKE, B.*—This is very like the case of *Goodner v. Cover* (1), where it was held, that an attorney may recover costs for conducting a suit in this court, though not an attorney of it, if he practise in the name of an attorney who is.]

Jervis.—But in such case the proceedings must be in the name of that attorney whose consent has been obtained. Here, however, the plaintiff's country attorney trans-

acted a great deal of the business himself, and, in his affidavit of increase, describes himself as the attorney. *Latham v. Hyde* (2) shews, that the attorney cannot recover his costs if he be not an attorney of this court. The consent is a condition precedent, and the want of it cannot be cured by any adoption which the other attorney may make. *Meeking v. Whalley* (3) and *Humphreys v. Harvey* (4), which are cases on the Certificate Act, shew how strict the rules are which apply to attorneys. Then the language of the statute 2 Geo. 2. c. 23. is general, and makes no exception of country attorneys practising by their agents.

LORD ABINGER, C. B.—The particulars of the case of *Latham v. Hyde* do not appear in the report, but, as far as they are shewn, it is not like the present. The statute does not require any formal licence, and there is evidence of the country attorney acting with the consent of his London agent. But, in truth, Mr. Gilbertson (5) is acting himself as the attorney in court and in all that is done in town. I do not think the principle on which the statute is framed applies to such a case as the present. *Latham v. Hyde* only decides, that, if an attorney presumes to act in the name of another, without his authority, he shall not recover his costs.

PARKE, B.—It certainly appears to me that Gilbertson is the real attorney in this suit. But I apprehend the statute really does not apply to a country attorney who procures his agent in London to conduct the business of the suit in court. There is, however, sufficient evidence of the consent in the correspondence.

BOLLAND, B. and GURNEY, B. concurred.

Rule discharged.

(2) 1 Cr. & M. 128; a. c. 2 Law J. Rep. (N.S.) Exch. 72.

(3) 1 Bing. N.C. 59; a. c. 3 Law J. Rep. (N.S.) C.P. 298.

(4) 1 Bing. N.C. 62; a. c. 3 Law J. Rep. (N.S.) C.P. 300.

(5) This was the name of the agent in town.

(1) 3 Dowl. P.C. 424.

1837. } HENDERSON AND OTHERS v.
Jan. 20. } SHERBORNE.

Overseer—Liability.

The supply of a single article to one pauper by an assistant overseer for his own profit, does not render him liable to the penalty imposed by the 55 Geo. 3. c. 137. s. 6.

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 28.]

1837. } BELCHER AND OTHERS, ASSIG-
Jan. 25. } NEES OF LEES AND OTHERS,
v. JONES.

Bankruptcy—Fraudulent Preference.

One of the partners in a bank, which was in a state of insolvency, intending to give a preference to his father-in-law, communicated to him the state of their affairs. The father-in-law, besides his private account, had also an account for an insurance company, of which he was a trustee. The bankrupt did not intend to favour the insurance company, and was anxious that no communication should be made to them; but his father-in-law transmitted the information to them, and their debt was drawn out by cheques, one paid over the counter, and the other passed through the clearing-house before the bank stopped. The other partners were not acquainted with the fact of the communication having been made:—Held, that the money was not recoverable by the assignees from the company on the ground of a fraudulent preference.

Assumpsit for money had and received to the use of the assignees.

Plea—the general issue.

At the trial, before the Lord Chief Baron, at the Sittings after last Trinity term, the following facts appeared in evidence:—Messrs. Lees, Brassey, & Co., the bankrupts, were bankers in London, and stopped payment on Wednesday the 11th of June 1835. Mr. Lee, one of the partners, had married a daughter of Mr. Koope, and on the Sunday preceding, being at the house of his father-in-law, informed Mr. Koope's son of the embarrassed state of the bank's affairs, and that they must stop payment in the ensuing week. He in-

quired what was the state of Mr. Koope's account, and, though he was anxious that some part of it should be drawn out, expressed a wish that the whole should not be withdrawn, and that neither Mr. Koope, senior, nor another person, should be informed of this communication. That other person was a shareholder of the Phoenix Assurance Company, of which Mr. K. and two other gentlemen were trustees, and the company had a balance of 8,000*l.* in the bank at this time. On Monday Mr. Koope's son drew out the whole of his father's private account. Mr. Lee saw his father-in-law in the evening of that day, and told him that the bank would close on Wednesday. Mr. Koope, the next day, acting on that information, communicated the intelligence to the Phoenix Company, and two cheques were drawn upon the bank in favour of the company, one of which was paid over the counter, and the other passed through the clearing house. The bank did not open on Wednesday, and this action was brought by the assignees against the defendant, the secretary of the company, in whose name they are empowered to sue and be sued, to recover the amount so received by the company. His Lordship left it to the jury to say, whether there was any intention on the part of the bankrupt to favour or benefit the Phoenix Company, because, if not, the defendant was entitled to a verdict. The jury having found a verdict for the defendant—

Sir W. W. Follett, in last term, obtained a rule to enter a verdict for the plaintiff, or for a new trial, on the ground of a misdirection; against which, cause was shewn, on a former day in this term, by—

Sir F. Pollock, Richards, and Martin.—It is sought to recover the money from the company, on the ground that they have been fraudulently preferred by the bankrupt; but the jury have expressly found that there was no intention on the part of the bankrupt to prefer the company, and their verdict ought not to be disturbed.

[PARKE, B.—The question is, the bankrupt having committed a fraud on the bankrupt law, with a certain intent, and the consequences of his act going beyond that intent, can the money now be recovered by the assignees?]

There is no authority for such a position. All the cases of fraudulent preference,—which is itself an excrescence upon the bankrupt law, and not originally contained in it,—depend upon the intention of the bankrupt to prefer the particular creditor. In *Fidgeon v. Sharpe* (1), Gibbs, C. J. expressly states, that “it cannot be a fraud upon the bankrupt laws, unless the actor meant it should be so.” And in *Vacher v. Cocks* (2), Bayley, J. put it upon the same ground, saying, “the question of fraudulent preference depends upon what is passing in the mind of the party making the payments, at the time when they are made.” The cases of *Harman v. Fisher* (3), *Alderson v. Temple* (4), and *Hartshorn v. Slodden* (5), all establish the same doctrine. Then, it is clear there was no intention in the mind of the bankrupt to prefer the company; on the contrary, there is evidence that he expressly desired to exclude them from the benefit which he proposed to give to his father-in-law. It cannot be said, that a bankrupt has committed a fraud upon the law, when his utmost endeavours were used to prevent its being committed.

[PARKER, B.—If there be a fraud intended, how far are its consequences to be followed? Can we take the necessary, or the probable, or the actual consequences? or are we simply to undo the fraudulent act contemplated?]

It is impossible to carry out the principle of fraudulent preference to this extent. Where can the Court stop? Various instances may be put of communications made by a trader, which may give a knowledge to his creditors of the state of his affairs; and are the creditors, who act upon such communications, to be afterwards called upon to refund, as having obtained the payment of their debts by a fraudulent preference? Such a doctrine would lead to the most serious consequences. The one great requisite is, that the act done should be the voluntary and spontaneous act of the bankrupt; otherwise, as far as

any case has hitherto gone, the transaction cannot be impeached as a fraudulent preference. Then, if there be no decision which determines the present to be a fraudulent preference, the Court will not extend the doctrine beyond its present limits. In *Crosby v. Crouch* (6), *Morgan v. Brundrett* (7), and *Atkinson v. Brindal* (8), it was laid down, that the cases on this subject have gone far enough.

Sir W. W. Follett and Wightman, in support of the rule.—This case clearly falls within the principle which supports the doctrine of fraudulent preference, namely, that all the creditors shall share rateably in the distribution of the bankrupt's estate; and that no one, or no class of creditors, shall receive an advantage by the act of the bankrupt. No doubt, it is requisite that the act which is to be impeached must be done voluntarily and in contemplation of bankruptcy. But here the act which the bankrupt did, and which he clearly intended to do, was a fraud upon the other creditors, and he must be responsible for the entire consequences of that fraud. This is not the case of a communication to A, who informs B, and thus B. is enabled to obtain payment; but the bankrupt, knowing that the party fills two characters, makes a communication to him intending to benefit him in one only. He cannot, however, limit the consequences to that fraud. In the cases suggested on the other side, no fraud at all exists in the mind of the bankrupt, whereas, here, the creditors have confessedly been defrauded by the act of the bankrupt; and the question is, how far that act is to be followed. Many instances might be suggested, in which a bankrupt's act must necessarily be treated as a fraudulent preference, though the consequences may be beyond his intention. Suppose A. and B. are creditors, and the bankrupt, intending to prefer A, make a communication to him in the hearing of B, and B, or both, obtain payment of their debts in consequence of that communication; or suppose he intend that his creditor should only draw out a portion of his

(1) 5 Taunt. 545.

(2) 1 B. & Ad. 152; s. c. 8 Law J. Rep. K.B. 341.

(3) Cowp. 117.

(4) 4 Burr. 2235.

(5) 2 Bos. & Pul. 583.

(6) 2 Campb. 166.

(7) 5 B. & Ad. 596; s. c. 2 Law J. Rep. (N.S.) K.B. 195.

(8) 2 Bing. N.C. 225; s. c. 5 Law J. Rep. (N.S.) C.P. 73.

balance, and, in consequence of the communication, he draw out the whole, could it be said that there was not a fraudulent preference to the full extent? It was contended, that the bankrupt did not know of the actual payment of this money; that can make no difference. He did an act which set the Phoenix Company in motion, and which enabled them to obtain payment.

[PARKE, B.—How would it have been, according to your argument, if, after this communication, the bankers had refused to pay the company's cheque, and they had immediately commenced proceedings, and the money had then been paid?]

It might be contended, that there is still a *locus penitentiæ*, and that the refusal to pay after the communication would remove the fraud.

[PARKE, B.—Yet the company would have obtained their money in consequence of the act done by the bankrupt.]

[LORD ABINGER, C.B.—The payment here is made in obedience to an order of the creditor, and there is no evidence of a knowledge on the part of the bankrupt that they intended to draw the cheque. Now, a demand made by a creditor takes away the character of a fraudulent preference. You must contend that the demand in this case is not to have such an effect.]

The bankrupt must have known that his communication would produce the result which happened, namely, that the money would be drawn out; and if he meant that it should not, he ought to have given orders that the cheques drawn by the company should not be paid. In fine, this was a payment in consequence of the communication made by the bankrupt, voluntarily made, and without pressure.

[PARKE, B.—The term *voluntary payment*, as applied to this subject, means a payment originating with the bankrupt.]

Cur. adv. vult.

The judgment of the Court was this day delivered by—

LORD ABINGER, C.B.—[After stating the facts of the case, his Lordship continued—] The act was done with the view of rendering a benefit to the bankrupt's father-in-law, and it was not the intention of Mr. Lee that his father-in-law should make use of the communication for the benefit

of the Phoenix Company; indeed, the very contrary was his intention. So the jury have found upon the facts of the case. The question which has been made, is not whether the jury have found a right verdict, but whether the communication being made to the father-in-law, and he being connected with the company, it was not a probable consequence of that communication, that Mr. Koope would make the use of it which he did, namely, to apprise the company of the state of the bank. It is said, that this must be taken to be a fraudulent preference of the Phoenix Company, so as to entitle the assignees of the bankrupt to recover the money which has been paid over to them. The sum of the argument is this, that, however a man's intention may be directly contrary to the desire of giving a preference to a particular creditor, yet, if from the act which he does, that creditor does get a preference, the assignees are entitled to recover the money paid. The Court, after consideration, are of opinion, that such a doctrine will carry the law a great deal farther than either the cases or principle warrant. It is admitted, that this law was engrafted by the decisions of the Judges, and particularly of Lord Mansfield, upon the Bankrupt Law. But, conceding the propriety of those decisions, we conceive the principle has diverged from what was intended by them, and there has been lately a recurrence more than before to the real principle upon which the doctrine depends. Now, in the present case, the bankrupt has not given any money at all; the money was paid by his partners, and not in consequence of the communication made by the bankrupt. They paid the money on the company's draft, upon an application by their creditor, who had obtained a knowledge of their circumstances, contrary to the intention of the party who made the communication. This, therefore, was not a payment made voluntarily by the bankrupt; it is not a payment at all by the one partner who made the communication, but his copartners paid the order of their customer. It can only be considered as a fraudulent preference, when the object is, that one creditor, or a class of creditors, shall have some particular benefit. There is no such evidence here, but directly the contrary. Two of the

partners were not parties to the communication, and the partner who made it is expressly found to have made it without any intention of giving a preference to the defendant. If the doctrine contended for be correct, we cannot conceive any case, where, in consequence of some act done by the bankrupt, the creditor might obtain information of his affairs, and, in consequence, obtain his money, in which the assignees might not recover. In no case has the principle been laid down to that extent. I must not be understood as holding it to be essential, that the party intending to favour the creditor, should be on the premises at the time when the payment is made, to render it a fraudulent preference; but I mentioned the fact as existing in the present case. I may illustrate this case thus:—suppose the bankrupt had brought a sum of money with him, and out of it had paid his father-in-law his private debt, but had refused to pay the money due to the Phoenix Company, saying, “that it was not his design to give them any preference,” and had sent back the balance; and, suppose that the father-in-law had sent after the messenger, and desired him to carry the money to the Phoenix Company, and he had done so;—there would have been no fraudulent preference. But that is this case.

Rule discharged.

1837. }
Jan. 28. } WALLIS v. DAY AND ANOTHER.

Covenant—Restraint of Trade.

A trader covenanted to sell his trade of a carrier to the defendants, and not to trade as a carrier on his own account, but to serve them as an assistant in that trade during his life; and the defendants, in consideration of these covenants and of his faithful services, covenanted to pay him 2l. 3s. 10d. weekly for fifteen years, and 1l. 8s. 10d. weekly if he survived that period:—Held, that this was not a general restraint of trade, but a partial restraint for which there was an adequate consideration.

Covenant.

The declaration alleged, that the defendants, by indenture dated July 8, 1830,

covenanted to pay to the plaintiff for the term of fifteen years from the date of the indenture, if he should so long live, the weekly sum of 2l. 3s. 10d. free from all deductions. Breach, non-payment of the weekly sums for eighteen weeks ending on the 22nd of October 1836.

The defendants cravedoyer of the indenture, and set it out. It recited—That the plaintiff had for many years carried on the business of a carrier from London to St. Ives, and thence to Wisbeach, and that he had agreed with the defendants for the sale of the said business to them, upon the terms and conditions thereafter expressed; and the indenture witnessed, that, in pursuance of the said agreement, and in consideration of the covenants, &c. on the part of the defendants, and of 10s., the plaintiff sold to the defendants the good-will, interest, and advantage which he had in his business of a carrier from London to St. Ives and thence to Wisbeach; and he, for the considerations before expressed, covenanted that he would not thenceforth during the term of his life, either by himself or by any person on his behalf, use or follow the business of a carrier, except as thereafter was excepted, and that he would, to the utmost of his power, promote and encourage his connexions and customers becoming the connexions and customers of the defendants. The plaintiff then covenanted that he would, during his life, serve the said defendants as an assistant in the said trade of a carrier, and diligently attend to the business and concerns thereof during the usual hours of business, and would not do any wilful damage or injury to the said defendants, nor suffer any to be done, without acquainting them therewith. And the defendants, for the considerations before expressed, and in consideration of the covenants thereinbefore contained, and of the good and faithful service of the said plaintiff, covenanted to pay the sum of 2l. 3s. 10d. weekly for the term of fifteen years, and, if he should survive that period, the weekly sum of 1l. 8s. 10d. during his life. It was then provided, that if the plaintiff promoted any other person in the business, or did not serve the defendants faithfully and honestly, the complaint should be referred to a person named, or if he should be dead, to his executors or to two arbitrators; and if the arbitrators

should find that the plaintiff had robbed the defendants or embezzled their money, or fraudulently sought their customers, or been absent from his service without being excused by sickness or imprisonment, for one calendar month, the weekly payments should wholly cease; and if he absented himself for less than a month, a deduction was to be made from the weekly payments.

The deed being thus set out on oyer, the defendants demurred generally, and there was a joinder in demurrer.

Kelly, on a former day, argued for the demurrer.—This action cannot be maintained. The defendants covenant, in consideration of the plaintiff's covenants, and also of his serving them faithfully, to pay the weekly sum now sought to be recovered. But the plaintiff's covenants are illegal. He covenants not to carry on his trade during the whole of his life in any place. That covenant amounts to a general restraint of trade, and is void, being against good policy.

[LORD ABINGER, C.B.—The consequence will be then, that, although the plaintiff may have given his services to the defendants, he is not to be paid anything for them.]

The plaintiff will recover for his services what they are worth, but not the 2*l.* 10*s.*, that sum is not the recompense for his services. Besides, it is not clear that he has performed any services at all.

[LORD ABINGER, C. B.—It must be taken on this demurrer that he has done so.]

That would be the case if the covenant to pay this weekly sum were dependent upon the condition of his due service, but the covenants in truth are independent, and one is conditional upon the other—*Hunlock v. Blacklowe* (1).

[LORD ABINGER, C. B.—So that, if the plaintiff had broken his covenant and had carried on his business of a carrier, he would nevertheless have been entitled to recover this payment?]

Certainly. If, however, the consideration for the defendants' covenant be the performance of that illegal covenant, they are not liable upon it.

[PARKE, B.—The question as to the consideration is immaterial here, because this covenant is contained in an instrument under seal.]

(1) 2 *Saund.* 156; 1 *Mod.* 64.

But if the covenant be illegal it cannot be enforced; and there are numerous authorities which shew, that a general restraint upon a party from carrying on his trade anywhere is illegal; and that a covenant entered into to enforce that restraint is void—*Mitchell v. Reynolds* (2), *Chesman v. Nainby* (3), *Homer v. Ashford* (4), *Young v. Timmins* (5). A partial restraint on a sufficient consideration may indeed be allowed, but the sufficiency of the consideration must be proved. There is one case, namely *Bunn v. Guy* (6), which may be cited against the general doctrine, but in truth it does not touch it.

[LORD ABINGER, C. B.—Suppose there had been no consideration at all for this covenant, would it not have been binding? Then, it is shewn, that the defendants' covenant was in consideration of the performance of three things, and they cannot enforce the performance of one of them; they are not, therefore, relieved from their covenant.]

The case goes farther; the covenant is an illegal one.

[LORD ABINGER, C. B.—Suppose it were performed, there is nothing criminal in the performance; the party would not be liable to an indictment for so doing.]

But, in *Thorpe v. Cole* (7), there was an agreement for a reference of a poor-rate, which is not in itself a criminal act,—on the contrary, it is highly beneficial; yet, as it was not allowed to be done by law, this Court held it could not form the consideration of a contract.

[PARKE, B.—That was the case of an assumpsit, not covenant, as here. The only ground for avoiding this covenant is, that a part of the consideration for it was the plaintiff's covenant to abstain from carrying on his trade, which is alleged to be illegal; and, as there is no means of separating the several considerations, the whole is void. If there had been a reservation of 5*s.* in respect of this covenant, and 2*l.* for the rest, the defendants' covenant would only have

(2) 1 *P. Wms.* 181.

(3) 2 *Stra.* 739; s. c. 2 *Lord Raym.* 1456.

(4) 3 *Bing.* 322; s. c. 11 *B. Moo.* 91.

(5) 1 *C. & J.* 331; s. c. 9 *Law J. Rep. Exch.* 68.

(6) 4 *East.* 190.

(7) 2 *Cr. M. & R.* 367; and 1 *M. & W.* 531; s. c. 5 *Law J. Rep. (N.S.) Exch.* 24; 281.

been void as to the former part. I agree with the argument that there is no condition, and that the question has nothing to do with consideration; but the only way to look at it is, that the defendants' covenant must be considered as a reward for the plaintiff's entering into this engagement.]

Wightman, contra.—There is a preliminary question here, whether, assuming these covenants to be independent, the objection can be taken in this action: it is submitted that it cannot. In all the cases where the objection has been raised, it has been taken in answer to an attempt to enforce the particular covenant alleged to be illegal. There is no such attempt here. Again, there is a distinction between covenants void at common law and by statute. In the former case, those covenants only which are contrary to law are void, the others are not; whereas, in the latter case, if part be illegal the whole is avoided—*Pigot's case* (8), *Fetherston v. Hutchinson* (9), *Norton v. Syms* (10).

[*PARKE, B.*—In the case in *Hobart*, the bond is conditioned for the performance of two distinct things; here the question is, whether the inducement for the covenant is legal.]

In equity, there may be relief, though the covenants be independent, but the illegality of one is not an answer in law to a declaration on the other—*Newman v. Newman* (11), *Greenwood v. the Bishop of London* (12). If, therefore, the Court should think that the different considerations be separable, then whether this covenant be legal or illegal is immaterial. But, in truth, it is not illegal. Now, a partial restraint, for which there is an adequate consideration, is good. Here there is no absolute restraint; the plaintiff is only prevented during his life from carrying on his trade as a master; he may work as the assistant of the defendants in that trade. The public will obtain all the benefit of his talents and industry as the defendants' assistant, whereas, but for such a covenant, it might have been wholly lost. This is probably the most beneficial mode of employing them.

[*LORD ABINGER, C.B.*—It is a common stipulation in partnership deeds, that one partner shall not carry on the business at any other place than where the firm are settled.]

Then, is there any illegality in a man's being restrained from acting as a master tradesman? No case has yet established that there is. The nearest to the present was *Young v. Timmins*; that case, however, was decided upon the ground, that no adequate consideration was disclosed. Here, there was only a partial restraint, for which there was an adequate consideration—namely, the payment of the annuity.

Kelly replied.—The covenant to serve another during the covenantor's life is void. It is contrary to general principles, and contrary to *Magna Charta*; it is a restraint upon personal liberty.

[*PARKE, B.*—Have you any authority for the position, that a man cannot bind himself to serve another for the term of his whole life?]

No; but it is evidently against the principles of the law. Then, as to the argument respecting the legal and illegal parts of the covenant,—that is not applicable here, because they cannot be severed.

[*LORD ABINGER, C.B.*—How do we know that the plaintiff does not communicate as much of his knowledge and ingenuity to the public in his present situation as if he had continued a master?]

Cur. adv. vult.

LORD ABINGER, C.B., on this day, delivered the judgment of the Court. After having stated the deed and the covenants, he continued:—The demurrer is supported on the ground that the plaintiff has no right to bring an action for the price stipulated to be paid him for his wages, because the deed contains a covenant by him not to carry on his trade of a carrier as a master. It is said, that it is illegal, and contrary to good policy, as being in restraint of trade, and that, this part being void, the whole is void. If that be true, the consequence will be, that the plaintiff will be bound by his covenants to serve the defendants; but he may never obtain any compensation for his services. It cannot be doubted, that if a party make several contracts, one of which may not be enforce-

(8) 11 Co. Rep. 27.

(9) Cro. Eliz. 199.

(10) Hob. 14.

(11) 4 Mau. & Selw. 66.

(12) 5 Taunt. 727.

able on the ground of illegality, he is, nevertheless, liable to perform the others. Therefore the plaintiff would be answerable on his covenant, if he refused to render his services to the defendants. It was, indeed, suggested, that the covenant by the plaintiff to serve during his life was illegal. No case was cited in support of that position; and there is no principle on which it proceeds. There is nothing unlawful in an engagement to serve another for life. On the contrary, my Brother Parke has referred me to a case in *Vin. Abr.* (14), where it was held, that such contract must be by deed, which raises an implication, that the Court thought such a contract might be good; though certainly it is not a direct authority. Then it is said, that the covenant not to carry on the trade as a carrier, but to serve the defendants for his life, was illegal. The reverse was decided in *Wickins v. Evans* (15), where a contract by three persons to take a particular district each to himself, and not to interfere with the districts of the others during his life, was held to be binding, though the contract was for the term of the parties' lives. There is, therefore, no authority for saying, that a contract to serve another for life, or to be restrained from carrying on business as a master for life, is illegal. The judgment of the Court in favour of the plaintiff may be sufficiently supported by the authorities cited in the judgment of the Court in *Mitchell v. Reynolds* (16). The law there laid down is, that contracts in general restraint of trade are illegal, being considered as contrary to the public benefit which results from the free exercise of trades, and to the private benefit of individuals who are oppressed and restrained from their natural freedom. But where the public or the individual gains some advantage from the contract, it is good. The mere naked contract, without consideration, by which a party binds himself to refrain from carry-

ing on his trade is, no doubt, bad; but such a contract may be made under circumstances which shew, that the public or the individual have a good consideration for the restraint. A case is put by Lord Chief Justice Parker, in *Mitchell v. Reynolds* (17). Suppose a man engaged in trade was desirous in his old age of selling it, and procuring himself a maintenance for the rest of his life, his covenant would be lawful. That is like the present case. Here, the party has sold his business to the defendants. He does not enter into a covenant not to trade again, but he contracts to continue in his trade as long as he is able to carry it on as their servant; when he comes to his old age, and is no longer able to trade, he is to receive a smaller allowance. It cannot be said, that this is in restraint of trade, where the party covenants to carry it on as long as he is able. And it seems to us, that there is a sufficient adequate consideration for the plaintiff ceasing to trade as a master, and covenanting to trade as the defendants' servant. There must, therefore, be—

Judgment for the plaintiff (18).

1837. }
Jan. 17, 18. } CARRINGTON v. ROOTS.

Statute of Frauds—Memorandum in Writing—Interest in Land.

To a declaration in trespass for taking a horse and cart, the defendant pleaded that he was possessed of a field and a crop of grass growing therein, and that he distrained the horse and cart, damage feasant; the plaintiff replied, that the defendant agreed to sell and sold, and the plaintiff agreed to buy and bought of the defendant

(17) The passage is the following, at p. 194:—
“The fourth reason is in favour of these contracts, and is, that there may happen instances wherein they may be useful and beneficial, as to prevent a town from being over-stocked with any particular trade, or in case of an old man, who, finding himself under such circumstances, either of body or mind, as that he is likely to be a loser by continuing his trade, in this case it will be better for him to part with it for a consideration, than by selling his custom he may procure to himself a livelihood, which he might probably have lost by trading longer.”

(18) See *Coker v. Hitchcock*, in the Exchequer Chamber, *post*.

(14) In *Vin. Abr.* ‘Master and Servant,’ (N), where the statutes 34 Edw. 3. c. 9 & c. 10. are commented upon, it is stated, “If a labourer be retained to serve for term of life, he shall not have an action of debt against the executors of his master without deed; for the statute does not compel him to serve in such form. Contra, if he had been retained for one year—Bro. ‘Laborers,’ p. 44, citing 2 H. 4, 15.”

(15) 3 Gr. & J. 318.

(16) 1 P. Wms. 181.

the said crop of grass, with liberty to the plaintiff to cut the said grass, and take it from the said close when fit to be cut; and that the plaintiff, by virtue of the agreement, entered into the possession of the said crop, and brought his horse and cart for the purpose of cutting and carrying away the said crop of grass, wherefore the defendant committed the trespasses *de injuriâ*. The defendant, in his rejoinder, traversed the agreement:—Held, that on these pleadings the plaintiff was bound to shew a valid contract in law for the sale of the grass; and, therefore, there being no note in writing of the agreement for the sale, the plaintiff could not recover, even though it was to be considered as a sale of an interest in land.

Where there is a sale of an interest in land, without a note in writing, it operates as a licence to the purchaser to excuse his entry on the land, but cannot be rendered available as a contract in any way.

Trespass for seizing and detaining a horse and cart.

Plea—That the defendant was lawfully possessed of a close, with the appurtenances, situate at the parish of St. John's, Hampstead, and was also possessed of a certain crop of grass, there then growing and being, and that he distrained the horse and cart damage feasant to the said crop of grass. Third plea, similar to the second, only alleging that the defendant seized the horse and cart for the purpose of removing and carrying away the cart from the said close.

Replication—That while the close and crop of grass were the close and grass of the defendant, the defendant agreed to sell and sold to the plaintiff, and the plaintiff then agreed to buy and bought of the defendant, the said crop of grass, at and for a certain sum, at the rate of 5*l.* 10*s.* per acre, for each acre of the said grass, with liberty to the plaintiff to cut the said grass, and take the same from the said close, when fit to be cut and taken, and for that purpose to enter into and upon the said close with his horse and cart; *by virtue of which agreement* the plaintiff afterwards entered into the possession of the said crop, and became and continued possessed thereof, until the defendant, before the said time when, &c., wrongfully took pos-

session of a part of the said crop without the plaintiff's consent, and that the grass was fit to be cut and taken, and the plaintiff, for the purpose of cutting and taking away the said grass, then brought his said horse and cart into the close, and upon the said crop of grass therein, wherefore the defendant committed the trespasses *de injuriâ*. There was a similar replication to the second plea. In the rejoinder the defendant denied the agreement to sell, and the sale and the agreement of the plaintiff to purchase the said crop of grass, with liberty to the plaintiff to cut or take the said grass, or to enter into and upon the said close with his horse and cart.

At the Middlesex Sittings, after Michaelmas term, before Gurney, B., it appeared that the plaintiff had agreed, in May, to purchase a crop of growing grass in a field, of four acres, belonging to the defendant, near Hampstead, for the price of 5*l.* 10*s.* per acre, to be cleared by the end of September; there was no memorandum in writing; and it was said, that one of the terms was, that half the price should be paid down before any of the grass was cut by the plaintiff, and as he had not paid this sum of money, the defendant turned the plaintiff's horse and cart out of the field, and prevented him from carrying away the grass. This was the trespass complained of. It was objected, that the action was not maintainable, there not being a memorandum in writing of the agreement; that, whether this was an interest in land or a contract for the sale of goods, wares, and merchandises, there must be a note in writing; and if it should be held, that this was a contract for the sale of a chattel, then there was a variance between the evidence and the record, because, according to the latter, the sale was of a chattel, whereas the evidence disclosed the sale of an interest in land. The learned Judge refused to nonsuit, but reserved the points; and in Michaelmas term—

Greenwood obtained a rule for a nonsuit, against which—

Erle and *Chandless* now shewed cause.—This is not the case of a sale of goods, when a note in writing would be requisite, but it is a contract for the sale of an interest in land; and it is not material in this action, that there is no memorandum in

writing. This is not an action brought to charge the defendant on any contract or sale, according to the language of the 29 Car. 2. c. 3. s. 4.; but it is an action of trespass to recover damages for the defendant's wrongful seizure of the plaintiff's horse and cart. It will be seen that the language of the 4th and of the 17th sections differs. In the latter, the contract itself is rendered void, but not so in the former. The plaintiff may therefore avail himself of the contract to repel a trespass committed by the defendant. This is the construction which has been put upon the statute by Lord Ellenborough, in *Crosby v. Wadsworth* (1), where he says, "The statute does not expressly and immediately vacate such contracts, if made by parol; it only precludes the bringing of actions to enforce them, by charging the contracting party or his representatives, on the ground of such contract, and of some supposed breach thereof, which description of action does not properly apply to the one now brought, viz. a mere general action of trespass, complaining of an injury to the possession of the plaintiff, however acquired, by contract or otherwise." So also in *Teal v. Auty* (2) it was held, that where a contract for a sale of growing trees had been executed and acted upon, the objection of the want of a note in writing could not be taken in an action for the price of the trees. An analogy may be derived from the construction which has been put upon other statutes, where the same language is used. Thus, the Statute of Limitations enacts, "that no action of debt, &c. shall be brought, except within six years," yet it is necessary to plead the statute specially, and the statute does not defeat the debt, otherwise there could be no lien for a debt to which the statute applies, whereas the contrary has been decided. So, the statute of the 24 Geo. 2. c. 40 (the Spirituous Liquors Act), enacts, "that no person shall maintain any action where the debt has not been contracted at one time to the amount of 20s.;" yet it has been held that the debt is not void, but that money paid generally may be appropriated to the discharge of a debt contracted contrary to the provisions

of this act—*Cruikshanks v. Rose* (3). Here, the trespass is the substantial cause of action, and the contract is only incidentally brought into the case. Then, is this an interest in land? It is an agreement for the sale of a growing crop of grass made before it is fit to cut. It is not a sale of grass severed, nor is it to be cut by the owner of the land and then to be sold, but the plaintiff is himself to cut it. The distinction which has been taken in the cases on this subject is of things which would be emblements, and they are to be considered as chattels, whereas those which are not emblements are to be treated as interests in the land—*Evans v. Roberts* (4). It cannot be said that growing grass would be emblements. It resembles the case of growing trees, which are interests in land—*Scorell v. Boxall* (5), which was distinguished from *Smith v. Surman* (6), because the Court held, that there was a sale of the timber when cut, in the latter case, and not of the growing trees. The result of the authorities is, that wherever the subject of the sale is that which has been a part of the inheritance, and has not been severed from the land by the act of the tenant, there is a sale of an interest in the land. The present case clearly falls within that rule. There was also a provision for taking the aftermath; that cannot, however, affect the nature of this transaction, so far as it relates to this action of trespass.

Greenwood, in support of his rule.—First, the plaintiff has no right to maintain this action, not having any memorandum of the agreement. Admitting that this was an interest in land, there is no ground for distinguishing between the case of an action brought to enforce the contract and the party availing himself of it, as the plaintiff seeks to do by way of asserting his right. There is, indeed, a difference in the language of the 4th and 17th sections, but the ordinary inference from that is weakened by the long interval between the two sections, the interposition of a great variety of other matters, and the irregular framing of the whole act; and evidently the legis-

(1) 6 East, 611.

(2) 2 Brod. & Bing. 99.

NEW SERIES, VI.—EXCHCO. PL.

(3) Mo. & Rob. 100; see also *Philpott v. Jones*, 2 Ad. & El. 41; s. c. 4 Law J. Rep. (N.S.) K.B. 65.

(4) 5 B. & C. 829; s. c. 4 Law J. Rep. K.B. 313.

(5) 1 You. & Jer. 396.

(6) 9 B. & C. 561; s. c. 7 Law J. Rep. K.B. 296.

lature did not intend to make any different provision in these two cases. The object was, to require written evidence in both cases; and the meaning of the legislature is, that, in either case, a parol contract shall be void. It is conceded that there is no remedy on the contract. How, then, can it give a right? In all the cases, the language of the Judges has been that such a parol contract is "void"; if it be so, it cannot be available to the plaintiff—*Chater v. Becket* (7), *Thomas v. Williams* (8). The plaintiff relies upon the construction put upon the Statute of Limitations, and that regulating the sale of spirituous liquors, but they do not afford any authority. It may be, that a lien is not barred by the Statute of Limitations; but it has been held, that a defendant cannot set off a debt barred by it. Again, a direction in a will to pay all debts, does not apply to a debt barred by the statute—*Ex parte Dendney* (9). As to the latter statute, *Scott v. Gilmore* (10) shews, that not only it prevents an action being brought upon the contract there described, but it makes the contract itself void, and avoids a security based, even for a part of its consideration, upon such a contract. But the observation of Lord Ellenborough in *Crosby v. Wadsworth* has been cited: the real meaning of that observation is, that the contract, though void as such, might be available as a licence. There might be a difficulty in maintaining such a construction, namely, that what the parties intended to be a contract should, by the non-observance of certain statutory provisions, be converted into a licence revocable; it is not, however, sought by the defendant to deny Lord Ellenborough's dictum; but then the plaintiff ought to have pleaded a licence, and not a contract. If it had been pleaded as a licence, the defendant could have pleaded, and shewn that it had been countermanded. It may also be considered, that this is an action brought to charge a person on the contract, as in *Scorell v. Bozall*. Then, secondly, there is a variance; if the pleadings be looked at, it appears that the plaintiff claims a chattel. He follows the

(7) 7 Term Rep. 201.

(8) 10 B. & C. 201; s. c. 8 Law J. Rep. K.B. 414.

(9) 15 Ves. 488. See, however, *Jones v. Scott*, 1 Russ. & M. 355; s. c. 9 Law J. Rep. Chanc. 252, where the contrary was decided by Brougham, L.C.

(10) 3 Taunt. 226.

language of the plea, and sets up a purchase of a crop of grass. The meaning of the terms must be gathered from the understanding of the parties, disclosed upon the record—*Heath v. Milward* (11). The crop of grass, and the liberty of going and cutting it, are severed in the plea, and continue so severed in the replication; and it is shewn, that what was intended to be bought was that chattel, namely, the crop of grass, and not any interest in the field itself. That this was a chattel may be deduced from *Evans v. Roberts*.—[Here he was stopped by the Court.]

LORD ABINGER, C.B.—It is admitted by the plaintiff, that if this were a contract for a sale of goods, the action could not be maintained; but it is insisted that, the contract being for a sale of an interest in land, the action is not defeated, though there is not any note in writing. Suppose that that was a matter of doubt, and that we should be inclined to hold that this contract bore the character of an interest in land, and, therefore, that it fell under the provisions of the 4th section, the question would arise, whether, under that section, which enacts, that no action shall be brought on any contract, without a note in writing, it is meant that it shall not be available for any purpose. I think that it cannot be available as a contract at all, if no action can be brought upon it, although it may afford an apology or excuse, if a party is put into possession under it, and an action of trespass be afterwards brought upon it. There is, in effect, an attempt by the plaintiff, to avail himself of the contract in the present case. If the whole of his case were set out in the declaration, the contract would form a part of it, and it would appear that the plaintiff claimed the right of an exclusive enjoyment of the close, and of taking a cart into the field, by authority of the defendant; that would be a collateral and incidental mode of obtaining the benefit of the contract; whereas, the meaning of the statute is, that the contract shall be altogether void. But on these pleadings, it will be seen, that the replication sets up a contract, which must mean such a one as is available to give a party a right which can

(11) 2 Bing. N.C. 98; s. c. 2 Scott, 168; 4 Law J. Rep. (N.S.) C.P. 222.

be enforced. The only sense which can be given to it, is, that there is a legal contract by which he claims the right. Now there is no legal contract, if he cannot enforce the right; and the evidence shews that he could not enforce the contract. It is another thing to say whether the plaintiff might not have pleaded a licence. A contract is something more than a licence. This contract, if there had been no countermand nor objection made to it, might have been available to the plaintiff, if he had put his horses and cart in the field, as a licence. He would then have shewn matter of excuse, which would have taken from the defendant all right to maintain an action of trespass. That is the utmost extent to which the plaintiff could have availed himself of this contract. But, as it is, the replication is not sustained.

PARKE, B.—I am of the same opinion. The evidence does not support the replication. I have had some doubt in this case, but the result of my consideration has brought me to that conclusion. The whole question turns on the meaning of the replication—[His Lordship here read the pleadings.] The allegation, that the defendant wrongfully took possession of a part of the crop, without the plaintiff's consent, is not mainly of importance; because the real question is, whether this was a mere licence or a binding contract, and, therefore, my judgment does not proceed upon it, but it helps to shew the plaintiff's meaning in the replication:—my judgment would have been the same, though it were wholly omitted. What does the plaintiff mean, when he states an agreement for the purchase of the crop? Does he mean a licence by operation of law, or a binding contract, that he should have a right to take this crop of grass? I am of opinion, that the latter is the true construction. It means a real binding agreement in point of law, which the party can enforce as a matter of right. Even if it be an agreement which cannot be enforced on both sides, it may have an operation, for it has the effect of a licence countermandable. That is the correct result of the observation in *Crosby v. Wadsworth*. It is a licence to enter and take the crop of grass. The plaintiff might have pleaded it as such, and his evidence would have supported it. But my opinion is, that on the true construction of the re-

plication, this is an averment of a binding agreement, and of a right to enter, by virtue of a contract which is not proved.

BOLLAND, B.—This is an assertion that the plaintiff had a right to enter, by virtue of an agreement for the purchase of a crop of grass, with liberty to come and cut it. The question is raised on the validity of that contract; if it be necessary that there should be a contract to support the right claimed, it appears that the agreement is void by the statute.

GURNEY, B. concurred.

Rule absolute.

1837. }
Jan. 25. } THE KING v. GEORGE ATKINS.

Customs—Bond—Custom-house Agents—Licence—Evidence—Variance.

By the 3 & 4 Will. 4. c. 52. s. 144. licences granted to Custom-house agents under the 6 Geo. 4. c. 107. s. 1. are continued in force, though that statute was repealed by the 3 & 4 Will. 4. c. 50.

Semble—that commissioners of Customs might at common law take bonds from persons licensed by them to act as Custom-house agents, for the faithful conduct of such persons towards his Majesty's Customs.

In the assignment of breaches on a Custom-house agent's bond it was alleged, that certain silk goods were entered by him for exportation, from abroad, and landed by him, on which certain duties were payable upon importation, and that they were afterwards warehoused by him. At the trial, no evidence was given of the nature of the goods, but it was proved that the defendant paid the duties of importation:—Held, that it was not to be assumed that the goods were prohibited goods, or warehoused for exportation only, and therefore that they must have been such as were liable to the payment of duties.

*Scire facias on a bond for 1,000*l.*, given by the defendant to the King.*

The defendant, in his plea, set out the bond and the condition, which recited that the defendant had applied to the commissioners of Customs for a licence to enable him to act as a Custom-house agent, which they had granted in pursuance of the powers vested in them by the 6 Geo. 4.

c. 107, and the condition was stated to be, that the defendant, and any clerk whom he might appoint to act for him, in the manner prescribed by the said act, should, at all times during the continuance of the said licence, conduct themselves faithfully and incorruptly, and should not wittingly or willingly do any act prejudicial to his Majesty in his customs or duties, and that he should not part with the licence, but give it up to the commissioners when he ceased to act as agent. The defendant then pleaded performance of the condition in terms.

The replication assigned breaches of the condition of the bond. The first was as follows:—that whilst the defendant was such licensed agent, two cases of goods, being silks and gloves, were entered by him for exportation from abroad, i. e. from Calais into Great Britain, and afterwards landed, and a full entry thereof made on the 11th of September 1834, on which certain duties were payable upon importation: that the goods were duly warehoused without payment of the duties, and were afterwards entered outwards for exportation to Calais, and security was given for the due shipment and exportation by the said defendant, to whom a cocket was granted, and an order was made out to the locker of the warehouse for the delivery of the said two cases; but that, instead of these cases, two other cases, containing cotton goods, not being subject to the payment of any duties on importation, were, knowingly and illegally, and with intent to defraud his Majesty of his said customs waterborne, put on board ship for exportation, which two cases were so waterborne with the knowledge and consent, and by the contrivance of the defendant, with intent to prejudice his Majesty in his said Customs, and thus the condition of the bond was broken, and the defendant acted contrary to the statute in that case made and provided. The other breaches merely varied the statement of the same transaction.

The defendant, in his rejoinder, denied the breaches alleged.

The case came on for trial before the Lord Chief Baron, at the Sittings after last Easter term, when a verdict was found for the Crown; and subsequently, upon a motion in arrest of judgment or for a new trial, it was ordered, that the opinion of the Court should be taken upon a special

CASE,

which set forth the bond, dated the 22nd of March 1830, executed by the defendant and his surety, bearing the condition stated in the pleadings, and continued:—

On the 28th of August 1833, the statutes 3 & 4 Will. 4. c. 50, 51, 52, 53, 55, 56, and 57, received the royal assent. By the former of these statutes, the 6 Geo. 4. c. 107. was repealed. On the 30th of August 1834, the defendant, as agent of Richard Girard, the importer, took out a bill of sight for four cases of merchandise, further particulars unknown, being in the ship *Belfast*, then lying in the river Thames, from Calais, and under this bill of sight the four cases were examined, and found to contain foreign goods, and were warehoused by the defendant, as agent for Richard Girard, for exportation only, without the payment of any duty, according to the provision contained in the last-mentioned act of parliament. Two of the cases were marked; and upon the 11th of September an entry was passed by the defendant for the exportation of these two cases. Under colour of this entry, the defendant attempted to export two other cases, similar in appearance, but which, being examined by the officers of his Majesty's Customs, were found to contain goods of British manufacture. The bonded cases, containing the foreign goods, were afterwards removed from the warehouse, and the regular duties of importation were paid on such goods.

The questions for the opinion of the Court were, first, whether the above bond could now be put in force; secondly, whether the goods warehoused for exportation only were subject to the payment of duties described in the pleadings. If the Court should be of opinion in the negative of either of the above questions, the verdict was to be entered for the defendant; but if in the affirmative of all the above questions, then the verdict was to be entered for the Crown.

F. Barlow, for the Crown.—The first question is, whether the bond is valid. It was valid when entered into; but it is said, that the repeal of the 6 Geo. 4. c. 107, by the 3 & 4 Will. 4. c. 50, rendered it void in 1834, when the breach of it took place. There are three answers to this objection: first, that the bond and the licence are good and

valid independently of any statute. There can be no doubt that the commissioners might grant a licence to any individuals to act with their sanction; such licence and sanction would be a benefit to agents; and they might justifiably require the agents, to whom they granted their licences, to bind themselves to behave honestly and faithfully as such agents—*Jones v. Wollam* (1). Secondly, the repeal of the former statute does not vacate the licence and the bond given under it, if there be nothing in the provisions of the 3 & 4 Will. 4. c. 50. inconsistent with that licence and bond. Certainly, nothing inconsistent is contained in that statute; it simply repeals the former act. That a simple repealing statute does not vacate proceedings under the repealed statute appears from the decisions relative to the charges by clergymen upon their livings. The 13 Eliz. c. 20. prohibited all such charges; but that statute was repealed by the 43 Geo. 3. c. 84, which was repealed by the 57 Geo. 3. c. 99, and the statute of Elizabeth was revived. In the interval, however, many cases occurred in which clergymen charged their livings; there was nothing in the repealing statute which saved those charges; yet it was held that they continued valid notwithstanding the act under which they were created was repealed—*Doe d. Broughton v. Gully* (2), *Doe d. Wilks v. Ramsden* (3). Thirdly, the subsequent statute did in effect protect all past licences and bonds. They were first required by the 4 Geo. 4. c. 69. s. 46 (4), and that was not to be until after the

expiration of one month from the passing of the act: other expressions in different sections in that statute are prospective only. In the 6 Geo. 4. c. 107. s. 139 (5), however, where persons are prohibited from acting as Custom-house agents unless licensed, there is no postponement of the time, but the prohibition is immediate. It must have been contemplated by the legislature that there were many licences then existing, and it never could have been intended that they should all be determined. Such an enactment would have been most serious in its consequences, as it would have stopped the proceedings in the Custom-house for a considerable time, until the new licences could have been prepared. There is also a provision in sec. 142, which applies to the clerks of the agents, and prohibits them from acting as clerks to the agents, until their name, &c., shall have been indorsed on the licence of such agent, unless such person shall have been appointed by the commissioners of Customs before the commencement of that act. It seems irrational to provide that the clerks shall continue empowered to transact the business, and not to provide for their masters, if it can be supposed that the legislature intended that the licences granted to the latter should cease. The language of the 3 & 4 Will. 4. c. 52. s. 144, 147. is the same as that in the 6 Geo. 4. c. 107. Several instances will be produced in the different Customs Acts, in which the legislature has expressly kept alive commissions, bonds, or licences, given and granted under previous repealed statutes, as the 3 & 4 Will. 4. c. 51. s. 5, 9; c. 52. s. 95; c. 53. s. 26; c. 55. s. 4; c. 57. s. 4,

(1) 5 B. & Ald. 769.

(2) 9 B. & C. 344; s. c. 7 Law J. Rep. K.B. 201.

(3) 4 B. & Ad. 608.

(4) Which enacts, "That from the expiration of one calendar month next after the passing of this act, no person shall act as an agent for transacting any business at the Custom House in London, which shall relate to the entry or clearance of any ship or ships, or to the clearing of any goods or baggage, or the passing of any entry whatever, upon which any revenue of Customs shall be payable, unless authorized so to do by licence under the hands and seals of the commissioners of Customs, and the said commissioners, or any two of them, may grant any such licence to any person or persons who may require the same; and, in such cases, the said commissioners may require a bond to be given by every person to whom such licence shall be granted, for acting as such agent, with one sufficient surety in 1,000*l.*, conditioned in the faithful and incorrupt conduct of every such person, and of his clerk acting for him as herein provided, and to deliver up such

licence if the same shall be revoked within seven days after the notice of such revocation."

(5) Which enacts, "That no person shall act as an agent for transacting any business at the Custom House in the port of London, which shall relate to the entry or clearance of any ship, or of goods, or of any baggage, unless authorized so to do by licence of the commissioners of Customs, who may require bond to be given by every person to whom such licence shall be granted, with one sufficient surety in 1,000*l.*, for the faithful and incorrupt conduct of such person, and of his clerk acting for him; provided that such bond shall not be required of any person who shall be one of the sworn brokers of the city of London; and if any person shall act as such agent, not being so licensed, or if any person shall be in partnership in such agency with any person not so licensed, such person shall, in either case, for every such offence forfeit 100*l.*"

but an examination of the different provisions in those statutes will shew the necessity of introducing such specific provisos.

The second question in the case is, whether the foreign goods, which had been imported, were goods liable to the payment of duties, which is the ground for a new trial. There can be no doubt that they were. It is so alleged in the replication, and the defendant has not denied it.

[PARKE, B.—If that fact be necessary to constitute the defendant's misconduct, by denying his misconduct he has put it in issue.]

The goods were imported and warehoused for exportation; they must be liable to the payment of duties; and the defendant did, in point of fact, pay the duties upon them.

Welsby, contra.—As to the first point. First, the defendant is not answerable on this bond at common law. It is a bond given to the King to secure the due performance of the defendant's duty, under the licence granted by the commissioners of Customs. They, however, have no authority to impose a licence independently of the statutes. It can be no benefit to a person desirous of acting as a Custom-house agent, to be subjected to such a bond as the present. But the condition of the bond expressly refers to the statute, and the bond purports to be taken by its authority. The bond also is to be in force so long as the licence continues; that is clearly imposed by the statute. *Jones v. Wollam* is distinguishable, because there the bond was good at common law; here it is a restraint upon a person's exercise of his trade. Secondly, it cannot be set up as a common law bond, because the replication alleges the misconduct of the defendant to be an act contrary to the statute.

[PARKE, B.—The bond cannot be supported on that ground; it is to continue during the existence of the licence: if you can make out that that is determined, the bond has ceased to be in force.]

Then the repeal of the statute has put an end to the licence? Where there is a simple absolute repeal of any statute which gives authority to do an act, all acts which are done under it, unless expressly saved, are avoided. The cases referred to, of the clergymen's charges, were decided upon a very different principle. But it is said, that the new code of the laws of the Cus-

toms, adopted the licences which were created under the old acts, and kept them in force: that, however, will be found not to be the case. Certainly, the statute of the 3 & 4 Will. 4. c. 51. does not, in express terms, continue the old licence; but, it is contended, that it does so by inference. That inference does not necessarily arise, and is rebutted by various provisions contained in those statutes. The repealing statute, c. 50, has a saving of all penalties and forfeitures incurred under the former acts; which would hardly be necessary, if the statutes, by inference, continued the previous provisions. Reference has been made to the postponement of a month, in the 4 Geo. 4. c. 69, but it will be observed, that in that statute, many new provisions are made, which might require preparation, and some parts of the act will come into operation before others. In the subsequent acts, it might be considered unnecessary to give that time, because the parties might be prepared with their licences and bonds ready to be executed.

[LORD ABINGER, C.B.—The penalty could not be recovered from an agent, who was protected by a licence granted under the former acts. Surely, the licence was kept in force to protect him from the penalty.]

The 147th section is said to protect the clerks of the agents, by the licence previously given to the latter; but the real object of that section was to make fresh regulations regarding the authority to be given to clerks, which were not to be required where a clerk had previously been licensed. The different exceptions and savings expressly made by the legislature in the instances referred to on the other side, have not been satisfactorily answered, and shew the understanding of the legislature, that the licences, bonds, &c. existing at the time when the statute was repealed, were determined.—Then, as to the second point, which turns on the evidence. The replication states, that goods were imported into this kingdom, subject to the payment of duties, for which other goods were substituted on which no duties were payable. Now the evidence does not prove that the goods imported were liable to the payment of the duties; and if they were not, there was a variance, because the fraud would have been different from that which is alleged.

For aught that appears to the contrary, they were prohibited goods, or goods entered for exportation only; in which cases, no duty would be payable thereon at all, or not on their first entry, and if so, they ought not to have been described as goods liable to the payment of duties absolutely—*The Attorney General v. Key* (6), and *The Attorney General v. Greaves* (7).

Barlow, in reply, was stopped by the Court.

LORD ABINGER, C.B.—This case involves two points. The first is, whether the licence continues, notwithstanding the repeal of the statute. If so, the bond may well continue. If, indeed, the commissioners were authorized in granting the licence by the statutes, the bond would be good at common law. The question, however, is, whether the licences continued. Some ambiguity arises upon the language of the statute, but the doubts have been sufficiently removed, and I think the licence is referred to as a continuing licence. It is quite enough if we can infer that from the statutes. By the 4 Geo. 4. c. 69, the commissioners of Customs were to license persons to act as agents, and their clerks also were to be licensed; and section 55 [which his Lordship read] requires a written appointment of the clerk by the agent, which the commissioners are to allow and sanction. Then comes the 6 Geo. 4. c. 107, which is supposed to have put an end to the agent's licence. After making provision for the agent, it goes on to provide, in section 142, [which his Lordship read,] for the clerk; it continues the licence for the clerk, but it makes some variation, as it requires a different attestation, namely, by the collector and controller of the Customs; and there is a proviso for such persons as shall have been appointed with consent of the commissioners of Customs before the commencement of the act; which proviso distinctly shews that a person might act, though licensed before the commencement of the statute. That can only refer to the licence under the former statute, and that licence must have an effect after it had been repealed. Where, therefore, any clerk to an agent had been

licensed and appointed before the statute, he is permitted to act as such clerk since it passed. If the clerk is protected by the licence, it will surely be sufficient to protect the agent also from the penalty imposed by the statute. On the first point, then, I am satisfied that the licence is in force, and that, although it is not continued in express terms, yet, the statute, by necessary implication, does give validity to it. The language of the 3 & 4 Will. 4. c. 52. is the same, and the statute must be taken to have the same effect. Then the second point arises from a confusion in the application of the case of *The Attorney General v. Key*, where the facts proved in evidence contradicted the description set out in the information. It is averred, that the goods imported were liable to the payment of duties; they must be assumed to be so, unless the contrary be shewn. It is said, they might have been prohibited goods: but they were silk goods, and no silk goods are prohibited; all may be imported, and are liable to the payment of duties. If it be that they were imported, and warehoused for the purpose of exportation only, still the fraud would be the same.

PARKE, B.—With regard to the last objection, on the ground of variance, I think there is no variance in this case. The difficulty arises from its not being stated what was the nature of the goods. It appears they were warehoused goods, and it is competent for a party to warehouse goods either under 3 & 4 Will. 4. c. 52. s. 60, or under c. 56. s. 8. Under the former, goods are to be entered for exportation only, being such as are not to be used in this kingdom, and are not liable to the payment of any duty. Under the latter, the duty, though not payable at first, will become due when the goods are to be used in this kingdom; though if they be afterwards exported, they are not to pay it. According to the evidence, the goods belonged to the second class. They were originally liable to the payment of duties, though they might be relieved from the payment on exportation. Then the other point arises, whether the objection urged in arrest of judgment, can prevail. The condition of the bond recites the appointment of the defendant as agent under the 6 Geo. 4. c. 107, and provides for the defendant's good conduct during the conti-

(6) 1 Cr. & J. 159; s. c. 2 Cr. & J. 2; 1 Law J. Rep. (N.S.) Exch. 49.

(7) 2 Cr. M. & R. 669; s. c. 5 Law J. Rep. (N.S.) Exch. 56.

nance of the licence. The bond is supported upon three grounds: first, that it is good at common law. So it would have been, had it been taken for a limited time. The condition is nothing more than that the defendant would do his duty. It was voluntarily entered into, and there was a good consideration. But the continuance of the bond is limited to the continuance of the licence, and it is said that the licence has been determined. If the enactment in the 3 & 4 Will. 4. c. 52. s. 144. had been, that the agent should not act, unless he should be licensed under that act, the licence would have ceased and the bond been determined. But I am of opinion, that that is not the effect of the act of parliament; all turns on the 144th section. If it means to continue the privilege to parties previously licensed, that licence continues in force—[His Lordship here read the section.] What is the meaning of that section? Is it, that he shall not act unless *heretofore* or *hereafter* licensed? Looking at the words, and considering the effects which were ably and forcibly pointed out by Mr. Barlow, as following from the construction contended for, I think the licence is continued. Otherwise, the consequence would have been, that no business could have been transacted at the Custom-house, until all the agents had obtained new bonds and licences. The argument arising on the section concerning the clerks, is also strong. When the motion in arrest of judgment was first made, several provisions were referred to, where the legislature have expressly kept alive existing commissions, &c. For all these, Mr. Barlow has assigned a very good or very plausible reason: either it was necessary to save them in consequence of the new provisions, or the legislature have been more scrupulous than was actually necessary. The effect of the act is, therefore, to continue the licence to the persons already licensed; and the section ought to be read as though the words "unless already authorized" had been inserted.

BOLLAND, B.—It is clear from the 3 & 4 Will. 4. c. 52. s. 147, that the licences were to continue: the proviso would be inconsistent with a total annihilation of them.

GURNEY, B. concurred.

Judgment for the Crown.

1837. { THE KING v. THE SHERIFF OF
Jan. 30. { KENT, IN A CAUSE OF POTTER
v. SIMPSON.

Sheriff—Return—Setting aside an attachment.

A return to a writ of capias, "the defendant is not to be found in my bailiwick," is a void return.

When a sheriff has obtained a rule nisi to set aside an attachment for not returning a writ of capias, on payment of costs, after making a return of non est inventus, the Court will not refuse to make it absolute, on the ground of misconduct on his part, in omitting to make the arrest.

A rule had been obtained for an attachment against the sheriff of Kent, for not making a return to a writ of capias.

Clarkson, on a former day, moved to set the attachment aside as irregular, there having been a return in these words: "The within-named defendant is not to be found within my bailiwick." He contended, that this was a sufficient return, and could not have misled the plaintiff; and referred to *Watson on Sheriffs* (1) as an authority that such a return was good. But—

The Court held, that it was not sufficient: ALDERSON, B. observing, that the common return of *non est inventus*, "is not found," had a specific technical meaning, and had become words of art. There was no great blame in making this return, but still it was irregular. The very argument now raised shewed the importance of keeping to the strict use of words.

He then obtained a rule nisi to amend the return, and to set aside the attachment on payment of costs; against which—

Chandler now shewed cause, and was about to argue that the sheriff had not used due diligence in attempting to make the arrest; when—

PARKE, B. said—This was an arrest on mesne process. How can the sheriff be liable for the whole debt? The attachment must be set aside.

Rule absolute.

(1) See App. vi. s. 3. p. 370; but no such return is found in Impey's Office of Sheriffs, nor in Tidd's Appendix.

1836. } THE ATTORNEY GENERAL V.
 Nov. 24. } HILL AND ANOTHER.*

Land Tax—King's Dock-yards.

The King's dock-yards are not liable to be assessed to the land tax.

—This was an information for trespass and intrusion by the defendants by distraining certain goods and chattels of the King's Dock-yard at Deptford, to which the defendants pleaded the general issue; and the cause coming on to be tried at the Sittings after last Easter term, a verdict was taken for the Crown for 58*l.* 2*s.* damages, subject to the opinion of the Court on a case, which stated, that the distress in question had been made for land tax on the Dock-yard at Deptford on the 26th of November 1835.

The defendant Hill was the collector and one of the assessors of the land tax for the parish of St. Nicholas, Deptford, and the other defendant was the broker who made the distress. The case set forth a notice of the distress, signed by the broker, directed to the Commissioners of His Majesty's Navy, which stated, that carts, horses, and wood had been distrained for land tax. The assessment was also set forth, in which the rate stood thus :

Rental.	Names of Proprietors.	Names of Occupiers.	Names and descriptions of Estates or Property.	Sums Assessed.
£.	Commissioners of His Majesty's Navy for all the Docks, Ships, Wharfs, Warehouses, &c. &c.			£. s. d.
3,100				113 15 0

The case continued thus :—The Dock-yard at Deptford, upon which the distress and assessment in question were made, is the property of the Crown, and is wholly used for public purposes, and produces no rent or revenue whatever. There is a part of the dock-yard, upon which the houses of certain officers of the establishment stand; and which houses are officially occupied by them, and for which they pay no rent, which are separately assessed to the land tax; but the assessment and distress in question do not affect that part of the

dock-yard. The dock-yard has been from time to time enlarged; but since the year 1797, when the Land Tax Act was passed, by which the quotas to be raised by each county were settled, nothing has been added, except some small quantity of ground for the gardens attached to the officers' houses, which are separately assessed and paid for. It is admitted, that the dock-yard has for many years past been included in the land tax assessment, and the amount paid without objection until the assessment in the last year. An appeal was made on behalf of the Commissioners of the Navy to the Commissioners of the Land Tax, which was determined against the appellants, after which the distress was made. The questions for the opinion of the Court were, whether His Majesty's Dock-yard at Deptford, being the property of the Crown, and used for public purposes, was liable to be assessed to the land tax: and whether the distress could be made thereon, or on the goods of the Crown for the land tax duty (if assessable) in case of non-payment.

Wightman, on a former day, argued for the Crown.—The King is not bound by any statute, unless named, and cannot be taxed for a sum payable to himself. Can it said that he is expressly rendered liable? The 38 Geo. 3. c. 5. s. 17, upon refusal to pay the land tax, authorizes a collector to distrain upon the goods and chattels of the party in arrear, whether on the premises or not; so that, in this case, the goods of the Commissioners of the Navy may be distrained wherever they may happen to be, or, if the King be considered as the party really liable, His Majesty's goods may be distrained, which could never have been intended.—[He was stopped by the Court.]

R. V. Richards, contra.—The Crown is not indeed expressly named in the Land Tax Acts; but it is fairly to be implied, that the lands occupied by the Crown should be charged with it. First, the statutes imposing the duty must be understood as applying to all land without distinction. The 87 Geo. 3. c. 5. imposed the tax upon the several counties of England, and different districts were specifically made liable to the payment of a particular amount of duty. Now, if the Crown, upon the purchase of land in these districts, is not

* This case was decided in Michaelmas term last.
 NEW SERIES, VI.—EXCHQ. PL.

to be charged with the land tax, a larger amount of tax must necessarily be thrown upon the remainder of the districts than was originally intended by the legislature—*Harrison v. Bulcock* (1), *All Saints College v. Costar* (2). The fair inference is, that the lands were always to be charged with the duty, whether they came into the hands of the Crown or not. It is not, as supposed, any charge on the King. Then section 98 excepts the Queen and the Prince of Wales from the payment of the duty which would have otherwise been payable in respect of their annuities. Secondly—the Land Tax Redemption Acts empower the Surveyor General of the land revenues of the Crown to redeem the land tax charged on the manors, messuages, lands, tenements, rents, or other revenues of the Crown (3). These must apply to the property of the Crown, and are not confined to lands in the possession of the tenants of the Crown. In other statutes, as in the 57 Geo. 3. c. 93, which is a general Assessed Tax Act, and in the Post Office Acts, where the tax is imposed upon all persons in general terms, it has been deemed necessary expressly to exempt the King and the royal family.

[GURNEY, B.—One of the properties charged with the land tax by the 38 Geo. 3. c. 5. is "the palaces of Whitehall and St. James." The palace of Whitehall would include a considerable district—all Privy Gardens from Whitehall to this place probably.]

[LORD ABINGER, C.B.—And the verge of St. James's Palace may extend over a great part of Westminster.]

Wightman, in reply.—The Land Tax Redemption Acts apply to the hereditary revenues of the Crown within the survey of the Exchequer. The present case relates to lands vested in the Crown for public purposes. This appears also from the statute 42 Geo. 3. c. 116. ss. 10 & 71. This dock-yard is not within the survey of the Exchequer: at least the defendant ought to shew it is, if he seeks to render it liable to the duty. As to the charge in the act upon the King's palaces, that is explained

by the circumstance that there is a tax imposed upon all offices, salaries, and pensions, and many of the persons who are subject thereto are inhabitants of those palaces. The act, therefore, is applicable to the tax paid by them. Then the Commissioners cannot be rated or assessed in respect of their occupation of these premises—*Lord Amherst v. Lord Somers* (4), *The King v. Terrott* (5). They have no beneficial occupation of them. The remedy by distress would be quite inconsistent with the Crown's ownership of this land.

[PARKE, B. referred to *The King v. Cook* (6).]

In *Smithett v. Blythe* (7) it was held, that the King's ships were not liable to pay dues where the King was not expressly named.

[PARKE, B.—The difficulty arises from the Land Tax Redemption Acts. How did the Crown lands ever become charged? The rule of law is, that the King is not bound by an act of parliament, unless named, because he is the enacting person.]

Richards referred to the judgment of Best, J. in *Netherton v. Ward* (8), as shewing that, though the goods of the Crown may not be liable to be distrained, yet there may be a charge on the Crown.

LORD ABINGER, C.B.—The doubt as to the manner in which the Crown land became liable to pay the land tax at all, has not been cleared up by the discussion. Before we give our final judgment, it will be more satisfactory that we should receive that information. At the same time, I should be sorry to have it supposed that I entertain any doubt on the question, whether the Land Tax Act imposes any charge upon the Crown lands. The Crown is exempted from impost, unless expressly mentioned; and, as this is a grant to His Majesty, it never can have been intended that His Majesty should take money out of one pocket to put it into another. On the general principle, the Crown not being liable,

(4) 2 Term Rep. 372.

(5) 3 East, 513.

(6) 3 Term Rep. 519.

(7) 1 B. & Ad. 509; s. c. 9 Law J. Rep. K.B. 59.

(8) 3 B. & Ald. 21.

(1) 1 H. Bl. 68.

(2) 3 B. & P. 635.

(3) 38 Geo. 3. c. 60. s. 45, 46, & 47; 42 Geo. 3. c. 116.

unless expressly named, I should say, that none of the acts imposing this tax affect the Crown lands. Certainly, the clauses enforcing the payment do not include the King; and my present opinion is, that the land thus occupied never could be charged. I am prepared to state my opinion, that the Crown is entitled to our judgment on the mere construction of the case before us; but we shall give a more satisfactory judgment when we have ascertained the mode by which the duty has been imposed upon the Crown land, which is thrown into some obscurity by the Redemption Act.

The case stood over for some days, that an inquiry might be made; and on this day—

LORD ABINGER, C.B. said—The Court expressed their opinion at the time of the argument; but, in consequence of some obscurity, which appeared to exist on the acts of parliament as to the mode in which the property of the Crown in the hands of a subject, became assessable to this tax originally, we requested some information before we pronounced our final judgment: not that it would have altered our opinion, but we thought it satisfactory to have that explained. Mr. Wightman has made the inquiry, and finds that it never was intended to free the tenants of the Crown within the survey of the Exchequer from the tax, but only the Crown itself for what it occupies; and that the Crown never would have been subject to the tax, unless particularly named, which it is not. Then this is the ordinary case of a supply granted by the parliament to the King for the purposes of public advantage, in which the subject is to bear the tax which is imposed; but, the Crown not being named, cannot be subject to it. The lands in question are in the occupation of the Crown; and to say that the dock-yard occupied by the servants of the Crown for public purposes shall be burthened with the tax, would be to say, that it might be imposed on the King's palace. We are of opinion, that the assessment can have no effect on the property of the Crown. The goods taken on this distress are the goods of the Crown, and the taking of them has subjected the party to an action of trespass at the suit of the Crown. If we were to determine that the land-tax assessment at-

tached on this land, we should determine, that the goods and chattels in the King's palaces of Whitehall and St. James's might be taken for the land tax, which would be a very absurd decision.

Judgment for the Crown.

1837. }
Jan. 14, 20. } JONES v. WILLIAMS.

Evidence—Acts of Ownership in continuous Localities.

In an action of trespass, A claimed the whole bed of a river which ran between his farm and that of B,—Held, that he might give in evidence acts of ownership done by him in and on the bank of the same river above and below B's farm, and opposite to his own land.

Trespass for breaking and entering the plaintiff's close between a stream of water, called Gwy-derrig, and the defendant's farm, called Dolegwynon. The close was differently described in other counts, and the last count was for taking stones belonging to the plaintiff.

Pleas—Not guilty;—that the closes were the soil and freehold of the defendant;—and other pleas which are not material.

At the trial, before Lord Denman, C.J. at the last Brecon Assizes, it appeared that the question in the cause was the ownership of the bed of a stream called Gwy-derrig, which had its source far away from the property of both parties, and ran between the plaintiff's farm called Ynisyborde, and the defendant's farm called Dolegwynon. The plaintiff contended, that the whole bed of the stream belonged to him, while the defendant, on the other hand, claimed a moiety. It was affirmed by the plaintiff's counsel, that the plaintiff's farm extended on the side of the river, opposite to the defendant's farm, to a greater extent down the stream than the latter; and he proposed to shew, that the plaintiff was the owner of the whole bed of the stream below the defendant's farm, and to give evidence of acts of ownership exercised by him on the bank and fences opposite to his own farm, and contiguous to the bank and fence of the defendant's farm. Cefn Cerig was the

name of the farm opposite to the plaintiff's farm. The Lord Chief Justice was of opinion that this was not evidence, and refused to receive it. The defendant recovered a verdict, the jury, on the evidence, finding that the river was common to both.

Chilton, in last term, had obtained a rule to set that verdict aside, and have a new trial, on the ground that this evidence was improperly rejected.

J. Evans and *James* now shewed cause. —The evidence was properly rejected. This was an attempt to give in evidence acts *inter alios*, to decide the question between these parties. How can the acts of the plaintiff, in the stream above or below the defendant's property, afford any criterion as to the plaintiff's right to the bed of the stream opposite or adjoining to it? There may be many explanations given to that right so exercised by him; or, supposing the right to have been acquired by the laches of the owner of his land, that laches ought not to prejudice the defendant. But it is said, that the evidence is admissible, in consequence of the unity of locality. To let in that doctrine, however, it should have been shewn that the plaintiff was the owner of the river from its source; the mere title to a part below the defendant's farm is not sufficient evidence of a unity of locality.

[*PARKER, B.*—How is this case to be distinguished from *Doe v. Kemp* (1)? There, acts of ownership, on different places by the side of a highway, were held to be admissible in evidence to prove the party's right to a particular place by the side of the highway. The question is, whether the principle is not the same in a river.]

There, a continuity of ownership was shewn: the claim was by the lord of the manor, and a connexion was shewn between the different slips of land; that connexion was wanting in the present case. In *Stanley v. White* (2), the existence of the belt of trees was proved, and the whole was treated as one district inclosed by those trees: and the necessity of that proof is shewn by *Tyrwhitt v. Wynne* (3).

(1) 2 Bing. N.C. 102; s. c. 4 Law J. Rep. (N.S.) Exch. 331.

(2) 14 East, 332.

(3) 3 B. & Ald. 554.

The general doctrine was, in some degree, modified by *Doe v. Kemp*, because it was there held, that the mere existence of the manor is not sufficient evidence of continuity of ownership to let in the acts in different parts of the waste. Here, the presumption of law is in favour of the defendant being owner of a moiety of the stream, and there is no proof of such continuity between the two places, as to create a unity of character sufficient to admit the evidence of acts done on the one to prove the right to the other.

Chilton, contra, referred to *Evans v. Butt* (4), before Lord Denman, C.J. at Gloucester, and afterwards in the Court of King's Bench, and was stopped by the Court.

LORD ABINGER, C.B.—Taking the whole of the circumstances in this case together, as explained by the map, it appears to me that the evidence was admissible; though I by no means wish to be understood as saying that it would be entitled to any great weight, unless accompanied with other circumstances to give effect to it. Now the question is this: the object of the plaintiff was to prove that he was the owner of the whole stream, and for that purpose it was important to shew that the usual proposition of law, that each party was entitled *ad medium filum*, was not applicable in the present case; and, in order to shew that, he was endeavouring to prove that upon the same side of the river with the land of the defendant, he had exercised acts of ownership, such as repairing the hedge, and therefore he claimed a right up to the hedge; and then going further, he shews that the hedge continued a line of demarcation, without anything occurring to break its continuity, except that a cross hedge came down to it, dividing the defendant's farm from his neighbour's land on the same side of the river, down to a considerable distance, till it came opposite to the extremity of the plaintiff's land on the other side. From these facts, the plaintiff proposes to shew that it is all his own. And it appears to me, that the evidence ought to have been received, in order to rebut the proposition,

(4) In Michaelmas term, 1835, not reported.

that the middle of the river was to be considered as the boundary between the two distinct closes. I should have thought the evidence admissible; it might not appear very strong, unless coupled with other evidence. It appears to me, however, that it was evidence on behalf of the plaintiff; and, inasmuch as that evidence was rejected, that the case ought to go down again to a new trial.

PARKE, B.—I think, also, that this case ought to go down to a new trial, because I think the evidence offered of its being one continuous hedge, and of the various acts done tending to shew possession, were admissible in evidence. They are admissible in evidence, on the ground that they are such acts as might lead a jury to infer, that the entire spot belonged to the plaintiff. On that ground, the evidence tendered was admissible in point of law. Ownership may be proved either by shewing possession has been taken of the land, or by some operation done on the land itself. It is impossible, in the nature of things, to confine the evidence to the very precise spot on which the trespass may have been committed. You may give evidence of acts done on other parts, provided they are within such locality as would raise a reasonable inference in the minds of the jury, that the spot in question, on which the trespass is said to have been committed, belonged to the plaintiff. In ordinary cases, to prove his title to a close, the tenant is called upon to give in evidence acts of ownership over every part of the land. It does not follow, indeed, but that the plaintiff and defendant both may have pieces of land in the same inclosure: but that is a fact to be submitted to the jury. So, I apprehend, the same rule is applicable to a wood which was not inclosed by any fence; if you prove the cutting of timber, I take it to be evidence to go to a jury to prove a right in the party to all the trees, although there was no fence round the wood, and nothing in proof but the cutting of trees in this wood; and *Stanley v. White*, I think, goes on this principle. In that case there was a continued belt of trees, and acts of ownership on one part were held to be admissible, as proving that the party was the owner of another part, on which the trespass was com-

mitted. So I should apply the same reasoning to a continuous hedge, though, no doubt, the defendant might rebut that evidence by shewing acts of ownership along the same fence. The ground on which acts of ownership are admissible is, not that they take place by the acquiescence of any party; they are admissible of themselves, because they help to prove that he who does them is the owner of the soil; and may have been done in the knowledge of persons who might contradict the right in question. Applying that reasoning to the present case, surely the plaintiff, who claims the whole bed of the river, has a right to shew the taking of stones, not out of the spot in question, but all along the bed of the river, which he claims as being his property; and he has a right to have that submitted to the jury. What weight the jury might attach to it, has nothing to do with the question. The principle is the same as that which was laid down in *Doe v. Kemp*.

BOLLAND, B. and GURNEY, B. concurred.

Rule absolute.

1837. } LAMBERT v. NORRIS AND
Jan. 15. } OTHERS.

Landlord and Tenant—Contract for additional Rent for Additions.

A landlord demised certain premises by indenture at a specific rent, and afterwards the lessee agreed, that if the lessor would enlarge the buildings on the premises demised, he would pay a sum of 10l. per cent. additional on the outlay. The additional erections were made, and the lessee subsequently became bankrupt:—Held, that this agreement was a collateral contract made by the bankrupt, from which he was discharged by his certificate, and not one running with the land, for which the assignees, who retained the use of the premises, were liable.

Assumpsit for the use and occupation of cottages, warehouses, workshops, &c.

Plea—Payment into court of 57l. Replication, damages ultra.

At the trial, before Gurney, B., at the Sittings in London, after last Michaelmas term, it appeared, that the plaintiffs were the devisees of one M. Boyd, and the de-

defendants were the assignees of Messrs. Turner and Davey, paper-manufacturers, who had lately become bankrupts. In 1828, Mr. Boyd granted a lease of certain premises to Messrs. G. W. and R. Turner for twenty-one years, at the rent of 230*l.* per annum. These premises consisted in part of a manufactory which Mr. Boyd had erected for the lessees, and after the lease had been executed, Mr. G. W. Turner applied to him to enlarge the building, which he consented to do, on an agreement by Mr. G. W. Turner to pay a rent of 10*l.* per cent. upon the additional outlay. This amounted to 215*l.*, and a rent of 20*l.* a year was consequently claimed by Mr. Boyd. At the same time, Mr. G. W. Turner agreed to pay for a shed which he took into his occupation. On the 30th of December 1830, G. W. and R. Turner dissolved partnership, and G. W. Turner continued in the business, taking in Davey as a partner. Turner and Davey made another application to Mr. Boyd to enlarge the buildings, to which he assented on the same terms—namely, on the receipt of a per centage on the additional outlay. This amounted to 250*l.*, and the rent claimed was 35*l.* Some other premises were taken by Messrs. Turner and Davey, at a specific rent, under a written agreement.

On the 3rd of May 1835, a fiat issued against Messrs. Turner and Davey, under which they were declared bankrupts, and in the course of the same year, Mr. Boyd died. The assignees of Messrs. Turner and Davey proposed to pay one year's rent for the premises under the lease, and also for the occupation of the additional premises taken by Turner and Davey, but refused to pay the rents claimed on the additional outlay, and the action was brought to recover the additional rent for three quarters of a year. The learned Judge was of opinion, that the action was not maintainable in respect of this sum; and the defendants having paid into court the amount due for the occupation of the other premises not included in the lease, he nonsuited the plaintiffs, but gave them leave to move to enter a verdict for 33*l.* 15*s.*, if the Court should be of opinion that the action could be sustained.

Channell now moved accordingly.—This contract must be treated as one which ran

with the land. The assignees, therefore, who took the land with the additional erections upon it, took it subject not only to the original lease, but also to the additional rent. *Hoby v. Roebuck* (1) was cited for the defendants, at the trial; but *Donnellan v. Reid* (2) shews, that under an agreement such as the present, a surrender of the term with reference to the particular part which is altered, may be inferred, and then there is a parol demise at the new rent.

[*PARKE, B.*—If you can make that out, you will be right.]

LORD ABINGER, C.B.—The action must be brought on the original contract which was entered into by the bankrupts. It cannot be supposed, that the parties intended that there should be a surrender of the premises.

PARKE, B.—*Donnellan v. Reid* was an action on the contract itself, and is decisive against the plaintiffs.

Rule refused.

1837. }
Jan. 15. } *HOUSEGO v. COWKE.*

Bill of Exchange—Notice of Dishonour.

A person called at the drawer's house on the day after a bill had become due, and saw the drawer's wife; he stated he had brought the bill which had been dishonoured. She said she knew nothing about it, but would tell her husband; and he came away without leaving any written notice:—Held, sufficient proof of notice of dishonour.

Assumpsit against the defendant as drawer of a bill of exchange, to which the defendant pleaded, that he had had no notice of dishonour.

At the trial, before the under-sheriff of Middlesex, in the vacation after last term, the plaintiff called a witness, who stated, that when the bill was dishonoured, he went to the defendant's house, and there saw the defendant's wife; he told her that he had brought the bill which had been dishonoured. She said she knew nothing about it, but would tell her husband; and the

(1) 7 Taunt. 157.

(2) 3 B. & Ad. 897; s. c. 1 Law J. Rep. (N.S.) K.B. 269.

witness came away without leaving any written notice. The under-sheriff held that this was sufficient, and the plaintiff recovered a verdict.

Humfrey now moved to set this verdict aside, on the ground that this notice was not sufficient, and referred to a case in the Common Pleas, where a rule *nisi* for a nonsuit had been obtained on a similar point.

[LORD ABINGER, C.B.—Is it necessary

that a notice of dishonour should be in writing?]

Perhaps not always; but if there is not a proper person to receive a notice of dishonour, as the drawer's wife was not, in this case, a notice in writing ought to be left.

Per Curiam—(LORD ABINGER, C. B.,
PARKE, B., and BOLLAND, B.)—

Rule refused.

RULE OF COURT.

IT IS ORDERED, that, from and after the last day of the present term, no rule shall be drawn up for setting aside an attachment, regularly obtained against a sheriff, for not bringing in the body, or for staying proceedings regularly commenced on the assignment of any bail bond, unless the application for such rule shall, if made on the part of the original defendant, be grounded on an affidavit of merits, or if made on the part of the sheriff or bail, or any officer of the sheriff, be grounded on an affidavit, shewing that such application is really and truly made on the part of the sheriff or bail, or officer of the sheriff, as the case may be, at his or their own expense, and for his or their indemnity only, and without collusion with the original defendant.

ABINGER,
W. BOLLAND,
J. PARKE,

E. H. ALDERSON,
J. GURNEY.

END OF HILARY TERM, 1837.

CASES ARGUED AND DETERMINED

IN THE

Court of Exchequer of Pleas.

EASTER TERM, 7 WILL. IV.

1837. } CANNING, ASSIGNEE OF HEA-
April 25. } LEY, A BANKRUPT, v. WOOD.

Bankrupt—Payments.

Payments to be protected by the 82nd section of the Bankrupt Act, are not necessarily payments in money. Goods delivered, not under a contract of sale, but in diminution of a previous debt, may be a payment within the meaning of the statute, if the transaction be bona fide.

Trover for silks.

Plea—That the silks were not the property of the plaintiff.

At the trial, before Lord Abinger, C.B. the facts appeared to be these:—The bankrupt was a dealer in laces and fringes; the defendant a manufacturer, living in Manchester. The bankrupt having contracted a debt to the defendant, the latter made repeated applications for payment, and finally, on the 11th and 12th of June 1835, received from him two several parcels of goods, which were taken at a low price, in diminution of the debt, and a few days afterwards, a cognovit was given for the residue. The bankrupt had previously committed a secret act of bankruptcy;

and on the 29th of June, a fiat issued against him. Upon the suggestion of counsel, that Tindal, C. J. had lately adopted a similar course, his Lordship left it to the jury to say, whether this was a payment in the due course of trade, reserving to the defendant leave to move to enter a nonsuit.

The jury found that it was not a payment in the due course of trade.

Erle having obtained a rule to enter a nonsuit—

Channell shewed cause.—The question is, whether this is a transaction protected by the 82nd section of the Bankrupt Act. The plaintiff's title, relating back to the act of bankruptcy, is *prima facie* good as to all matters subsequent, and the onus of impeaching it lies on the defendant:—he must bring himself within the 82nd section. Now, it is not every transfer of goods that is a payment; or it is at least doubtful, whether it be so or not. A delivery of goods, unless in the ordinary course of business, is not a payment; and if so, the defendant ought to have a finding in his favour on this point, whereas he has one against him. The basis upon which the Court of Common Pleas went, in pronouncing their judgment, in *Carter*

v. Breton (1), is the same as that upon which the Court should now act.

[ALDERSON, B.—In that case, the goods were delivered over as a *security*, to be delivered back if the debt were paid. How, then, could that be a payment?]

The jury found it was a sale.

[ALDERSON, B.—Then it was the subject of a set-off, and could not have been pleaded as payment—that constitutes the distinction. In many cases there may be a payment by goods—for instance, if there be a balance paid over together with the goods, then they would be clearly delivered as a payment *pro tanto*: whether so delivered or not, would be a question for the jury.]

LORD ABINGER, C.B.—I think the rule should be made absolute for entering a nonsuit. I was induced to reserve this point, in consequence of what was stated to have been done by the Lord Chief Justice of the Common Pleas; but upon looking at the act of parliament, it is clear, that the question left to the jury was not properly framed. The statute 6 Geo. 4. c. 16. omits the words “due course of trade,” which had occurred in the early Bankrupt Acts, and adopts the phrase “*bonâ fide*.” Upon that question, I see no evidence of the transaction not being *bonâ fide*: the creditor took the goods as the best thing he could get. Upon the other point, this was clearly a payment *pro tanto*.

PARKE, B.—I also think that there should be a nonsuit. The sole question is, whether a payment in goods is a payment within the 82nd section. It is quite clear, that payment may be made in any way the parties may choose; and it seems equally clear, that these goods were delivered and received as payment. They never could have been the subject of an action for goods sold and delivered. Then, if it were doubtful, whether such a payment is within the statute, the language of Lord Kenyon, in *Wilkins v. Casey* (2), would decide the point. The question left to the jury was not necessary to the verdict; and, therefore, their finding is on an immaterial issue. The words “due course of trade,” having been omitted in the 46 Geo. 3. c. 135. and 6 Geo. 4. c. 16, the ques-

tion, with regard to that is only important as assisting the jury to determine, whether the transaction was *bonâ fide* or not. But it is by no means a conclusive test, for payments may easily be made *bonâ fide*, though quite out of the ordinary course of trade.

BOLLAND, B.—The creditor had an equivalent for his debt; and I do not see why that equivalent should not be a payment.

ALDERSON, B.—This is a payment, really and *bonâ fide*. Whether really, depends upon whether the goods were so delivered that the party could plead it as payment; and if part of the debt was wiped off by it, I think it was so pleadable. There is nothing to shew it was not *bonâ fide*.

Rule absolute.

1837. }
April 15. } MARRYATT v. BRODERICK.

Award—Stakeholder—Action.

An award by one of two referees is bad, unless there is distinct evidence of a submission thereto by all the parties to the reference.

Therefore, where by the rules of a race-course all disputes are to be settled by the two stewards, the decision of one of the stewards is not binding without the consent of all the parties interested.

Money deposited with a stakeholder to abide the result of a legal horse-race, is not recoverable back from him after the race has been run, although there is a dispute as to the winner.

Assumpsit for money had and received.
Plea—Non assumpsit.

The defendant was clerk of the Newport Pagnell race-course; the plaintiff and a Mr. Shaw were subscribers to a race to be run there by horses not thorough bred. The stewards of the races were Lord Charles Fitzroy, and General Grosvenor. Neither of them attended the races; the latter had been appointed without his own knowledge, and took no part in them; but a person of the name of Bailey acted as the deputy of Lord Charles Fitzroy.

Before the race commenced, the plaintiff made a formal objection to Mr. Bailey, that Shaw's horse was thorough bred, and therefore disqualified. Bailey, however, declined interfering, but desired the plaintiff to refer the matter to Lord Charles Fitz-

(1) 6 Bing. 617; s. c. 8 Law J. Rep. C.P. 224.

(2) 7 Term Rep. 713.

roy. The race was thereupon run, and Shaw's horse came in first, and the plaintiff's horse second. By the rules of the Newport Pagnell races, all disputes were to be settled by the stewards, whose decision was to be final. Some time after the races, a letter was written by the plaintiff to Lord Charles Fitzroy, and an answer returned by him in terms amounting to an award in the plaintiff's favour; but the defendant not having paid over the stakes, the present action was brought to recover, as winner of the race, the sum of 60*l.*, being the whole amount of the stakes, or, if not entitled to that, then the sum of 10*l.*, being the amount of the plaintiff's single stake.

At the trial, before Littledale, J., at the last Northampton Assizes, no evidence was given that Shaw's horse was in fact thorough bred, and the plaintiff was nonsuited, the learned Judge being of opinion that the letter or award of Lord Charles Fitzroy was inoperative, without the signature of the other steward.

Humfrey now moved to set aside the nonsuit, and enter a verdict for the plaintiff. First, the plaintiff is entitled to the stakes upon Lord Charles Fitzroy's letter. No doubt, as a general rule, where parties submit to two persons, both must agree in the award; but the stewards are persons acting in a public character, and there is a distinction between them and private arbitrators—*The King v. Whitaker* (1).

[*PARKE, B.*—That was a case of commissioners appointed by act of parliament: you cannot say that the stewards had any authority independently of the agreement of the subscribers, who, at the time of subscribing, came in to the terms previously settled by the rules of the races.]

Then, there was evidence of an agreement to be bound by the decision of Lord Charles Fitzroy alone. Bailey referred the dispute to him, and neither party objected to it. At all events, the plaintiff is entitled to his own stake. The matter is still in dispute, and the depositor may recover back his money so long as it remains in the hands of the stakeholder—*Bate v. Cartwright* (2).

[*PARKE, B.*—There, both the race and the bet were illegal.]

(1) 9 B. & C. 648; s. c. 7 Law J. Rep. K.B. 332.

(2) 7 Price, 540.

But the Court, in the judgment, agreed with Lord Kenyon, who, in *Cotton v. Thurland* (3), put entirely out of the question the illegality of the subject-matter.

[*ALDERSON, B.*—In what does a legal wager differ from any other legal agreement? I can understand the doctrine in the case of an illegal contract, because there is no tribunal by which it may be enforced. The right to recover back a deposit from a stakeholder has sometimes been put, on the ground of his being a countermendable authority, as in the ordinary case of an arbitrator; but I question the analogy of the two cases.]

[*PARKE, B.*—I know it has been decided that after deposit, either party may reclaim his stake from the stakeholder. I confess I could never understand that case—but it is quite clear that when the event has happened, the winner is entitled to the whole.]

A party ought not to be driven to a court of law for a decision upon a matter, which it was his intention to submit to a private arbitrator.

PARKE, B.—I think there is no ground for a rule. Supposing there had been no agreement varying the terms of the submission, no award could be binding, unless made by both the stewards. There must be clear proof of such an agreement by all the parties, including perhaps the stakeholder. I think there was no such proof in this case, for what was said by Bailey amounted only to this—that he declined deciding the matter in dispute. The plaintiff, therefore, cannot rest his case on the award at all. Then, as to the stakes; they are in the clerk's hands to abide the event of the race. If the authority of the stewards is gone, and that mode of determining the matter is at an end, then it remains to be decided by a jury. It is contended, that the money is recoverable upon a notice given to the clerk of the course. I doubt this, because the agreement is, to leave the money in his hands to abide a certain event, and it could not be varied without the consent of all the other parties. Here, there was no other demand of the stake, no rescinding of the contract before the race was run. The effect, therefore, is, that the stakes

(3) 5 Term Rep. 405.

remain in the defendant's hands to abide the decision of the stewards, if they are still competent to act, according to the terms of their authority; or if they either cannot or will not act, then the matter must be decided in a court of law.

The other Judges concurring—

Rule refused.

1837. } **MAGEE V. ATKINSON AND**
April 21. } **TOWNLEY.**

Contract—Evidence—Custom.

Plaintiff bought of defendants some railway shares, and a note of the contract signed in the defendants' name by their clerk, was sent to the plaintiff. A second note was afterwards sent by defendants, saying they sold the shares "on account of H. J." Both notes were kept by the plaintiff. On an action brought for breach of the agreement in not completing the sale,—Held, that it was no misdirection to leave it to the jury to say which was the contract, and to tell them, that if the defendants signed their own names, they were liable.—Held also, that evidence to shew that in Liverpool it was not customary to insert the principal's name in the contract note, was properly rejected.

This was an action of assumpsit, tried before Patteson, J., at the last Spring Assizes for Liverpool, which was brought to recover damages for the breach of an agreement to deliver fifty Great Western Railway shares. Among other pleas, the defendants pleaded the following, upon which the question turned, viz.: that they did not sell the shares for themselves or upon their own account. The following facts were proved: both the plaintiff and the defendants were brokers. Early in December, Scores, the plaintiff's agent, met the defendant Townley; on being asked if he had any shares to sell, Townley said he had, and Scores agreed to purchase them. An entry was made in defendants' book, by their clerk, and a contract-note of the sale, signed by the defendants' clerk for them, and in which their names only appeared, was sent to the plaintiff. The defendant Townley, on seeing this entry in his book, said to the clerk, "you have entered these in my name; I am selling for H.

Jacob," on which the entry was altered, and another was sent to the plaintiff, stating the shares were sold "on account of H. Jacob." It did not appear whether the second memorandum was sent on the same day as the first, or the following day. Both were put on Scores's file, and kept till the 12th of January. Upon these facts, the learned Judge left it to the jury to say, which was the contract; observing that a man who signs his own name in this way, is bound by it; but, that if he stated he was an agent at the time, and signed as such, and disclosed his principal, he would not be liable. The learned Judge also rejected evidence, to shew that it was not customary in Liverpool, to insert the name of the principal. The plaintiff had a verdict for 385*l.*, and—

Alexander now moved to set it aside, and have a new trial, on the ground of misdirection, and that evidence was improperly rejected; and he cited *Wilson v. Hart* (1).

PARKE, B.—I do not see any improper rejection of evidence, the object of the evidence tendered being to alter the written contract. It was properly left to the jury to consider whether the second contract-note, as altered, was adopted by the plaintiff. There must be no rule.

ALDERSON, B.—The custom attempted to be proved, is a custom to violate the common law of England. It was left to the jury to say whether the second note was a disclosure of the principal, or a variation of the contract. If it had been immediately rejected, there would have been an end of the question.

Rule refused.

1837. } **MINSHALL AND ANOTHER V.**
April 21. } **LLOYD.**

Trover—Tenant's Fixtures.

A tenant's right to things affixed to the freehold, is at an end, if he omits to detach them during his term or possession; and he cannot afterwards treat them as chattels, in an action of trover brought against the sheriff, for taking them under a writ of fi. fa.

Accordingly, where the lease of certain collieries, assigned goods and chattels, and

(1) 7 Taunt. 295.

engines partly affixed to the freehold, to the plaintiffs, and the lessor afterwards took possession of the collieries and engines, by reason of a forfeiture:—Held, that the plaintiffs could not maintain an action of trover against the sheriff, who had taken the engines under a fi. fa. against the lessee, in as much as the latter had not detached them during the continuance of his possession.

Trover. The second plea denied the plaintiffs' property in the goods. The action was brought against the late sheriff of Denbighshire, for a seizure made under a *fi. fa.* Amongst other things specified in the plaintiffs' particulars, were certain steam-engines alleged to have been taken by the defendant, and which, by the evidence and the Judge's report, appeared to be in part affixed to the freehold. The plaintiffs claimed them under the following circumstances:—

By a lease dated the 1st of June 1824, Mrs. Youde demised the Plas Madoc Collieries to Edward Youde, for a term of twenty-one years, with a power of re-entry upon forfeiture for non-payment of rent. The lessee entered and continued in possession, by himself or his tenant, till some time in the year 1829. Between January 1825 and January 1827, he placed on the premises the various engines, &c. now in dispute. By lease and release dated the 3rd and 4th of January 1827, he assigned these engines, &c., together with the other chattels claimed in this action, to the present plaintiffs, in trust, and as a security for the payment of an annuity to a Mrs. Whalley. The rent falling into arrear, an ejectment was brought by Mrs. Youde, and judgment obtained by her in June 1829, under which she took possession as well of the collieries as of the engines, &c. thereon. The seizure now complained of, was made in November 1829, in pursuance of a judgment against Edward Youde.

At the trial, before Vaughan, J., at the last Summer Assizes for the county of Denbigh, a verdict was taken generally for the plaintiffs for 1,000*l.*, with leave to the defendant to move to enter a nonsuit, the parties agreeing to refer the facts to this Court, upon the second issue, in order to ascertain whether the plaintiffs were entitled to the engines, &c. in question; and

if so, whether trover would lie for them. A rule having been obtained to reduce the damages by an ascertained value of the engines—

J. Jervis and Mathews shewed cause.—These are not fixtures—*Lawton v. Lawton* (1), *Lord Dudley v. Ward* (2), and *Trappes v. Harter* (3). They are an annexation to the freehold, and contradistinguished from fixtures. They are privileged by trade, and do not go to the lessor. Again, as to tenant's fixtures, there is a distinction between such as are voluntarily on the land demised at the end of the term, and such as are compulsorily taken, as here, upon a re-entry for forfeiture. This may be deduced from the judgment of Lord Tenterden, in *Lyde v. Russell* (4). So, also, if the tenancy is determined by death, such fixtures go to the executor, and not to the lessor. The right of the plaintiffs stands upon the same footing, and these not being fixtures, but personal chattels, trover will lie for them.

Cresswell, Sir W. W. Follett, Tyrwhitt, and Welsby, contra.—These are fixtures, moveable, perhaps, during the term, or during the tenant's possession afterwards, but which, if not then removed, become part of the freehold. It matters not whether the tenancy ended by the effluxion of time or by forfeiture—*Storer and others v. Hunter* (5). Nor does this resemble the instance put, of an executor's right upon the death of the tenant, which is by the act of God; whereas, here, the term ended by the default of the tenant himself.

[*ALDERSON, B.*—In the case of emblements, if the lessee die, the tenancy being determined by the act of God, his executor shall have them; but if the lessee's own act determines it, he shall have none.]

Assuming that the tenant had a licence to erect and remove during the term, such a licence would cease at the end of it. The plaintiffs cannot be in a better situation than the tenant. At all events, these are fixtures, and trover will not lie—*Lee v. Risdon* (6), confirmed by *Hallen v. Run-*

(1) 3 Atk. 13.

(2) Amb. 114.

(3) 2 Cr. & M. 153; s. c. 3 Law J. Rep. (N.S.) Exch. 24.

(4) 1 B. & Ad. 394; s. c. 9 Law J. Rep. K.B. 26.

(5) 3 B. & C. 368; s. c. 3 Law J. Rep. K.B. 81.

(6) 7 Taunt. 188.

der (7), *Boydell v. M^cMichael* (8), *Coombs v. Beaumont* (9). *Trappes v. Harter* is shaken by these latter cases.

PARKE, B.—The learned Judge, who tried this cause, has reported, that these steam-engines were in part affixed to the freehold; and substituted, as we are, for a jury, we must take this to be a large concern, in which boilers, cylinders, and engines are affixed to and used upon the premises in the ordinary way. Everything permanently fixed to the soil is part of the freehold; the right of the tenant to remove exists only when they are put up for trade or ornament, in which case, he may disannex them from the freehold. If that is so done, the sheriff may remove them as well as the tenant, but that power of removal is confined to the term, or to the tenant's possession. I assent to the case of *Coombs v. Beaumont*; there they never were goods and chattels at all to the plaintiff, so as to enable him to bring trover; that right to remove did not exist in the tenant when the sheriff took the goods. In *Davis v. Jones* (10), Lord Tenterden's judgment proceeds on the ground of the parts of the machine, for which the action was brought, not being fixtures; he does not give any opinion as to the tenant's right during the term. I think, therefore, this action cannot be maintained for the fixed engines.

BOLLAND, B. concurred.

ALDERSON, B.—These are not goods and chattels until the tenant has exercised his right to make them so. He loses that right with his possession.

Rule absolute, for reducing the damages.

1837. }
April 21. } YEOMANS v. LEIGH.

Witness—Competency—Negligent Driving.

A witness, whose only interest in the action is, that the verdict may be used for or against him, is rendered competent by statute 3 & 4 Will. 4. c. 12. s. 26, without a release.

(7) 1 Cr. M. & R. 266; s. c. 3 Law J. Rep. (N.S.) Exch. 260.

(8) 1 Cr. M. & R. 177; s. c. 3 Law J. Rep. (N.S.) Exch. 264.

(9) 5 B. & Ad. 72; s. c. 2 Law J. Rep. (N.S.) K.B. 190.

(10) 2 B. & Ald. 165.

Therefore, in an action on the case for the negligent driving of the defendant's servant, the servant is a competent witness for the defendant, without a release.

Case for negligent driving by the defendant's servant.

Plea—Not guilty.

At the trial, before Bolland, B., at the sittings in London after last Michaelmas term, the servant was tendered as a witness on the part of the defendant. The learned Judge, however, considering him incompetent without a release, he was not examined, and the plaintiff had a verdict.

Hindmarsh having obtained a rule to shew cause, why this verdict should not be set aside, and a new trial granted, on the ground of the improper rejection of evidence,—

Petersdorff now shewed cause, and contended, that the statute 3 & 4 Will. 4. c. 12. s. 26. did not apply to cases of this kind, so as to make the witness admissible. He could only become so by a release, as before the statute—*Green v. the New River Company* (1). This has been so decided in several recent cases. He cited *Mitchell v. Hunt* (2), *Harrington v. Caswell* (3), *Harding v. Cobley* (4), *Hodson v. Marshall* (5), *Burgess v. Cuthill* (6), admitting that this last case was opposed to a decision of Parke, B., in *Faith v. M^cIntyre* (7).

PARKE, B.—I think the witness was competent without a release. The statute applies to all cases, where the only interest is, that the verdict may be used for or against the witness. The verdict here might be used against him in an action by his master, and that is the only interest he has in the result of the action.

ALDERSON, B.—Sections 26 and 27, taken together, make the witness competent, and save the expense of a release.

Rule absolute.

[See also *Pickles v. Hollings* and another, 1 M. & Rob. 468, *Creevy v. Bowman*, ib. 496.]

(1) 4 Term Rep. 589.

(2) 6 C. & P. 351.

(3) 6 C. & P. 352.

(4) 6 C. & P. 664.

(5) 7 C. & P. 16.

(6) 6 C. & P. 282.

(7) 7 C. & P. 41.

1837. }
April 22. } BEALE v. OVERTON.

Interpleader Rule.

The sheriff who receives in vacation a notice of an adverse claim to goods taken in execution by him, must apply for an interpleader rule, in such time that cause may be shewn upon it in the course of the following term.

A rule on behalf of the sheriff under the Interpleader Act, had been obtained by—

But, on the 28th of January, and enlarged to this term. The affidavits shewed that the sheriff had entered on the 25th of November, and received notice of adverse claim on the 28th.

Humfrey, for the execution creditor, contended, *in limine*, that the sheriff had come too late—*Cook v. Allen* (1), and *Ridgway v. Fisher* (2). At all events, the execution creditor was entitled to costs.

PARKE, B.—The sheriff should come without delay. Where he has notice of adverse claim in vacation, he should apply early enough in the following term, to allow of cause being shewn before the end of it.

Willmore appeared for the claimant; and the execution creditor not insisting further, the rule was discharged; the goods to be delivered to the claimant, and the sheriff to pay the costs of both parties.

1837. }
DOE d. MORGAN v. ROE.

Ejectment—Judgment—Appearance.

Judgment signed in this Court against the casual ejector, without entering an appearance, is not irregular, and in future the costs of entering such appearance will not be allowed, as it seems to be unnecessary.

A rule had been obtained by *Erle* to set aside the judgment that had been signed against the casual ejector for irregularity, because no appearance had been entered.

(1) 2 Dowl. P.C. 4; s.c. 2 Law J. Rep. (N.S.) Exch. 199

(2) 3 Dowl. P.C. 567.

Sir W. W. Follett shewed cause.—There is no authority either way. *Tidd*, p. 1224, 9th edit., refers to a rule in 1662, and another in the time of Charles 2. But there is no such rule in this court, nor is any appearance ever entered in the Common Pleas. The statute 12 Geo. 1. c. 29. does not apply to this action.

Erle, *contra*.—It is quite clear, though there may be different practice in the different courts, that in the King's Bench an appearance must be entered, unless the proceedings be by original.

PARKE, B.—There must be an affidavit of service. It might be difficult to serve *Richard Roe*. The officers are not aware of any rule on the subject. Judgment has been over and over again signed without it. But, you are entitled to set it aside on payment of costs. In future, entering an appearance will not be allowed in costs, as no appearance seems necessary.

The other Judges concurred.

Rule absolute.

1837. }
April 27. } PRITCHARD v. M'GILL.

Middlesex County Court Act.

A defendant is entitled to the benefit of the 19th section of the Middlesex County Court Act (23 Geo. 2. c. 33), though the plaintiff does not reside within the county.

Thomas having obtained a rule for entering a suggestion on the roll to give the defendant double costs under the Middlesex County Court Act, 23 Geo. 2. c. 33, the sum recovered at the trial (which was before the sheriff,) being under 40s.

Ogle shewed cause.—The affidavits do not state that the plaintiff resides within the county. Although there is neither authority nor dictum that this is necessary, there is none the other way; and the same principle which requires it in the case of a defendant, applies also to the case of a plaintiff; and it may be observed, that until the case of *Tuff v. Woodward* (1), there was nothing to shew that even the defendant must reside

(1) 5 Term Rep. 175.

within the county (2). Moreover, by this act, certain powers are given which cannot be exercised, unless the plaintiff resides within the jurisdiction:—such is the power to examine the plaintiff by section 1, and the power to commit for non-performance of the orders of the Court by section 5. Again, a judgment against a plaintiff residing out of the jurisdiction, would be a nullity.

[ALDERSON, B.—Your argument is not stronger than one which might be used in the ordinary case of a foreigner suing in the superior courts. Though he resides out of the jurisdiction, he may seek his remedy here, and all we do is to obtain from him security for costs. There is a material distinction between a jurisdiction *in invitum*, and a jurisdiction over a party who comes to seek, and submits to it.]

[PARKER, B.—A judgment against a plaintiff residing out of the county, would not be a nullity. An action might be maintained upon it. The same difficulty would arise where a defendant who resided in the county at the commencement of the suit, goes to reside elsewhere in the course of it.]

There is another objection. By the 19th section there are two excepted cases, in which the defendant is not entitled to a suggestion, though the damages are under 40s.—that is, where the title to land, or an act of bankruptcy principally comes in question. In these two cases, the Judge is to certify to that effect; but, as the sheriff has not the powers of a Judge, and could not therefore certify, the affidavit should have supplied that which would otherwise have been inferred from the absence of a certificate, by averring, that neither the title nor an act of bankruptcy came in question.

Per Curiam.—If any question of that nature was likely to arise, so that either party would be prejudiced by the mode of trial, it would have been a good objection before a Judge, on the application for a writ of trial. At present, there is no ground for the objection. As to the other point, if the residence of the defendant, and the

cause of action, be within the county, that is sufficient.

- *Rule absolute.*

1837. }
May 2. } RYLAND v. WORMALD.

Time—Practice—Pleas in Abatement.

Since the rule Hil. 2 Will. 4. r. viii, the four days for pleading in abatement are reckoned exclusively of the first, and inclusively of the last, day.

In this case, a declaration was delivered on the 8th of March. On the 13th (the 13th being Sunday) the defendant pleaded privilege as an attorney. On the same day, the plaintiff signed judgment for want of a plea, which he would have been entitled to do, according to the former practice as to the time for pleading in abatement, unless such pleas are within the rule Hil. 2 Will. 4. r. viii, in which case the plea would be in time.

Cowling had obtained a rule to set aside the judgment signed, for irregularity.

Chandless shewed cause—and, admitting that the words of the rule would embrace pleas in abatement, relied upon the practice being to include both the first and the last days—*Jennings v. Webb* (1), *Long v. Miller* (2). Pleas in abatement not being favoured, the general words of the rule should be limited, so as not to controul the existing practice.

Per Curiam.—The rule must be understood according to its grammatical construction. The time for pleading in abatement is extended by it, and the four days are now to be reckoned, the first exclusively, and the last inclusively.

Rule absolute.

1837. }
May 2. } HEALD v. SMITH, THE YOUNGER.

Sheriff—Fieri Facias—Insolvent.

Where the sheriff, after notice that the defendant had applied to take the benefit of

(2) There is an earlier case of *Welsh v. Troyte*, 2 H. Bl. 29, to the same effect.

(1) 1 Term Rep. 277.

(2) 2 Stra. 1192.

the Insolvent Debtors Act, levied upon his goods under a fi. fa., and returned fieri feci:—Held, that he was bound to pay over the proceeds to the plaintiff.

A writ of *testatum fi. fa.*, issued to the sheriff on the 18th of January, under which he levied on the 27th, being at the same time served with a notice that the defendant had applied to take the benefit of the Insolvent Debtors Act. He also had further notice, on the 4th and 6th of February, that he had applied for his discharge. On the 21st of February the sheriff was ruled to return the writ; and on the 1st of March he returned, that he had levied from the defendant 14*l.* 0*s.* 7*d.* The defendant had applied to the Insolvent Court, under the Insolvent Act, on the 26th of November. A rule having been obtained, calling upon the sheriff to pay over 14*l.* 0*s.* 7*d.* to the plaintiff,—

Watson shewed cause.—The Court will relieve the sheriff, notwithstanding his return. At the time it was made, the defendant might have a defeasible title to these goods. It is like a bankruptcy—*Bridges v. Walford* (1), *Clutterbuck v. Jones* (2).

Hance, contrà.—The sheriff having notice at the time the levy was made, he takes the responsibility upon himself by returning *feri feci*; he might have returned *nulla bona*, as the goods were, at that time, in the provisional assignee.

PARKE, B.—Here the sheriff has been guilty of laches. If he had used due diligence, he might have found out that the defendant had no goods, as they had been assigned, under the application by the defendant, to take the benefit of the Insolvent Debtors Act, of which the sheriff had notice. This is distinguishable from the case of *Brydges v. Walford*, where, if the sheriff had used all diligence, he could have made no other return: here, he might have searched at the Insolvent Court. He has concluded himself by his return, and is not entitled to be relieved against it. The rule must be made absolute, with costs.

Rule absolute.

(1) 6 *Mau. & Selw.* 42.

(2) 15 *East*, 78.

1837. }
May 5. } **BELBIN V. BUTT AND OTHERS.**

Pleading—Evidence—Payment.

Under a plea of nunquam indebitatus in debt for goods sold and delivered, the defendant cannot give evidence of payment in reduction of damages.

Debt for goods sold and delivered.

Plea—Nunquam indebitatus.

At the trial, before the under-sheriff of Hampshire, an admission by the defendants of the sale and delivery of a fly-carriage, in October 1835, for 20*l.*, of which 2*l.* had been paid, was put in by the plaintiff; and the defendants, to prove payment of the residue, tendered in evidence a promissory note, dated February 1836, for the amount, payable twelve months after date. This was objected to, as there was no plea of payment; but the under-sheriff received the evidence, and left it to the jury to say whether the note was given in payment for the carriage. The jury found for the defendants.

Addison obtained a rule to set aside the verdict, and enter it for the plaintiff, with nominal damages.

Robinson shewed cause.—Upon the pleadings the note was receivable in reduction of damages, though not as payment.

PARKE, B.—*Shirley v. Jacobs* (1) has decided, that where the general issue only is pleaded in assumpsit, payment may be given in evidence in reduction of damages: but has any case decided that you can do that in debt, where there is no inquiry as to damage? There must be a new trial, and then Mr. Robinson may apply for leave to amend. The defendants must pay the costs of the trial before the sheriff, or they may allow the plaintiff to take a verdict for nominal damages; they may decide between the two; this was a mistake of the under-sheriff.

The other Judges concurred.

(1) 2 *Bing. N.C.* 88; *a.c.* 4 *Law J. Rep. (N.S.)* C.P. 61.

1837. }
April 21. } NORTON V. ELLAM.

Promissory Note—Statute of Limitations—Demand, when not necessary.

The Statute of Limitations runs from the date of a note, with lawful interest payable on demand, and not from the time of demand. A demand is not necessary before bringing an action.

The declaration was on a promissory note in the following form:—"I promise to pay 200*l.* on demand, with lawful interest."

Plea—That the cause of action did not accrue within six years.

At the trial, before Lord Abinger, C.B., at Westminster, at the Sittings after Michaelmas term, a verdict was taken for the plaintiff, with liberty to move to enter a nonsuit, on the ground that the Statute of Limitations was a bar to the action, there having been no demand within six years of the date of the note.

Butt having obtained a rule accordingly,

Petersdorff now shewed cause.—A demand is necessary before the statute begins to run. The mere introduction of interest shews, that it was probable some time was intended to elapse before demand—*Barough v. White* (1). In *Holmes v. Kerrison* (2), it was held that the statute did not run till the note had been presented for payment. This case is similar. *Christie v. Fonsick*, in *Selw. N.P.*, differs as to this point in different editions. In the old cases, bringing an action, was a demand—*Rumball v. Ball* (3); but that is altered by the writ of summons, which is the present mode of commencing an action.

Butt, contrà, referred to the 8th edition of *Selwyn's N.P.*, where it is stated distinctly, "The statute runs from the date of the note, and not from the time of demand."

PARKE, B.—There is no doubt on this point. In goods sold and delivered, payable on request, the statute runs at once. In case of money lent, with interest at 5*l.* per cent., no demand is necessary before bringing an action. There is no obligation

in law to give any notice at all. A promissory note, payable on demand, is payable without any demand, and the statute runs from the date of it. Adding the words, "with interest," makes no difference. A note payable at sight, by the terms of the contract, must be shewn before action brought; that was the case of *Holmes v. Kerrison*.

ALDERSON, B.—I am of the same opinion. There must be something to shew that a demand is to be a collateral fact.

Rule absolute, for entering a nonsuit.

1837. }
April 22. } LEVY V. PRICE.

Errors in fact—Supersedeas—Execution.

It is irregular to issue execution upon a judgment, after notice that a writ of error coram vobis, has been sued out, though before notice of its allowance.

The rules of Hilary term, 2 Will. 4. and Hilary term, 4 Will. 4. do not apply to errors in fact.

In this case, a writ of error *coram vobis* was sued out on the 17th of February, and notice of it given on the 22nd. It was allowed on the 19th of April, on which day, before the allowance, execution was levied under a *fi. fa.*

Mansel obtained a rule to set aside the *fi. fa.* for irregularity, with costs, and to stay proceedings. He quoted *Birch v. Triste* (1).

Humfrey shewed cause.—A writ of error is not a supersedeas from the time of notice of its being sued out, but from notice of its allowance—Hilary term, 2 Will. 4. rule 83; Hilary term, 4 Will. 4. rule 9.

[*PARKE, B.*—Those rules do not apply to errors in fact; and were made to assimilate the proceedings in all the courts. The notice, that a writ of error had been sued out, would shew that this was error in fact. The case of *Birch v. Triste* must bind us. You ought to have applied for leave to take out execution.]

Then, as to the bail in error, the words of 6 Geo. 4. c. 96. s. 1. are very large.

[*PARKE, B.*—That statute does not ap-

(1) 4 B. & C. 327; s. c. 3 Law J. Rep. KB. 227.

(2) 2 Taunt. 323.

(3) 10 Mod. 36; s. c. Cro. Eliz. 548.

(1) 8 East, 411.

ply to error in fact. It is *in pari materia* with the statute of James.]

Then bail in error is not necessary.

Per Curiam.—The execution is irregular. The rule must be made absolute, and no action brought against anybody.

Rule absolute.

1837. }
April 22. } JONES v. HOWE.

Judgment as in case of Nonsuit.

The plaintiff, after one default in going to trial, gave a second notice, went to trial thereupon, and got a verdict. Between the date of the second notice and that of the trial, the defendant moved for judgment as in case of nonsuit. The Court afterwards set aside the verdict, and discharged the rule for judgment as in case of a nonsuit, on the usual peremptory undertaking.

On the 10th of April, the plaintiff, after one default, gave a second notice of trial for the 18th. The defendant, on the 15th of April, obtained a rule to shew cause why judgment as in case of a nonsuit should not be entered, which rule, as it was obtained without two days' notice of motion, did not, by the practice of this Court, operate as a stay of proceedings. The plaintiff went to trial on the 18th, pursuant to his notice, and obtained a verdict, and now—

Hoggins contended, that the defendant was precluded from making his rule absolute for judgment as in case of a nonsuit.

Addison, *contra*.—The defendant had a right to come to the Court when he did. The notice of trial, for a subsequent day, did not take away that right. *Smedley v. Christie* (1) and *Bainbridge v. Purvis* (2) are to this effect.

PARKE, B.—The defendant is in fault for not making his motion a stay of proceedings. The rule must be discharged, on the plaintiff's giving a peremptory undertaking; the intermediate verdict to be set aside on payment of costs; the costs

of the day for which the first notice of trial was given, to be paid by the plaintiff, and the defendant to pay the costs of this application.

1837. }
April 24. } BOYDELL v. CHAMPNEYS.

Insolvent—Discharge—Bill of Exchange.

A discharge of an insolvent debtor as against the holder of a negotiable security, is a discharge as against all other parties to it, though not named in the schedule.

Declaration by drawer against acceptor of a bill of exchange.

Plea—Defendant's discharge under the Insolvent Debtors Act.

The defendant, being indebted to the plaintiff for business done as an attorney, gave him his acceptance for the amount. The plaintiff indorsed the bill to one Charles Boydell, who sued the defendant upon it, to judgment. Shortly afterwards, the defendant took the benefit of the Insolvent Debtors Act, and inserted the name of Charles Boydell in his schedule, for the amount of the bill. The plaintiff, afterwards receiving the bill back again from Charles Boydell, brought the present action upon it, and the cause was tried at the London Sittings in Hilary term last, when a verdict was taken for the plaintiff, leave being reserved for the defendant to move to enter a nonsuit.

Chandless having accordingly obtained a rule for that purpose,—

Erle and *Jardine* shewed cause.—The plaintiff's right on the bill is not barred by the defendant's discharge, which operates as against Charles Boydell only. The 46th section empowers the Insolvent Court to discharge the prisoner, "as to the several debts and sums due, or claimed to be due, to the several persons named in his schedule as creditors." *Macdonald v. Bowington* (1), where the same question arose, was even a stronger case than the present, for there the acceptor, sued by the indorsee, had been actually taken in execution; yet this, which was a satisfaction as to the indorsee, was held to be none as to the

(1) 2 Dowl. P.C. 152.

(2) 1 Dowl. P.C. 144.

(1) 4 Term Rep. 825.

drawer. So also in a case upon the Bankrupt Act—*Mead v. Braham* (2).

[PARKE, B.—If the holder of the bill gave a release, the acceptor would be discharged: so he would also by payment. The ground is this: that the transfer of the bill is a transfer of the debt; and if the debt is extinguished by payment or release, then the liability of the acceptor is at an end.]

[LORD ABINGER, C.B.—It seems to turn on the question, whether the discharge of the insolvent is an extinguishment of the debt, or only a bar of the remedy by the party named in the schedule.]

The debt is not satisfied by the bill. That is only a security for it, and therefore the plaintiff was the defendant's creditor at the time he took the benefit of the act.

[LORD ABINGER, C.B.—If he sued him upon the original consideration, he would be barred by a plea of an outstanding bill.]

The debt remains, though the remedy may be suspended.

[PARKE, B.—The debt is extinguished, if the bill is extinguished.]

By the 40th section, the insolvent is bound to insert in the schedule all the persons whom he knows to be his creditors; and the plaintiff's name, therefore, should have been inserted.

[PARKE, B.—He was not a creditor at that time.]

Chandless, in support of the rule.—*Macdonald v. Bovington* was a case on the Lords' Act, the object of which act was, not to make any arrangement for liberating the debtor from the general body of his creditors, but to relieve him from the pressure of particular creditors only. The question is, whether it was the intention of the legislature merely to discharge the relation of debtor and creditor, as to such as are named in the schedule, or to discharge the debts themselves. The persons are to be inserted, merely to indicate the debt, and the parties who are entitled to sue at the time. The debt so inserted, in this case, was the debt now sued upon. There cannot be two debts. The debt was transferred to Charles Boydell, and thus he became the proper person to be inserted in the schedule; but still it was the same debt.

The words at the end of the 46th section expressly make the discharge operate, in certain cases, on persons not named, which is a strong argument in favour of the view, that the statute regarded the debt, not the creditor.—(He was then stopped by the Court.)

LORD ABINGER, C.B.—I think the rule should be made absolute. The case quoted from 4 *Term Reports* (*Macdonald v. Bovington*) has no application, because the Lords' Act, on which it was decided, merely discharges the person of the debtor; but, by section 20, expressly keeps alive the debt and judgment against him. The Insolvent Debtors Act, on the contrary, puts the debtor in somewhat the same situation as a bankrupt who has obtained his certificate. In *Mead v. Braham*, there was no certificate. Looking at the words of the statute, I think the debt is discharged. If this were not so, it might happen, that although a party who had given bills was discharged by the act as to one party, he might afterwards be sued by each of the others, and discharged *toties quoties*, according to the number of holders, whose names he might successively insert in the schedule. This would be most absurd, and contrary to the intention of the act.

PARKE, B.—I am of the same opinion. The 46th section is assisted by the words of the 61st, and both serve to shew that the debts are discharged, if they are specified in the schedule with sufficient certainty. This was the construction put by the Court upon a former Insolvent Debtors Act, (1 Geo. 4. c. 119,)—*Reeves v. Lambert* (3), though that act did not contain the provision which is to be found with respect to negotiable securities at the end of the 46th section of the present statute, and which provision strongly confirms the view we take of the meaning of the act, as applied to the case before us.

ALDERSON, B.—The object of the legislature is to identify the debt. This has been always so considered in that class of cases where a party has been held entitled to his discharge, if the jury thought that the debt described in his schedule was the

debt then sought to be recovered, and that a misdescription, if any, was not wilful.

Rule absolute.

[*Vide Forman v. Drew*, 4 B. & C. 15; s. c. 3 Law J. Rep. K.B. 129; *Nias v. Nicholson*, 1.R. & M. 322.]

1837. }
April 24. } PERRY v. SKINNER.

Patent—Disclaimer.

The entry of a disclaimer of part of a specification, under the 5 & 6 Will. 4. c. 83. s. 1, does not set up a void patent, so far as to give a right of action for infringements, committed previously to the disclaimer.

Demurrer to a replication.

The declaration, in case, by the plaintiffs as assignees of a patent for an improvement in pens, stated, that after the assignment to them, and after the passing of a certain act of parliament, entitled, 'An act to amend the laws touching letters patent for inventions,' to wit, on the 30th of April, A.D. 1836, the plaintiffs, by and with the leave of Sir Robert Mounsey Rolfe, Knt., then being His Majesty's Solicitor General, first had, and duly certified by his fiat and signature in that behalf, entered with the clerk of the patents a certain disclaimer and memorandum of alteration, in writing, of part of the specification, (the same not being such disclaimer or alteration as extended the exclusive right granted by the letters patent,) by which disclaimer and memorandum of alteration, the same being under the hands and seals of the plaintiffs, they did disclaim as follows—(setting forth the particular part of the specification disclaimed, and the alteration in the claiming clause, necessary to make it consistent with the previously mentioned part of the specification,) which said disclaimer and memorandum of alteration afterwards were filed by the said clerk of the patents, and duly enrolled with the said specification, pursuant to the statute. The declaration then alleged, that the defendant, within the term of fourteen years, to wit, on the 20th of February 1836, and on divers other days, &c. did counterfeit the said invention, and did use and prac-

tise the same otherwise than in relation to the said part of the invention so disclaimed, in breach, &c.

Plea—as to so many of the supposed grievances as were committed before the 30th of April 1836, *actio non*, because the said disclaimer, &c. was not entered or enrolled until the 30th of April 1836, as aforesaid, and until after the committing of the grievances in the introductory part of the plea mentioned; and that the said invention for which the said letters patent were originally granted, was not at the time of making and granting the said letters patent a new invention, but, on the contrary thereof, had been as to a material part thereof, publicly and generally practised, used and vended, before the date of the letters patent, by reason whereof the rights, &c. granted by the patent were void; wherefore the defendant, at the said several times when, &c., before the said 30th of April 1836, and whilst the said rights, &c. were so void, &c., committed the said several supposed grievances, as he lawfully might.

Replication—That the said last-mentioned grievances were respectively committed only with relation to, and in respect of those parts of the said invention, to which the said disclaimer and memorandum had no reference, and did not apply; and that the said last-mentioned parts of the said invention were, at the time of making and granting the said letters patent, a new invention.

Special demurrer. In the margin it was stated, that the defendant meant to contend, that the patent was, and by the replication is admitted to have been, void at the time of the alleged infringement, to which the plea is pleaded; and that, therefore, such infringement was lawful when it took place, and that it cannot be rendered otherwise by a subsequent disclaimer, even as to those parts of the patent which are not disclaimed or altered.

Wightman, in support of the demurrer.—The question is, whether the new Patent Act, 5 & 6 Will. 4. c. 83, makes a party liable by relation, for acts which, at the time when committed, were perfectly justifiable. That question arises upon the words of the 1st section, which, after empowering a person who has obtained let-

ters patent to enter a disclaimer of any part of his specification, or a memorandum of any alteration therein, goes on to state; that "such disclaimer or memorandum of alteration being filed by the clerk of the patents, and enrolled with the specification, shall be deemed and taken to be part of such letters patent, or such specification, in all courts whatever." Now, it is quite clear, that, before this statute, a patent taken out for too much was wholly bad—*The King v. Else* (1), and *Campion v. Benyon* (2). But for the statute, therefore, the patent, in the present instance, would have been void; the disclaimer only operates to give it effect from the date of the filing and enrolment thereof. The proviso in the same section as to evidence, was introduced *pro majori cautela*, to meet a particular case, which is not the present; and even if there is a difficulty in ascertaining its precise application, it cannot supply an inference which would make innocent parties wrong-doers by relation—otherwise a person taking out a patent would put into the specification a great deal more than was necessary, and then, without any risk, by means of a subsequent disclaimer, give validity to his patent, and recover against all who had in the meanwhile infringed it.

Rotch, contra.—If the words cited mean that the disclaimer becomes part of the specification "from thenceforth," then the statute virtually gives a new patent, which is certainly not intended. The obvious meaning of the words is, that the disclaimer takes effect from the date of the patent; and the language of the proviso at the end of the section confirms that view of the case.

LORD ABINGER, C.B.—It cannot be doubted, that the statute is obscurely worded; but it would be most unjust if a person acting consistently with the laws at the time being, should afterwards be made a wrong-doer by relation. We are not to presume such an intention in the legislature. The argument drawn from the language of the proviso would have much force, if that proviso were not capable of a double interpretation. I think the act must have a prospective operation only.

(1) 11 East, 189.

(2) 3 Brod. & Bing. 5.

PARKE, B.—Generally speaking, acts of parliament are to be construed according to their precise words; and the words here "shall be deemed and taken to be part of such letters patent, or such specification," may certainly mean part of the *original* patent or specification. But it is also a rule of construction, that if the ordinary interpretation lead to absurdity or inconvenience, it should not prevail. Here, it would be manifestly inconvenient, for it would make persons wrong-doers by relation. I think, therefore, we must adopt a legitimate modification of the words, and interpret them to mean "from thenceforth."

BOLLAND, B., and ALDERSON, B., concurred.

Judgment for the defendant.

1837. }
April 24. } REA V. SHUARD AND
ANOTHER.

Trespass—Justification.

In trespass to a building and close, it is a good justification, that the building belonged to the defendant, and that he removed the goods of the plaintiff, which were encumbering it, to the said close of the plaintiff adjoining thereto, the same being a convenient place for depositing them.

Trespass for breaking and entering a building and close, and removing goods from the building, and depositing them in the close.

Pleas—First, the general issue;—fifth, that R. C. was seized in fee of the building, and demised it to defendants, who thereupon entered, &c., and because the said goods were encumbering the building, they, the defendants, removed them to a small and convenient distance, to wit, into the said close of the plaintiff adjoining thereto, and there left and deposited the same for the use of the plaintiff; the said close of plaintiff being a convenient place for such depositing, &c.

Replication to fifth plea—traverse of title.

At the trial, before Parke, B., at the last Worcester Assizes, the jury found for the plaintiff on the first, and other issues, and for the defendant on the fifth.

Godson now moved for a rule to enter up judgment for the plaintiff on that issue, *non obstante veredicto*, and contended, that there was no legal justification in the fifth plea for the trespass committed on the land of the plaintiff; but—

The Court referred to *Viner's Abridgment*, 'Trespass,' (I.) a, p. 516, and to *Rolle's Abridgment*, (I.) 17, p. 566, as authorities that a defendant may justify the removal of plaintiff's goods to an adjoining close of the plaintiff, and "need not carry them to the pound." *Tyringham's case* (1) is to the same effect.

Rule refused.

1837. }
May 2. } LEACH v. THOMAS.

Arrest of Judgment—Bad Breaches—General Damages—Venire de novo.

Where several breaches are assigned, some of which are bad, and the jury give general damages, the Court will not arrest the judgment in toto, but will grant a venire de novo to assess the damages on the good breaches.

Case. The declaration, which consisted of one count, stated, that the defendant being about to quit a farm at Michaelmas, 1832, which he then held of the plaintiff, a certain agreement was entered into between them in the May preceding, whereby it was agreed, among other things, that the defendant should be paid 1s. a load for dung when driven on the land; and by a certain other agreement then made between them, for the considerations therein stated, the plaintiff agreed to let the farm again to the defendant from Michaelmas then next as a yearly tenant; and it was further agreed between them, among other things, that at the expiration of the said tenancy, the said defendant should not carry away or dispose of any dung, the produce of the said farm, or on the said farm at the time the defendant should quit, and that the defendant should keep the houses and fences of the said farm in good repair, and should commit no waste on the said farm. It then alleged mutual promises—the en-

try of the defendant, and the expiration of the tenancy in 1834, and the plaintiff's readiness to perform his part of the agreement on its determination. Several breaches were then assigned, of which the following, the third, fourth, and sixth, are alone material. The third breach was, that the defendant, further disregarding his promises, &c. when he was so quitting as aforesaid, to wit, &c. threatened to carry away from the said farm, or to dispose of divers, to wit, 100 other loads of dung, the produce of the said farm, if the incoming tenant would not pay him, the defendant, divers large sums of money, to wit, 100*l.*, for the same; and the defendant would have so carried away and disposed of the last-mentioned dung, if the said incoming tenant had not paid him such money as last aforesaid, and the defendant thereby then compelled the said incoming tenant either to pay him, the defendant, such monies as aforesaid, or to suffer the dung to be so carried away or disposed of by the defendant; whereupon the said incoming tenant, being so compelled as aforesaid, did then pay the defendant the said monies for the said dung, to prevent the same from being so carried away or disposed of. The fourth breach was, that the defendant, when he was so quitting, further disregarding, &c. threatened to carry away from the said farm, or to dispose of divers, to wit, 100 other loads of dung, then being on the said farm, and having theretofore, to wit, &c., been driven on the said farm, if the said incoming tenant would not pay him, the defendant, for the same, divers monies, exceeding 1s. a load for the same, by a large amount, to wit, by 100*l.*, and the defendant would then have carried away and disposed of the said last-mentioned dung, if the incoming tenant had not paid for the same such monies as aforesaid, and the defendant thereby compelled the incoming tenant either to pay the defendant the last-mentioned monies, or to suffer the said dung to be so carried away or disposed of, whereupon the said incoming tenant, being so compelled as aforesaid, did then pay the said last-mentioned monies, so exceeding 1s. a load, as aforesaid to the defendant, in order to prevent the said dung from being so carried away as aforesaid. The

(1) 4 Co. 38, b.

sixth breach was, that the defendant further disregarding, &c., when he was quitting, &c., threatened to commit further waste on the said farm, if the said in-coming tenant would not pay certain money, to wit, 20*l.*, to him, the defendant, and the defendant would then have committed such further waste as aforesaid, if the in-coming tenant had not paid the said money to the defendant, and the defendant thereby compelled the in-coming tenant either to pay the said money, or to suffer the said waste to be committed, whereupon the in-coming tenant, being so compelled, did then pay the last-mentioned money to the defendant, in order to prevent the said waste from being committed. Issue was taken upon these breaches respectively.

At the trial, before Patteson, J. at the Summer Assizes for Haverfordwest, in the year 1835, the jury found a general verdict for the plaintiff on all the breaches, with 20*l.* damages.

Evans having obtained a rule for arresting the judgment, on the ground that the jury had given general damages for breaches, some of which were bad—

E. V. Williams and *Leach* shewed cause.—There is no ground for arresting the judgment, as, at all events, the plaintiff will be entitled to a *venire de novo*.

[*ALDERSON, B.*—Can you satisfy us there should be a *venire de novo*? We wish you to apply to that point.]

The three breaches, which are objected to, are valid legal breaches. The agreement is, that the tenant is to leave all the dung, the produce of the farm, on the premises. Is it not a legal breach to aver, that he would not leave it without being paid for it? Secondly, for dung driven on the farm he is to have no more than 1*s.* a load. Is it not a legal breach that he insists on more than 1*s.* a load? But it is said, no damage has been sustained by the plaintiff in consequence of these breaches, as all was done with the in-coming tenant. But the injury need not be sustained individually by the contracting party, and the plaintiff may sue—*Anderson v. Martindale* (1).

[*PARKE, B.*—How can you support the breach as to waste? He does not commit

waste; he only threatens it. He never did, because they paid him the money. You may get through the other two.]

Then a *venire de novo* must be awarded, and not the judgment arrested. In *Tidd*, 9th ed. 922, it is said, “*venire de novo* is grantable.” Thirdly, when the jury give general damages, on a declaration consisting of several counts, and it afterwards appear one or more of them is defective—*Eddowes v. Hopkins* (2), *Grant v. Astle* (3); *venire de novo* is the only remedy—*Richardson v. Mellish* (4), *Angle v. Alexander* (5), *Day v. Robinson* (6).

[*PARKE, B.*—You cannot distinguish a bad breach from a bad count.]

It is conceded, in *Trevor v. Wall* (7) the Court refused a *venire de novo*, and arrested the judgment entirely.

[*PARKE, B.*—That was because a court of error cannot award a *venire de novo* when the proceedings originate in an inferior court, as those did, in an inferior court in Shropshire.]

Evans, contra.—The judgment must be arrested *in toto*. *Holt v. Scholefield* (8) is expressly in point, and refers to *Eddowes v. Hopkins*, which is not an authority; that was an application to amend the verdict according to the Judge’s notes. In *Richardson v. Mellish*, and the other cases cited, the *venire de novo* was granted by the court of error.

PARKE, B.—This case must go down again. Here we know that the defendant has been guilty of breaches, but we do not know to what amount. *Holt v. Scholefield* must be overruled as to this point. If the court of error can grant a *venire de novo*, there is no doubt the court with the original jurisdiction may also do it. Had you not better try to come to terms, as we shall certainly grant a new trial? You might have demurred. The rule must be absolute for a *venire de novo*, to assess the damages on the good breaches.

ALDERSON, B.—The point was not ar-

(2) Doug. 377.

(3) Doug. 730.

(4) 3 Bing. 549.

(5) 7 Bing. 119.

(6) 1 Ad. & El. 554; a.c. 3 Law J. Rep. (N.S.) Exch. 381.

(7) 1 Term Rep. 151.

(8) 6 Term Rep. 691.

(1) 1 East, 497.

gued in *Holt v. Scholefield*, it went entirely on the other point. *Grant v. Astle* was referred to. The rule must be absolute for a *venire de novo*.

1837. }
May 4. } SMITH v. ANDREWS.

Bail—Attachment—Waiver.

Where, after notice to the warden of Dover Castle, that he was in contempt for not bringing in the body, the plaintiff's attorney opposed the justification of defendant's bail above, under protest of irregularity, and afterwards received the principal sum and costs from the warden upon threatening him with an attachment:—Held, that opposing the bail was no waiver of the warden's contempt, and that the plaintiff's attorney was afterwards in a condition to move for an attachment against him.

In this case, a writ of *capias*, directed to the warden of Dover Castle, issued the 30th of September. The defendant was arrested on the 8th of November, and executed a bail-bond on the 10th. The warden returned *cepi corpus*, and a body rule issued the 22nd of November, returnable on the 28th. A notice to justify bail was given on the 6th of December, which plaintiff's attorney refused to receive, stating, that the body rule had expired, and the warden was fixed. Two subsequent notices, to justify bail at chambers, were given for the 23rd of December and the 5th of January, and the plaintiff's attorney attended upon each occasion, and opposed the justification, but continued to protest against the proceedings as irregular. He also applied for costs, on the rejection of the bail, on the 23rd. The bail were allowed by the Judge to justify on the 5th; on the 6th of January, a plea was sent to the plaintiff's attorney's office, and not returned; on the 13th, application was made to the warden for the principal sum, and a bill of costs delivered, amounting together to 79*l.* 7*s.* 2*d.*; but it did not contain any item for opposing the justification of bail, or for searching for bail. The warden was threatened with an attachment, and he paid these sums.

W. H. Watson having obtained a rule,

calling upon the plaintiff or his attorney to pay over 79*l.* 7*s.* 2*d.* to the warden,—

Kelly shewed cause.—The question is, whether, at the time the money was paid by the warden, the plaintiff was in a condition to move for an attachment against him. This case is the same in principle as *Holt v. Meadowcroft* (1). The warden was fixed on the 28th, when the contempt was incurred; and had that been term time, an attachment might then have been moved for. The justification of bail at chambers was a mere nullity, as it was in vacation, and without consent. Attending and opposing bail was no waiver—*Hawkins v. Plomer* (2).

[PARKE, B.—Is not accepting a plea an admission that the defendant is in court?]

The knowledge of the delivery of the plea is denied. The proceeding to justify bail was protested against throughout.

[PARKE, B.—We think there was no consent to the justification at chambers.]

Watson, contra.—Accepting and never returning the plea, is an admission that the defendant is in court. An attachment against the sheriff for not bringing in the body under these circumstances would be irregular—*The King v. the Sheriff of Middlesex* (3). No attachment would have been granted, because there was concealment from the warden of material circumstances. The rule of Hilary term, 3 Will. 4, does not apply. There is no mention of justifying bail in the bill of costs to the warden. This would have put him on the alert, and he would not have paid the money, and might have discharged a rule for an attachment on payment of costs.

PARKE, B.—The application is answered as to the irregularity; and I think the plaintiff was in a condition to move for an attachment; but the bill of costs should have contained items for searching for bail and the costs of justifying, and then it is clear the warden would not have paid the money, but, if an attachment had issued, would have moved to set it aside on payment of costs. By the omission to insert this, he has been led into a mistake. It is not clear there was any acceptance of

(1) 4 Mau. & Selw. 467.

(2) 2 W. Black. 1064.

(3) 2 Mau. & Selw. 562.

the plea. The rule cannot be granted in the terms prayed for; it must be suspended, to give time for an application to be made on behalf of the defendant, on an affidavit of merits. If no such application can be made, either on behalf of the bail or the defendant, the plaintiff's attorney must receive all proper costs, to be taxed by the Master, out of the 79*l.* 7*s.* 2*d.*, and refund the residue to the warden.

BOLLAND, B. and ALDERSON, B. concurred.

1837. }
April 17. } HART v. ALEXANDER.

Partnership—Liability—Evidence.

A, B, & C, were bankers at Calcutta. D, being then in India, deposited money with them in 1815. He came to England in 1821. In 1822, C. retired from the firm, and announced his retirement in the Gazette in India. In 1823, he announced himself as a candidate for the East India Directory, and stated his retirement from the firm, in advertisements in newspapers taken in at a reading-room to which D. subscribed. After 1822, D. executed two powers of attorney, the first to the firm in Calcutta, their names being all mentioned in it, and C's not included; the second, to a late partner who had quitted the house since C's retirement, enabling him to receive dividends from the existing firm. D. also received his account annually, from 1822 to 1833, from the firm at Calcutta, during which years the rate of interest varied considerably. The house having become insolvent, and D. having sued C. alone for his balance:—Held, that this was evidence to go to the jury, of D's knowledge of C's retirement, and of his adopting the new firm as his debtors.

Assumpsit for money lent, money had and received, and on account stated. Sixth plea, that defendant, prior to May 1822, carried on business as a partner in a certain co-partnership, under the firm and style of Alexander & Co.; and that the said debt was due from the said firm to the said plaintiff. That on the 1st of May 1822, defendant retired from the said co-partnership, and one Nathaniel Alexander became a partner; and thereupon, in consi-

deration that the said Nathaniel Alexander would, with the assent and knowledge of plaintiff, become liable to the said debt, he, the plaintiff, agreed with the said firm and the said defendant, to discharge, and did discharge the defendant from all liability in respect thereof.

Replication, denying the agreement to discharge the defendant *modo et forma*.

At the trial, before Lord Abinger, C.B., at Westminster, the following facts appeared in evidence:—The defendant and two others were in partnership as bankers at Calcutta, until 1822, when the defendant retired from the house, and Nathaniel Alexander succeeded him as a partner. The plaintiff was an officer in the King's service, and deposited his money in the bank at Calcutta in 1815, being at that time serving in India. He came home in 1821. Notice of the defendant's retirement was published in the *Calcutta Gazette*, in 1822. In 1823, the defendant published advertisements thirteen times in the *Courier* and *Times* newspapers, addressed to the proprietors of East India stock, announcing himself as a candidate for the Directory of the East India Company, and stating that he had ceased to be a member of the firm at Calcutta. It was shewn that these newspapers were taken in at a reading-room at Hythe, where the plaintiff had resided since his return to England, and to which he was a subscriber. In 1831, the plaintiff went to the office of Alexander's agent in London, and there executed a power of attorney to the firm in Calcutta, which contained all their names, and not the defendant's, enabling them to do certain business for him. In 1833, he executed another power of attorney to Fullarton, who had been a partner up to 1825, enabling him to receive certain dividends from the then existing firm. It was also proved that the plaintiff had communications with the house in India, from 1822 to 1833, and received from them annually the state of his banking accounts, upon which it appeared that the rate of interest upon the deposits fluctuated in the intermediate years between 9*l.* and 5*l.* per cent. The Lord Chief Baron left all these facts to the jury, as evidence of notice to the plaintiff, that the defendant had retired from the firm, and of assent by him to take the new firm as his debtors; and

the jury found a verdict for the defendant.

On this day, a new trial was moved for, on the ground of misdirection, in leaving these facts to the jury, as any evidence at all of such notice and assent.

Sir W. W. Follett.—The cases are to this effect: if the creditor of a firm receives distinct and positive notice of the retirement of one partner, and the taking in of another, and acquiesces in the change, he will be bound. It has not yet been held that a mere continued dealing is enough. There must be something to shew that he exercised a discretion, and agreed to take the credit of the new firm. Here no notice of any kind was proved.

[*PARKE, B.*—Knowledge will do.]

But there are no circumstances to bring home knowledge. The plaintiff was in England at the time the defendant's retirement was announced in the *Gazette* in India. It is not shewn he had the opportunity of ever seeing this. Then as to newspapers at Hythe, there is no proof he was at Hythe at the time the advertisements were inserted, or that he ever read those papers. Again, the advertisements were addressed only to the proprietors of East India stock, in which the plaintiff was not interested; but, if he knew the defendant *aliunde* to be a candidate for the directory, he need not necessarily know that he must cease to be a trader to become so. The powers of attorney ought to have no weight, as they would naturally include only the names of the firm who were in India.

LORD ABINGER, C.B.—When this case was tried before me, I thought there was sufficient evidence to go to the jury; and upon consideration, I have a strong impression in favour of the verdict. The question is, whether the plaintiff was acquainted with the fact of the defendant having quitted the partnership in the year 1822. I thought the evidence cogent at the time of the trial; and nothing that has been urged to-day, has induced me to come to a different conclusion. The plaintiff was in India in 1815; and it did not appear that he came to England until the year 1821. It was proved, that in the year 1822 he was living at Hythe, and subscribed to a reading-room there, which he con-

stantly attended. At that time, the defendant and Nathaniel Alexander, Fullarton, and Machan, were partners in the house. When a man invests his money in Indian securities, he usually takes some interest in what is passing in India; and I can say, from my experience in life, that a person who has been in the military or civil service in India, takes great interest in matters relating to that country. It is, therefore, not at all improbable that this gentleman knew that the defendant had ceased to be a partner; indeed, no one would doubt, that when a person engaged in a large mercantile firm in India, leaves the partnership, it is generally known to all persons connected with Indian affairs. In the year 1823, the defendant was elected a director of the East India Company. Now, by the law of the land, a director of that company cannot have an interest in a mercantile house: is it then too much to suppose that that circumstance was known to an officer in the army who had invested his money in the house to which the defendant had belonged? It is not, surely, an overstrained presumption, that he knew that to be the law. It further appeared that two newspapers were taken in at Hythe, in which was inserted an advertisement, stating the defendant's intention to be a candidate for a directorship. It also appeared that accounts were from time to time sent to the plaintiff, containing the amount of interest allowed by the firm on deposits. There was no change in these accounts after the year 1824; at that time they consisted of the addition of compound interest, the simple interest varying from 7l. and 8l. to as low as 6l. per cent. In the year 1831, the plaintiff signed a power of attorney to certain persons to act as administrator to his brother, who died in Persia. He executed this power of attorney in the house of Alexander & Co. From that circumstance, it may be presumed, that he was aware of the persons who formed the partnership firm, for the date was filled up in his own hand-writing, and the parties in India were all particularly specified. If this power of attorney had been intended to be addressed to certain partners only, the natural description would have been to "A. & B, persons in partnership, or trading with others in the firm of

Alexander & Co." Upon the face of this instrument, it must be presumed, in the absence of anything to defeat the presumption, that the person who signed it must have been aware who were the partners in the house of Alexander & Co. It further appeared, that after the firm failed, the plaintiff executed a power of attorney to Fullarton, who had been a partner in the house after the defendant left, to receive from the then existing firm the balance due to him. All these circumstances appear to me strong, very strong facts to shew a great probability, though he could not be proved to have received the circular letters, yet that he took such an interest in the solvency, credit, and condition of his debtors, as to know who were the partners in the house. These were fair circumstances for the jury to consider, and I cannot doubt that they have come to a proper conclusion. The defendant himself left a considerable sum in the firm, and was a loser to a great extent; though that fact is not material, except to repel the imputation that he improperly left the house in difficulties. Under these circumstances, if I had said that there was no evidence to go to the jury, of the plaintiff having known that the defendant had left the firm, I should have stultified myself. I can see no one reason why the jury should have considered that this gentleman did not attend to all his concerns, and had not the least curiosity to know if the defendant continued a partner. Sir W. W. Follett, in his able reply, put the case strongly in favour of the plaintiff, and I do not think it unbecoming my station to have endeavoured to remove from the jury any impression which that reply might have created. Under all the circumstances, I not only think there was evidence, but very strong evidence to go to the jury.

PARKE, B.—I see no misdirection, and am not dissatisfied with the conclusion of the jury, as I think there was evidence to support the plea. The fact of the defendant's ceasing to be a partner in 1822 was proved; and the first question here is, whether there was sufficient evidence to go to the jury, of the plaintiff having known that the defendant had so ceased to be a partner in the house of Alexander & Co.

I think there was sufficient evidence. It appeared that the defendant had been an East Indian director, and it is by no means improbable that the plaintiff knew that fact. Two newspapers were taken in a public room at Hythe, to which the plaintiff was a subscriber, in which were advertisements of the defendant's intention to stand as a candidate for the directorship; and the jury might presume that the plaintiff read the papers, particularly when they contained anything relating to India. It is said, that there must be also evidence of the plaintiff's knowledge of the change of partnership, and of his agreement to accept the new members of the firm, and to discharge the original debtors. I think there was some evidence of this. There was the fact of his having received accounts from the year 1822 to the year 1833, during which time the firm was several times changed, the accounts varying the rate of interest from time to time. This was evidence to go to the jury, of a knowledge of the persons rendering the accounts. In the year 1833, a warrant of attorney is given to Fullarton, to prove the plaintiff's debt against the insolvent firm in India. This is strong evidence of the plaintiff's knowledge of the persons composing the firm, and of his adoption of those persons as his debtors. I apprehend the law is now settled, that if one partner goes out, and another comes in, the debts of the old firm may be transferred to the new, by consent of all parties. In *David v. Ellice* (1), the outgoing partner was held liable; but that case, as well as the case of *Lodge v. Dicus* (2), has been much shaken by *Thompson v. Percival* (3). But it will be remembered, that in *David v. Ellice* the Court were substituted for a jury; and I do not know that twelve merchants would have determined as the Court did.

BOLLAND, B.—I regret to differ from my learned Brothers, but in this case I think there was no evidence for the jury. There is no doubt, that if it could be

(1) 5 B. & C. 196; s. c. 4 Law J. Rep. K.B. 125.

(2) 3 B. & Ald. 611.

(3) 5 B. & Ad. 925; s. c. 3 Law J. Rep. (N.S.) K.B. 98.

shewn that the plaintiff had notice of the change of partnership, and adopted the new firm, the defendant would not be liable; but clear liabilities cannot be removed but by clear dispensation or discharge, and I do not here find enough to satisfy me that the old firm were so discharged. Looking at the whole of this evidence, I cannot find enough to satisfy me of the probability of the plaintiff having a knowledge that the defendant had left the firm. We all know that a man is not bound to look at all the newspapers which may lie in a reading-room to which he subscribes; nor, indeed, to read all that may appear in any one paper. It seems to me, therefore, too much to consider the fact of the plaintiff having subscribed to the rooms at Hythe, as evidence of his knowledge of the change of partnership. With regard to the power of attorney, it was not necessary to mention in it the names of every person composing the firm of Alexander & Co., and I think you would only expect that the names would be mentioned in it, of such members of the firm as were then in India.

ALDERSON, B.—The general rule is, that where there is no misdirection in point of law, unless the Judge who tried the cause is dissatisfied with the verdict, there should be no new trial. The Lord Chief Baron intimates his opinion that he is satisfied with the verdict; so that, independently of any other grounds, I apprehend that this alone would be enough to determine us. It is clear that the defendant left the firm at the time stated in the plea, and that the plaintiff trusted the firm of Alexander & Co., no matter who were the persons who from time to time composed the firm. I think there was sufficient evidence from which a jury might infer that the plaintiff knew of changes in the firm from time to time; but the material question is, whether he had knowledge of the defendant having left. In my opinion, there is not much weight to be attached to the fact of the newspaper containing the advertisement alluded to, being in the reading-rooms. I do not see why I am to infer that the plaintiff read the advertisements: nevertheless, I cannot say that this was not evidence to go to the jury. The plaintiff being a member of the club-room, it is

possible that he might have read the advertisements in a newspaper. It is also reasonable to suppose that he may have looked at the power of attorney before he executed it. Though I cannot say, if I had been upon the jury, I should have come to the same conclusion, I concur in refusing the rule.

Rule refused.

1837. { DOIDGE v. ELIZABETH BOWERS,
April 18. { ROBERT WADHAM MUNN, AND
MARY ANN HIS WIFE, AND
HENRY BOWERS.

Landlord and Tenant—Yearly Tenancy—Evidence—Baron and Feme.

A, B, and C. occupied premises from December 1834 to September 1835, when C. married and left the place. An action was brought by the landlord against A, B, C, and C's husband, for rent accruing due after the marriage of C. upon an alleged contract, before the marriage, for a yearly tenancy. Payment to the landlord of a quarter's rent was proved, but when and by whom was not shewn.

Held, that this was not evidence to raise the presumption of a yearly tenancy by A, B, and C, without shewing the payment to have been made before the marriage, and with the assent of C.

Quære—If a mere payment by others during C's occupation, without some interference on her part, would have been evidence of such a contract by her.

Assumpsit. Second count, that before the intermarriage of the said Robert Wadham Munn and the said Mary Ann, the plaintiff demised a dwelling-house to the defendants, Mary Ann, Elizabeth, and Henry, at a yearly rent, payable quarterly, and that afterwards, and during the tenancy, and after the intermarriage of Robert Wadham with Mary Ann, two quarters' rent became due.

Fourth plea—traverse of the demise.

At the trial, before Parke, B., at the Worcester Spring Assizes, an agreement was put in evidence, dated the 25th day of December 1834, and signed by Elizabeth and Henry Bowers, and Mary Ann Bowers, (who afterwards married Robert Wadham

Munn,) by which those parties agreed to take, and the plaintiff, (whose signature was not affixed,) agreed to let the premises in question for a term of seven years, at a rent of 90*l.*, payable quarterly; and it was stipulated, that a lease was to be drawn, and that if any dispute should arise as to the covenants to be introduced therein, the same should be left to arbitration, &c.

It was proved, that the three Bowers went into possession of the premises, and that Mary Ann remained there till her marriage with Munn, in September 1835. Evidence was also given that the plaintiff was paid one quarter's rent. The jury found a verdict for the defendants, on the issue of the demise, and the learned Judge gave liberty to the plaintiff to move to enter a verdict thereon; accordingly,—

Talfourd, Serj., on this day, contended, that there was evidence of a demise. Although the agreement, not being signed according to the Statute of Frauds, would not pass the term, still it would create a tenancy, which would be, not a tenancy at will, but a tenancy from year to year. He also argued, that there was sufficient evidence of payment of rent to prove a tenancy, and that payment of one quarter's rent was evidence of a yearly tenancy.

LORD ABINGER, C.B.—That point is not raised by the evidence. If you had shewn rent paid by Mrs. Munn whilst a *feme sole*, that might have been evidence for the jury, as to her continuing a tenant after her marriage.

PARKE, B.—The original contract did not operate as a demise, and the utmost that existed was a tenancy at will. In order to shew a new contract for a yearly tenancy, it was necessary to shew, that Mrs. Munn assented to the payment of the quarter's rent. Here, consistently with the evidence, that payment may have been made, neither with her knowledge, nor before her marriage.

ALDERSON, B.—If there had been proof of payment by others during her occupation, it might have been enough to raise a presumption of her assent; but even that is doubtful without something done or some interference by her.

Rule refused.

1837. }
April 20. } **HOWE v. PRITCHARD.**

Venue—Material Evidence.

The Court will not grant a rule to set aside a verdict, because the plaintiff has failed in his undertaking to give material evidence in a particular county, the objection not having been made at the trial.

In this case, there had been a motion to change the venue to the county of York, which was discharged, on the plaintiff undertaking to give material evidence in the county of Lincoln.

At the trial, before Lord Abinger, C.B., at the last Assizes for Lincoln, the plaintiff had a verdict, which—

Balguy now moved to set aside, and to have a new trial, on the ground, that no material evidence had been given in the county of Lincoln. It appeared, that this objection had not been taken at the trial.

PARKE, B.—You should have made this objection at the trial. It is too late to make it now for the first time; as, if it had been mentioned at the trial, the plaintiff might have given material evidence in that county.

Rule refused.

1837. }
April 24. } **HARRIS v. BUTLER.**

Seduction—Pleading—Action.

A declaration in case for the seduction of the plaintiff's daughter, not founded on the loss of service, nor distinctly shewing that the injury complained of was in breach of a contract by the defendant express or implied, is bad on demurrer.

Case. The first count of the declaration stated, that one Matilda Harris, then being the daughter and servant of the plaintiff, with the consent of the plaintiff, became and was the apprentice of one Adeliza, the wife of the defendant, for the purpose of learning the business of a milliner, in consideration of the sum of 29*l.* then paid by the plaintiff to the defendant in that behalf, and on the terms, that the said Adeliza, with the consent of the defendant, should provide the said Matilda with meat,

drink, and lodging. Nevertheless, the defendant, intending, &c., whilst the said Matilda was such apprentice, debauched her, whereby she became ill, and incapable of serving the said Adeliza as such apprentice, or of learning the said business, and thereby the plaintiff lost the benefit he ought to have derived from the said money so paid, as aforesaid, and from the said Matilda being instructed in the said business, and hath laid out a large sum of money about her cure.

Second count, that plaintiff, at request of defendant, suffered the said Matilda, then being the daughter and servant of the plaintiff, and an infant, to wit, of the age of sixteen years, and accustomed to be employed by the plaintiff, to go and reside in the house of the defendant, to be furnished with board and lodging there, for the purpose of being taught the business of a milliner, by the said Adeliza, for a certain consideration then paid by plaintiff to defendant; and thereupon, it became and was the duty of the defendant to take due and proper care of the said Matilda, and of her morals and health, whilst she should remain in the house of the defendant, so that the plaintiff might not be injured and prejudiced, by reason of the improper treatment by the defendant of the said Matilda. Nevertheless, &c., (injury and damage in nearly the same terms as in the first count).

Plea—to each of the counts, that the said Matilda was not, at the said times when, &c. the servant of the plaintiff.

Special demurrer to each plea—stating for cause, (amongst others,) that the declaration is not founded solely on the loss of the service of the daughter.

Hughes, in support of the demurrer.—This is a special action on the case, founded on a contract between the defendant and the plaintiff, by which, in consideration of a sum of money paid to the defendant, a benefit was to be derived by the plaintiff, not immediately, but indirectly. The principle that the parties must stand in the relation of master and servant, at the time of the wrong done, extends only to actions *per quod servitium amisit*. The loss in this case is independent of the service. In *Hall v. Hollander* (1), Bayley, J.

(1) 4 B. & C. 660; s. c. 4 Law J. Rep. K.B. 39.

suggested an action of this kind, where the father had necessarily incurred expense, by an injury to his child, though no service could be proved on account of its tender age. Indeed, in two cases (*Booth v. Charlton* and *Johnson v. M'Adam*) cited in *Dean v. Peel* (2), Wilson, J. held, at Nisi Prius, that the action might be maintained, though the daughter were not living with her father at the time of the seduction, if she were under the age of twenty-one. So in *Speight v. Oliveira* (3), damages were recovered for the seduction of the plaintiff's daughter whilst in the defendant's service.

[PARKE, B.—There, the very act of taking her from her father's house, was a trespass. It was done under colour of a contract, and the defendant's fraud did not destroy the original relationship between father and child. So also in the cases referred to in *Dean v. Peel*, though the child was not with her father at the time, it was a casual absence with an *animus revertendi*; and, as Lord Ellenborough observed, the former relationship between the father and child continued. Originally, this action of seduction would not lie, without proof of the relationship of master and servant; and even in the case of the highest families, some service was held necessary. That rule was afterwards so far relaxed as this, that if the child was a minor, and of an age capable of acts of service, such service would be presumed. Here, you are out of court as to service, by your own admission. Then, can you shew, upon your declaration, any contract by the defendant to take care of the daughter's morals? Or does the law imply any promise to the father, of that kind?]

[LORD ABINGER, C.B.—Suppose a man take a lodging with board for his son or daughter, does the lodging-house-keeper impliedly contract to take care of their morals?]

[PARKE, B.—The duty may arise out of a contract of apprenticeship, but you do not state such a contract between the defendant and the plaintiff. Nor do you shew any other facts, from which a contract by the defendant to take care of the daughter's morals, may be implied.]

(2) 5 East, 47.

(3) 2 Stark. Rep. 493.

LORD ABINGER, C.B.—If the declaration can be amended, so as to let in the argument of a duty, express or implied, from the defendant's contract, the case will be different.

Leave to amend within a week, otherwise judgment for the defendant.

1837. } EDWARDS v. BREWER AND AN-
April 28. } OTHER, ASSIGNEES OF CARTER.

Stoppage in Transitu—Bankrupt.

A consignor, by taking bills for goods from the consignee, does not lose his right to stop in transitu.

The clerk to C, the consignee, (who was absent from home,) being informed of the arrival of goods, and applied to by the captain for directions where to deposit them, wrote to him the following note: "C. is absent from town: I think you had better land the goods at Griffin's wharf on his account;" Griffin's wharf not being the usual place of deposit for the consignee's goods:—Held, that it did not sufficiently appear from the note that Griffin's wharf was made the ultimate place of deposit for these goods by the consignee, so as to take from the consignor the right to stop in transitu at that place.

This was an action upon a feigned issue, to try the right of possession to certain iron, as between the plaintiff, the consignor, and the defendants, the assignees of one Carter, the consignee.

At the trial, before Lord Abinger, C.B., in London, at the Sittings after last term, the following facts appeared:—The iron was to be delivered at 7*l.* 5*s.* per ton, in the port of London, and a bill of exchange at four months was accepted by Carter, in payment for it. The plaintiff was to pay the freight. Upon the arrival of the goods in London, the captain twice applied at Carter's house without seeing him, and then told his clerk he should be under the necessity of landing the goods at Griffin's wharf, which was the place usually employed by the captain for landing his own goods. The captain also told his own clerk, that a note would come from Carter's clerk, which he was to open and act upon. The following note from Carter's clerk came in reply:—"Carter is absent

from town: I think you had better land the goods at Griffin's wharf on his account." The note was opened by the captain's clerk, and under his orders the goods were landed at Griffin's wharf, and an entry was made of them in the wharfinger's books, without any name, and a sum for freight charged against them. It did not clearly appear when this entry was made. Carter becoming bankrupt, the plaintiff gave notice of stoppage in transitu, while the goods were at Griffin's wharf. Upon these facts, the plaintiff had a verdict, with liberty to the defendants to move to enter a verdict or a nonsuit, or to have a new trial.

Sir F. Pollock now moved.—Griffin's wharf was here substituted by Carter as his place of deposit for these goods. If so, the right to stop in transitu was at an end when they were landed, and the assignees are entitled to a verdict. This depends upon the note from Carter's clerk. Wherever the consignee accepts the goods, though not at the ultimate place of their destination, the transitus is at an end. They were not landed for freight and charges, as the consignor was to be at that expense. Secondly, the plaintiff having taken a bill, had no right to stop in transitu without tendering the bill again. At this time, as against the assignees, the plaintiff had no right to the goods.

[PARKE, B.—Receiving the bill does not prevent the right to stop in transitu—*Hodgson v. Loy* (1).]

In that case, there was an actual tender of the bill, and the *postea* was not delivered up till the money was repaid. If the consignee has paid half the price for the goods, can the consignor have the whole of the goods without repaying what he has received? He may stop them, but cannot take them. The cases go to this, that it would be hard on the consignor to lose his lien if a small part be paid; but is it not equally hard on the consignee, if he has paid nearly the whole, to give up the goods without receiving back the money?

LORD ABINGER, C.B.—I thought the note from Carter's clerk was not a peremptory order, but an expression of opinion, and that Griffin's wharf was only a place of deposit in transitu, and not a place

(1) 7 Term Rep. 440.

of reception. The captain did not choose to land the goods on the consignee's account; but directed freight to be placed against them.

PARKE, B.—In this case, there must be no rule. The assignees have no title to these goods until they have got into the hands or the possession of the consignee. They were landed at Griffin's wharf, where he had not usually had his goods landed. Had he then taken possession of them? The consignee is away, and his clerk says, "You had better land the goods at Griffin's wharf, in my master's name." It is the same as if the clerk had not acted. Then, how does the captain act? He lands them, not in the consignee's name at all, but in blank, with freight and charges set against them. Then, the other point is as to the bills. It is settled by *Feise v. Wray* (2), that by an acceptance of bills, the vendor's right to stop in transitu is not taken away. The acceptance would not diminish his right to hold possession until the whole was paid. Whether the effect of the stoppage in transitu would be to rescind the contract, or merely to revest a lien does not seem quite settled—*Clay v. Harrison* (3).

BOLLAND, B. and GURNEY, B. concurred.
Rule refused.

1837. }
May 8. } LANMAN v. LORD AUDLEY.

Judgment—Cognovit—Executors.

The proviso in rule Hilary, 4 Will. 4. r. 3. (as to pleading), which makes it competent to a Court or Judge to order a judgment to be entered nunc pro tunc, applies only where the delay is of the Court, and not of the party applying; and therefore the Court refused to enter up judgment on a cognovit in Easter term, nunc pro tunc, the person by whom it was given having died in Hilary term.

Dasent moved for a rule calling on the executors of Lord Audley to shew cause why judgment should not be entered up on a cognovit given by the testator. The cognovit was dated on the 8th of February 1833, and Lord Audley died on the 14th of January 1837.

(2) 3 East, 93.

(3) 10 B. & C. 99; s.c. 8 Law J. Rep. K.B. 90.

[PARKE, B.—How can we grant this rule? I do not mean to say that a case may not arise, but I apprehend that the new rule for entering up judgment *nunc pro tunc*, applies, as formerly, in those instances only where the delay is of the Court, as, where a case has been argued, and some delay has arisen thereby. But here it is the plaintiff's laches; why did he not enter up judgment before?]

The defendant died in the course of last term, and this motion is made at the earliest moment after the necessary inquiries.

[PARKE, B.—You must take your remedy against the executors in the usual way.]

A similar application was made on a warrant of attorney in the Court of King's Bench, in the case of *Hamson v. the Executors of Sir George Naylor*, and that Court granted a rule *nisi*; but no cause was shewn, as the executors paid the money.

[*Kelly, amicus Curie*, stated that he had moved for the rule in that case, and the Court said, that where a party came in a reasonable time after the death of the defendant, they would grant a rule to shew cause.]

Before the recent rule of Hilary, 4 Will. 4, rule 3, judgment might have been entered up after the death of the plaintiff or defendant, pending the vacation, as of the preceding term—*Arch. Pr. K.B.* 383, 566. The plaintiff, therefore, would have been in time in the last vacation.

[LORD ABINGER, C.B.—Why did he not come in last Hilary term?]

The plaintiff at that time did not know that Lord Audley was dead. Some time also elapsed in ascertaining who were the executors, as the will was proved in Ireland. He had abstained from entering up judgment during Lord Audley's life, in consequence of communications from him.

LORD ABINGER, C.B.—The old notion was, that as a term was one day, judgment might be entered up on any day of the term if the defendant was proved to be alive at any time in term. But here the plaintiff does not come till the following term. What is asked could not have been done under the old rules, and I do not see why it should be done now.

Rule refused.

1837. }
 April 21. } LANGRIDGE v. LEVY.

Action on the Case—False Representation.

Declaration in case, stated that the defendant sold a gun to the plaintiff's father, for the use of himself and his son, (the plaintiff,) and that the defendant falsely warranted it to be a safe and secure gun, whereas it was unsafe and dangerous, of which the defendant had full knowledge; and that the plaintiff, confiding in the said warranty, did use the said gun, and that it burst, and by means of the premises, the plaintiff lost his hand. After verdict, held, that a sufficient cause of action against the defendant was disclosed, the damage being a consequence of the fraud, whilst the instrument was in the possession of a party to whom the defendant's representation was either directly or indirectly communicated, and for whose use he knew that the instrument was purchased.

Case. The declaration stated, that one George Langridge, the father of the plaintiff, theretofore, to wit, on &c., at the request of the defendant, bargained with him to buy of him a certain gun, to wit, for the use of himself and his sons, at and for a certain price, to wit, &c.; and the defendant then, by falsely and fraudulently warranting the said gun to be made by Nock, and to be a good, safe, and secure gun, sold the said gun to the said G. L., for the use of himself and his sons, for the said sum of, &c. then paid, whereas in truth the defendant was guilty of great breach of duty, and of wilful deceit, negligence, and improper conduct, in this, that the said gun, at the time of the said warranty and sale, was not made by Nock, nor was it a good, safe, and secure gun; but, on the contrary, was made and constructed by a maker very inferior, and was then and at all times a very bad, unsafe, ill-manufactured, and dangerous gun, and wholly unsound, and of very inferior materials,—of all which premises the defendant, at the time of the making of the said warranty and of the said sale, had full knowledge and notice: and the plaintiff saith, that he, knowing and confiding in the said warranty, did use and employ the said gun, which, but for the said warranty,

he would not have done; and that afterwards, the gun being in the hands and use of the said plaintiff, by reason and wholly in consequence of the weak, dangerous, insufficient, and unworkmanlike manufacture, construction, and materials thereof, then and whilst so in use by the plaintiff, burst and injured him; and that by means of the premises, breach of duty, and improper conduct of the defendant, the plaintiff lost the use of his hand.

A verdict having been found for the plaintiff, a motion was made to arrest the judgment; against which—

Bompas and Ball shewed cause.—This is an action on the case, which is a remedy to meet every wrong. The father bought the gun for the use of his son, a minor. The son has been injured; but he had no right of action on the contract. The action on the case is, therefore, applicable. The defendant warranted the gun to be safe—and the declaration contains an averment of a *scienter* as to its insecurity. If, with a knowledge of the purposes to which it was to be applied, the defendant sold the gun as safe and secure, knowing that it was not so, he is answerable for the accident which has happened. It is immaterial that this is *primæ impressionis*—*Chapman v. Pickersgill* (1).

[**PARKER, B.**—Could this declaration be supported if you were to strike out the allegation of the contract? Is the mere delivery of the gun to a person to be used by him, the defendant knowing it to be unsafe, a good cause of action?]

If not, there will be a wrong without a remedy. It was contrary to the defendant's duty to sell an unsafe gun. If a wrong, or an injury result from the breach of a duty, a party injured has a right of action. The duty may arise out of a contract, or may be imposed by the law. Here, it arises out of a contract with a third person. But that is immaterial: *Mast v. Goodson* (2) was a breach of duty arising out of a contract—*Everard v. Hopkins* (3). The servant may bring an action on the case, for unskilful treatment by the surgeon, employed by his master—*Vin. Abr.* 'Action on the Case,'

(1) 2 Wils. 145.

(2) 3 Wils. 548.

(3) 2 Bulst. 332.

'Deceit'—*Bretherton v. Wood* (4), and *Dixon v. Bell* (5). Whoever deals in articles of danger, must take care that they are not improperly used.

[ALDERSON, B.—Suppose a person has a mischievous bull, and another comes and buys it, saying, that he shall put it in a field, over which there is a public path, which he does, and a person is gored by the bull, has he an action against the seller?]

It is submitted that he has. If not, the fraud of the seller would be his protection, and that cannot be. Suppose a person to sell a vicious dog, which bites the children of the purchaser, the seller must be responsible. Where dangerous articles are used, the person is liable for any injury caused by them, as in the case of spring guns—*Holt v. Wilkes* (6).

[PARKE, B.—It must be something calculated to do an injury of a public nature.]

[ALDERSON, B.—Suppose the person using the gun had been a total stranger, would it have made any difference?—must not the principle go so far?]

It is not necessary for this case, that that should be determined, because the gun was sold expressly for the son; but, perhaps the doctrine goes that length. A case might be put of a wrong medicine sent from a chemist, which is received by a person, and placed by him in a cupboard, and afterwards taken by a third person, who, in consequence, receives an injury: can it be said, that he has no remedy against the chemist?

[ALDERSON, B.—Suppose the intermediate party had tasted it, and discovered that it was wrong, and had carelessly handed it over, would the chemist be liable? It is not averred in this declaration, that the father handed over the gun without knowledge of its defect. A great many authorities shew, that the act of an innocent agent is the act of the person who originates it, as in the case of the squib—*Scot v. Shepherd* (7); and, therefore, if this were the act of an innocent agent, who was required to hand the gun over to another, it would be the same as though it had been delivered by the seller himself. If your

declaration had averred, that the father was an unconscious agent, the case would have been brought within that principle.]

The averment, that by reason of the breach of duty the accident happened, negatives the idea of the father's negligence. They also cited *Townsend v. Watken* (8), and *Peppin v. Shephard* (9).

Erle and Butt, contra.—There is no precedent for this action—neither is it warranted by any legal principle. First, it is not stated in the declaration how the plaintiff got the gun, whether it was delivered to him by his father or not;—secondly, it is supposed, that some special damage which has happened has given a cause of action to the plaintiff. That is not so. A mere breach of contract with a third party will not do. There must be a breach of a public duty. If an accident happen from a breach of such a duty, an action may be maintainable by any person: if from a breach of contract, the party contracting may have an action, but no other. If, therefore, this case proceeds on the breach of warranty, the plaintiff cannot recover. Then, supposing the warranty out of the question, it appears simply that an unsafe gun was sold by the defendant to the plaintiff's father. There is no breach of public duty. It was not loaded when delivered to the father.

[GURNEY, B.—There was a case before me at the Old Bailey, where a man had sold a small cannon which he knew to be unsound. It was fired off on an occasion of some rejoicing, exploded, and a man was killed. The seller was tried, and convicted of manslaughter.]

In *Holt v. Wilkes* and *Dixon v. Bell*, the defendant had himself not used proper precautions in respect to his own dangerous instruments. If they had not been loaded when placed there, but some other person had loaded them, the party would not have been liable—*Bird v. Holbrook* (10). So of mischievous animals, they must not be placed in situations of open exposure, where the public are likely to pass. That is the act of the owner.

[ALDERSON, B.—Is not an unseaworthy ship dangerous? She may not be so while

(4) 3 Brod. & Bing. 54.

(5) 5 Mau. & Selw. 158.

(6) 3 B. & Al. 302.

(7) 2 W. Black. 892; s. c. 3 Wils. 403.

(8) 9 East, 277.

(9) 11 Price, 200.

(10) 4 Bing. 628; 6 Law J. Rep. C.P. 146.

in harbour. But suppose a ship-owner knowingly send an unseaworthy ship to sea, is he not liable to an action?]

If the ship sink, can all the passengers sue him for the loss of their goods? Take the case of an unruly horse, sold with a warranty of his being quiet in harness, and the purchaser lend him to his friend, whose carriage is broken, and his friends are injured, can he, or can they, bring their action? In *Soot v. Shepherd*, the instrument was immediately dangerous when set in action. *Com. Dig.* 'Action on the Case,' 'Negligence,' contains other instances of responsibility, but all are different from the present. Again, suppose a person make a steam boiler of insufficient materials, which is fixed on some private premises, where it explodes and damages some adjoining house, has the owner of the house any right of action against the engineer?—*Witte v. Hague* (11). The representations made to the father, give no right of action to the son.

[*PARKE, B.*—You contend, that the stranger ought not to trust the representation, and act upon it.]

It has been assumed, that there was no warranty; but if there was one, the loss is a breach of that warranty, and must be so treated.

[*PARKE, B.*—Then the question will be, whether the person to whom the representation is indirectly made can maintain the action, provided it be made with an intention of being communicated to that person, as may be collected from the declaration.]

It is not stated that the defendant represented it to the plaintiff, nor that the father told the son.

[*PARKE, B.*—It is not alleged that the plaintiff took the gun without his father's consent: we must assume the contrary.]

The damage is too remote, unless there has been some privity of contract—*Scott v. Lara* (12), *Ward v. Weeks* (13), *Vickers v. Wilcox* (14). In the cases cited from *Bulstrode* and *Wilson*, there was a direct misfeasance of the defendant, and so in *Williams v. the East India Company* (15),

the action was between contracting parties. There was a case of *Phillips v. Hayward* (16), before the Court of King Bench, some years ago, where an action was brought for an injury to a horse by an improper blister, and it appeared that the plaintiff had sent his horse to a farrier to be cured, and he sent it to the defendant, who applied the blister, and the Court held, that the action was not maintainable without a privity of contract between the plaintiff and the defendant. Again, there is no averment of the necessity to use the gun, or that it had been properly kept during the interval.

Cur. ado. vult.

PARKE, B.—In this case a motion was made to arrest the judgment, after a verdict for the plaintiff. [Here his Lordship stated the declaration.] It is clear that this action cannot be supported upon the warranty of a contract (for there is no privity in that respect) between the plaintiff and the defendant. The father was the contracting party with the defendant, and can alone sue upon the contract, for the breach of it. The question then is, whether enough is stated on this record to entitle the plaintiff to sue, though not on the contract; and we are of opinion that there is, and that the present action may be supported.

We are not prepared to rest the case upon one of the grounds on which the learned counsel for the plaintiff sought to support his right of action, namely, that whenever a duty is imposed upon a person by contract or otherwise, and that duty is violated, any one who is injured by the violation of it may have a remedy against the wrong-doer. We think this action may be supported without laying down a principle, which would lead to that indefinite extent of liability, so strongly put in the course of the argument on the part of the defendant; and we should pause before we made a precedent, by our decision, which would be an authority for an action against the vendors even of such instruments and articles as are dangerous in themselves, at the suit of any person whatsoever, into whose hands they might happen to pass, and who should be injured

(11) 2 Dowl. & Ryl. 33.

(12) Pea. N.P.C. 326.

(13) 7 Bing. 211; s. c. 9 Law J. Rep. C.P. 6.

(14) 8 East, 1.

(15) 3 East, 192.

(16) Not reported.

thereby. We do not feel it necessary to go to that length; and our judgment proceeds upon another ground. If the instrument in question, which is not of itself dangerous, but requires an act to be done, that is, to be loaded, in order to make it so, had been simply delivered by the defendant without any contract or representation on his part, to the plaintiff, no action would have been maintainable for any subsequent damage which the plaintiff might have sustained by the use of it. But if it had been delivered by the defendant to the plaintiff, for the purpose of being so used by him, with an accompanying representation to him, that he might *safely so use it*, and that representation had been *false to the defendant's knowledge*, and the plaintiff had acted upon the faith of its being true, and had received damage thereby, then there is no question but that an action would have lain, upon the principle of a numerous class of cases, of which the leading one is that of *Paisley v. Freeman* (17), which principle is, that a mere naked falsehood is not enough to give a right of action; but it must be a falsehood told with an intention that it should be acted upon by the party injured, and that act must produce damage to him. If, instead of being delivered to the plaintiff immediately, the instrument had been placed in the hands of a third person, *for the purpose of being delivered to and then used by the plaintiff*, the like false representation being knowingly made to the intermediate person, to be communicated to the plaintiff by him, and the plaintiff had acted upon it, there can be no doubt but that the principle would equally apply, and the plaintiff would have had his remedy for the deceit; nor could it make any difference that the third person also was intended by the defendant to be deceived; nor does there seem to be any substantial distinction, if the instrument be delivered, in order to be so used by the plaintiff, though it does not appear that the defendant intended the false representation itself to be communicated to him. There is a false representation made by the defendant *with a view that the plaintiff should use the instrument in a dangerous way*; and

unless the representation had been made, the dangerous act could never have been done. If this view of the law be correct, there is no doubt but that the facts, which, upon this record, must be taken to have been found by the jury, bring this case within the principle of those referred to. The defendant has knowingly sold the gun to the father, *for the purpose of being used by the plaintiff*, by loading and discharging it, and has knowingly made a false warranty that this might be safely done, in order to effect the sale; and the plaintiff, on the faith of that warranty, and believing it to be true, (for this is the meaning of the word "confiding,") used the gun, and thereby sustained the damage which is the subject of this complaint. The warranty, as between the parties, has not the effect of a contract; it is no more than a representation, but it is no less. The delivery of the gun to the father is not indeed averred; but it is stated, that, by the act of the defendant, the property was transferred to the father, in order that the son might use it; and we must intend, that the plaintiff took the gun, with the father's consent, either from his possession or the defendant's; for we are to presume that the plaintiff acted lawfully, and was not a trespasser, unless the contrary appears. We therefore think, that as there is fraud, and damage, the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time, as one of its results, the party guilty of the fraud is responsible to the party injured. We do not decide whether this action would have been maintainable if the plaintiff had not known of and acted upon the false representation; nor whether the defendant would have been responsible to a person not within the defendant's contemplation at the time of the sale, to whom the gun might have been sold or handed over. We decide, that he is responsible in this case for the consequences of his fraud, whilst the instrument was in the possession of a person to whom his representation was either directly or indirectly communicated, and for whose use he knew it was purchased.

Rule discharged.

1837. } PLUMMER V. LEE.

*Award—Certainty—Immaterial Issue—
Repleader—Costs.*

An award directed interest to be paid from the last settlement that took place in the lifetime of M. T. An action having been brought upon the award, and it appearing that the date of that last settlement was not in dispute, the Court afterwards refused to disturb a verdict given for the plaintiff: the award not being necessarily uncertain.

Quære—whether under a plea that “the arbitrator did not make any award,” the defendant could avail himself of the objection of uncertainty, to defeat the award?

To a declaration on such an award, alleging that there “had been a settlement in the lifetime of M. T. to wit, on the 12th day of July, A.D. 1833, which settlement was the last before making the award,” the defendant pleaded “that the day in the declaration mentioned was not the day of the last settlement before making the award;” and a verdict was found for him on that issue:—Held, that the allegation of the time of the last settlement was unnecessary, and the issue upon it immaterial. And, as the plea contained no confession, a repleader was awarded, and not a judgment non obstante veredicto.

Though several good pleas are pleaded, yet, if the cause of action is not confessed by any or all taken together, and an immaterial issue is raised and found on another plea, which, in like manner, does not confess the cause of action, there must be a general judgment of repleader.

On such a judgment, there are no costs to either party, in respect of any of the issues.

The declaration stated, that before the making of the submission to arbitration thereinafter next mentioned, certain differences had arisen, and were then depending between the plaintiff, as administratrix of M. Thompson, and the defendant, touching and concerning divers sums of money due from the defendant to the plaintiff, as administratrix as aforesaid, and of and concerning part of which said sums of money there had been a settlement on a certain day, in the lifetime of said M. Thompson, to wit, on the 12th of July

1833, which settlement was the last settlement next before the making of the award hereinafter mentioned. And thereupon, for putting an end to the said differences, the plaintiff, as administratrix as aforesaid, and the defendant, heretofore, to wit, on the 11th of June 1835, respectively submitted themselves to the award of one John Plummer, to be made between them of and concerning said differences. And the plaintiff, in fact, saith, that the said John Plummer having notice thereof, and having taken upon himself the burthen of the said arbitrament, afterwards, on the 13th of May 1836, made his certain award between the plaintiff, as administratrix as aforesaid, and the defendant, of and upon the premises, and did thereby award that there was then due from the defendant to the plaintiff, as administratrix as aforesaid, the whole sum of 150*l.*, together with interest on the same from the period of the last-mentioned settlement, on payment of which, a receipt in full should be given; of which award, the defendant, afterwards, on the day and year last aforesaid, had notice. And although the plaintiff, as administratrix as aforesaid, hath always been willing to receive the said monies so awarded, and, on payment, to give a receipt in full to the defendant, yet the defendant hath not paid the same or any part thereof, but, on the contrary, the said 150*l.* and interest, as aforesaid, amounting in the whole to a large sum of money, to wit, 160*l.* 6*s.* 2*d.*, are still wholly due to the plaintiff, as administratrix as aforesaid.

Pleas—First, that the said arbitrator, John Plummer, did not make any award of and upon the premises in the said declaration mentioned, in manner and form, &c. Second, that the day in the declaration in that behalf mentioned, was not the day of the last settlement next before the making of the said award in manner and form, &c. Third, that no such settlement as in the declaration mentioned, was at any time made in manner and form, &c.

At the trial, the plaintiff had a verdict on the first and third issues, with damages, and the defendant on the second issue.

R. V. Richards, for the defendant, obtained a rule to shew cause why a new trial should not be had, on the ground that the award, which was put in evidence, was not final

or certain, inasmuch as it found that interest was due from the time of the last settlement between the parties in the lifetime of M. T, without specifying the day of that settlement.—At the trial, it did not appear that there was, in fact, any dispute as to the day.

W. H. Watson, for the plaintiff, also obtained a rule, why judgment should not be entered for the plaintiff; *non obstante veredicto*, on the second issue. The two rules came on for argument at the same time.

Richards against the rule for judgment *non obstante veredicto*.—The second plea, which traverses the time of the last settlement, tenders a material issue; for though the time is laid under a videlicet, it is, nevertheless, material. The arbitrator was to fix the time from which he intended the interest to run, otherwise the matter would remain undecided. And though his award may be uncertain as to the time, yet that uncertainty may be removed by averment—*Cargey v. Aitcheson* (1). Such an averment is necessary and material, and, therefore, the time averred may be traversed.

Watson, contra.—The only instance in pleading where time is material, is, where it is matter of description:—here it is matter of allegation. The declaration would have been good without any allegation of the day, unless, perhaps, upon special demurrer, for want of time.

[*PARKE, B.*—It strikes me that the allegation is wholly immaterial.]

Then as to the rule for a new trial. The award is sufficiently certain. In the first place, there was no dispute as to the time of the last settlement; and if there was uncertainty in the award in this respect, the defendant ought to have pleaded it. Again, nothing shall be intended against an award, and what is uncertain in it, may be helped by averment—*Beale v. Beale* (2). So also in *Harrison v. Liversedge* (3). Therefore, where money is directed to be paid from a particular event, the date of that event may be shewn by averment.

Richards, in support of the rule for a new trial.—The award cannot be sup-

ported. All matters in dispute were referred. If all matters were not decided, the award is a nullity, and the parties are not bound by it; and the defendant may avail himself of it under a plea, that the arbitrator did not make any award. If money were adjudged to be paid from the death of A. B, or any other event, it would be bad for uncertainty. Here it is to be paid from the last settlement, that is, from what the arbitrator considered to be the last settlement, and no one but himself can say when that was. How then can such an award be final?

[*PARKE, B.*—Supposing it bad in respect of the interest awarded, may it not be good for the principal? May not the plaintiff forego that part of the award which is defective, he being the party to derive a benefit from it? If you are entitled to a new trial, it could only have the effect of reducing the damages. But another point arises here. Ought there not to be a repleader? This plea neither admits nor denies; and a judgment *non obstante veredicto* proceeds on the principle, that the plea confesses, but does not avoid. It may not be necessary to award a repleader in form, as the parties may amend their pleadings without a judgment *quod partes replacent*. We will take time to consider this last point.]

On a subsequent day in this term—

PARKE, B. delivered the judgment of the Court.—After stating the pleadings, his Lordship proceeded:—The first question to be disposed of is, the rule for a new trial. This award appears to the Court to fall within the principle laid down in the case of *Cargey v. Aitcheson*. It is not necessarily uncertain. If the time of the last settlement mentioned in the award was uncertain, or matter in dispute, the award would have been bad. We need not decide whether that objection would have been open to the defendant on this plea, because, admitting that it was so, it appeared distinctly in proof, that the time of the last settlement was certain, and was not a matter in dispute between the parties, but was mutually agreed on by both parties. We have no doubt, therefore, but that the award is good, and the first issue properly found for the plaintiff.

(1) 2 B. & C. 170; s. c. 1 Law J. Rep. K.B. 252.

(2) Roll. Abr. 'Arbitrament,' (H) 14.

(3) 2 Vent. 242.

The next question is, whether the second issue be immaterial, and what is the consequence if it be. We are clearly of opinion that it was immaterial. The precise day of the last settlement was of no consequence, if a last settlement had been made in the lifetime of the intestate, and before the reference. If there had been no other plea on the record, the proper course would have been to award a repleader, and not to have given judgment *non obstante veredicto*. That form of judgment proceeds on the confession in the plea, and the insufficiency of the avoidance—*Lacy v. Reynolds* (4), and *Lambert v. Taylor* (5); but, in this plea, there is no confession on which judgment can be given—it raises an irrelevant issue without any confession.

The next question to be considered is, whether a repleader ought to be awarded, as there is another proper issue raised and decided for the plaintiff on this record, on which, if it stood alone, the plaintiff would clearly be entitled to judgment. In the case of *Goodburne v. Bowman* (6), it was for the first time suggested, that if an immaterial issue be raised by one plea, and the cause of action is fully confessed, or proved on another, on the same record, the plaintiff is entitled to judgment on that confession, or proof, and a repleader would not be awarded. But the present case is distinguishable from that, for here no plea contains a confession of any part of the cause of action; and there is no issue upon any plea, nor on all the pleas taken together, establishing the truth of the whole of it; and we are not aware of any precedent that a repleader can be granted *as to part*; consequently, as there can be no judgment on a confession, there must be a repleader. To save the expense of a formal judgment, the parties should amend without costs on either side.

June 12.—The parties not agreeing to amend, there was judgment of repleader; and the Master taxed the costs of all the issues. A rule was obtained by—

Richards, for the Master to review his

(4) *Cro. Eliz.* 214; s. c. 2 *Roll. Abr.* 99.

(5) 4 B. & C. 138; s. c. 3 *Law J. Rep.* K.B. 160.

(6) 9 *Bing.* 502; s. c. 2 *Law J. Rep.* (N.S.) C.P. 148.

taxation, on the ground that on this repleader all the issues went for nothing, and no costs upon them could be given to either party. And, on this day, his rule was made

Absolute.

1837. } ROBINSON v. CRESSWELL.

Prisoner—Charging in Execution—Supersedeas.

It is no objection to charging a prisoner in the custody of the warden of the Fleet, in execution, that he was previously entitled to his discharge under R. 88. Hil. Term, 2 Will. 4, by reason of having been in custody for the space of one month after he was supersedeable, and that the warden, when applied to, refused to discharge him.

A certificate of the warden, that a prisoner is supersedeable, is not sufficient to support an application for a rule, calling upon the warden to shew cause why he should not be discharged, but there should be an affidavit of the facts, shewing that he is supersedeable.

Mansel moved to charge the defendant, a prisoner, in execution.

Udall, in opposition to his being charged, stated the following facts. A writ of detainer was served on the warden of the Fleet, in whose custody the defendant then was, some time in the month of October 1836, but the plaintiff did not declare until January of this year, which was out of time—Reg. Hil. Term, 3 Will. 4. (n.) The defendant, therefore, became then supersedeable, and, after one calendar month, was entitled to be discharged, by virtue of the rule Hilary Term, 2 Will. 4. r. 88. Application had been made to the warden to discharge him, but that officer doubted his power, and declined doing so. It was contended, that, under these circumstances, the defendant was not in legal, though he might be in actual custody, and, therefore, he could not now be charged in execution.

Per Curiam.—It is admitted, that the defendant is in actual custody. There is nothing to prevent his being charged in execution (1).

(1) Vide *Siggers v. Brett*, 5 B. & Ad. 455.

Udall had, on the day before, obtained a rule calling on the plaintiff to shew cause why the defendant should not be superseded; but, as it was not a stay of proceedings, it furnished no answer to this application. He had previously prayed for a rule calling upon the warden to shew cause why he should not discharge the defendant; and, in addition to the facts above stated, he produced a certificate from the warden, stating that the defendant was supersedeable. But, amongst other objections to this application,

The COURT said that there should be an affidavit of such facts, as shewed that he was supersedeable, and refused the rule as then prayed for.

[An application was made about this time, by the warden of the Fleet, to the Court of Common Pleas, for directions how to act in cases of this kind; in answer to which, the Court said they would communicate with the other Judges.]

1837. }
April 22. } DIXON v. WILLIS AND ANOTHER.

Attachment—Service of Rule.

If a rule for an attachment, which is served too late for cause to be shewn against it when due, is thereupon enlarged to the following term, there must be a personal service of the enlarged rule.

This was a rule for an attachment against two parties, drawn up for the 30th of January last, and served on one party at Leeds on the 28th, after nine o'clock at night; and on the other at York on the 30th. It was enlarged to this term, but the enlarged rule was not served personally.

Erle was heard against the rule.

Alexander in support of it.

PARKE, B.—The first rule was not served till too late: it is therefore gone. The enlarged rule was not served personally; that, therefore, is bad also.

Rule discharged, with costs.

1837. }
April 29. } ESS v. TRUSCOTT.

Evidence—Pleading.

An allegation in a declaration, that in pursuance of a contract between plaintiff and defendant, "J. C. made a valuation," is not supported by evidence of a valuation made by J. C.'s agent.

If the agent was substituted for J. C. by consent of the defendant, the plaintiff should have so declared.

Assumpsit. The declaration set forth a contract, by which, the parties agreed to be bound by the valuation of one James Cook, and then alleged that a valuation was made by him.

The plea denied that the valuation was so made.

At the trial, before the Judge of the Palace Court, it appeared that the valuation was taken not by Cook, but by Atkinson, his clerk or agent.

Gaselee moved to enter a verdict for the defendant, on the issue raised by the plea; against which,

Humfrey shewed cause.

LORD ABINGER, C.B.—An agency that implies discretion, cannot be deputed.

PARKE, B.—You can only support the declaration, by shewing that the parties agreed to take Atkinson's valuation, as a valuation by Cook. If they merely agreed to substitute him for Cook, you should have declared on the substituted agreement.

Rule absolute.

1837. }
May 2. } PLATT v. HALL.

Arbitration—Award—Certainty.

A rule for delivering the postea to the plaintiff, to enter the verdict according to the award of an arbitrator, may be drawn up on reading the affidavit "and the paper writing annexed," if the affidavit verify the paper writing as a copy of the award.

*Where a verdict was taken for the plaintiff for 2,000*l.*, subject to a reference of all matters in difference to an arbitrator, who had power to set aside the verdict or reduce the damages, and he awarded that the plain-*

tiff was entitled to demand 90l. of the defendant, and the defendant was entitled to set off 30l., in respect of journies, &c., in his plea and notice of set-off, and that he should deliver up certain securities to the plaintiff:—Held, that the award stated with sufficient certainty the amount for which the verdict was to be entered.

Assumpsit for money paid.

Pleas—Non assumpsit, and a set-off.

At the Liverpool Summer Assizes, 1836, a verdict by consent was taken for the plaintiff, for 2,000l. damages, subject to the award of an arbitrator, to whom all matters in difference were referred, and who was to be at liberty to reduce the damages, or to enter a nonsuit or a verdict for the defendant.

The arbitrator stated in his award, that the plaintiff was entitled to demand of the defendant the sum of 90l., in respect of the causes of action mentioned in the declaration, and that the defendant was entitled to set off against such demand 30l., for journies and expenses mentioned in his plea of set-off; and that the defendant was not entitled to set off any sum for commission; and that he should deliver up to the plaintiff certain securities mentioned in the award.

Crompton obtained a rule to shew cause why the *postea* should not be delivered to the plaintiff, with liberty for him to enter a verdict for 60l., upon the award of the arbitrator. The rule was drawn up "on reading the affidavit of J. C. (the arbitrator's clerk,) and the paper writing thereto annexed," and the "paper writing" was verified in the affidavit, as a copy of the award made in the cause.

Willmore shewed cause, and objected that the rule was not in the proper form. It was drawn up on reading the affidavit of J. C., and the paper writing annexed, which was insufficient, as the document itself must be specified—*Sherry v. Oakes* (1).

Crompton, contra.—*Sherry v. Oakes* is also in 3 Dowl. P.C. 349, and, it appears there that there was no affidavit verifying the paper writing annexed, as being a copy of the award.

[PARKE, B.—Here, the paper writing is verified as a copy, which clearly distinguishes the cases.]

Willmore then contended, that the award was not certain or final. The arbitrator has not, in terms, ascertained any sum as due from the defendant to the plaintiff, nor expressly determined for what amount the verdict was to stand. It is not clear upon this award, that after the securities have been given up, and all has been done, that the plaintiff may not be the debtor of the defendant.

PARKE, B.—The arbitrator has settled all the pecuniary demands at once, and all that remains to be done is to deduct 30l. from 90l. He has ascertained with sufficient certainty what sum the plaintiff is entitled to recover.

The other Barons concurring—

Rule absolute.

1837. { WILLIAM STONE, EXECUTOR OF
May 2. { BENJAMIN ROGERS, v. SARAH
 { ROGERS, EXECUTRIX OF GEO.
 { ROGERS.

Agreement—Stamp—Goods sold and delivered.

An agreement that the defendant should have a tenement of plaintiff's for 20l. a year, and the whole of plaintiff's keep and maintenance during the life of the defendant, requires only an agreement stamp, and not an ad valorem lease stamp.

A special count upon the agreement is not necessary where the plaintiff has done all that is required of him by the agreement; but he may recover the price of goods sold by him under it, on the common count in debt for goods sold and delivered.

Debt for goods sold and delivered by the plaintiff's testator to the defendant's testator, and for money due on an account stated.

Pleas—*Nunquam indebitatus*, and a set-off, for work done by the defendant's testator, and meat, drink, and washing, &c. found for the plaintiff's testator.

At the trial, before Williams, J., at the Taunton Spring Assizes, 1837, the plain-

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(1) 1 Har. & Wool. 119.
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tiff offered the following agreement in evidence:—

“September 10, 1836.

“An agreement between Benjamin Rogers and George Rogers—that is to say, George Rogers to have my tenement, called or known by the name of “Davey’s,” situated at Croford, in the parish of Wiveliscombe, in the county of Somerset, for 20*l.* per year, and the whole of my keep and maintenance during the said life of George Rogers, and to take possession immediately, and begin to pay rent at Michaelmas, the said George Rogers to find reed, leine, gads, and horse labour for drawing materials for repairs, (the cider press, engine, and twenty-four hogsheads to remain on the place,) and to take off the stock at 75*l.* 10*s.*, and to pay for the grass seed. The stock are as follows:

	£	s.	d.
Hay, at	7	0	0
Apples.	10	0	0
Wheat	16	10	0
2 Bullocks	21	0	0
8 Sheep, at 26 <i>s.</i>	10	8	0
12 Lambs, at 16 <i>s.</i>	9	12	0
Hurdles	1	0	0
	£ 75	10	0

“As witness our hands, this 10th day of September 1826.

“Benjamin Rogers.

“W. Stone.

“E. R. Stone.”

This agreement was stamped with a 1*l.* agreement stamp, and on an objection taken on the part of the defendant, that it required an *ad valorem* lease stamp, the learned Judge was of that opinion, but received the evidence, giving the defendant leave to move to enter a nonsuit. The delivery of the goods referred to in the agreement was proved; but no execution of a lease to George Rogers, of the tenement therein mentioned. An admission of 75*l.* 10*s.* being due, was also proved. A verdict was taken for the plaintiff, for 75*l.* 10*s.*, with leave to the defendant to enter a nonsuit, if the Court should be of opinion that the above agreement was not properly stamped, or that debt for goods sold and delivered was not the proper form of action in the present case.

Bompas, Serj. having obtained a rule *nisi* accordingly,—

Erle and *Bere* shewed cause.—This agreement is properly stamped. No estate of freehold could pass by such an agreement. It can only operate as an agreement, and not as a lease for life. No authorities are requisite to shew this.

[*PARKE, B.*—None are requisite. It could only be an agreement.]

There was evidence of the delivery of the articles mentioned in the agreement; and also an admission that 75*l.* 10*s.* was due. Secondly, a special count was here unnecessary. Where an agreement is proved to take goods at a certain price, a common *indebitatus* count is good, if the goods have been actually delivered—*Leeds v. Burrows* (1). This is an executed contract, the consideration being the agreement for the lease, not the actual execution of it. The special contract, therefore, being no longer open, but executed, the money may be recovered upon the common count—*Selwyn's Nisi Prius*, p. 71, 7th edit., *Chitty on Pleading*, p. 298.

Bompas, Serj. and *Bull*, contrà.—In case of an agreement not under seal, the whole consideration must be stated—*Clarke v. Gray* (2).

[*PARKE, B.*—That was not *indebitatus assumpsit*.]

Swallow v. Beaumont (3). This is the common rule of pleading. Here is a complicated contract not divisible. The goods were sold and delivered for a lease and for money.

[*PARKE, B.*—It is not to pay a joint sum for goods and the lease; money is due for the goods as soon as the consideration is performed.]

The question is, whether everything has been done by the plaintiff so as to entitle him to sue for goods sold and delivered. It is different where a contract has been rescinded, and there has been a delivery of goods. There, a new contract arises upon the delivery of the goods, and you may sue for goods sold and delivered: but, here, the contract was still open and executory. No lease has been granted.

(1) 12 East, 1.

(2) 6 East, 563.

(3) 2 B. & Ald. 765.

PARKE, B.—This rule must be discharged. The point being reserved, we are enabled to deal with the whole case. The learned Judge thought the agreement not properly stamped, but received it in evidence. I think the agreement was properly admitted, as the stamp is sufficient. It is only an agreement to grant a future lease for life, and could not operate for more than an agreement not being by deed,—*primâ facie*, the plaintiff would be entitled to recover upon that agreement, by shewing the stock was taken by the defendant, and in his possession. There was also evidence that 75*l.* 10*s.* was admitted to be due. But it is said, the form of the declaration is not proper; I see no objection to it. You cannot sue for goods sold and delivered upon an executory contract; but, if all has been done, you may. Here, the contract expresses that 75*l.* 10*s.* is to be paid for the stock. It would be different if there was no stipulated sum. If the lease was actually to be granted, that must have been granted before an action could be brought; the admission is evidence that everything had been done that was required, and that makes the defendant liable for goods sold and delivered. I give no opinion how it might have been, if there had been one entire sum for stock and other things which had not been performed. My judgment rests upon this, that here a stipulated price is to be paid for stipulated goods, and that all had been done by the plaintiff that was necessary to enable him to recover.

BOLLAND, B.—I am of the same opinion. It is said by the defendant, that if there is a special agreement for the performance of several things, that must be declared upon; but, here, everything that was necessary had been done by the plaintiff. It would have stood on different grounds if there had been no admission of 75*l.* 10*s.* being due; that admits that the plaintiff had done everything on his part. The rule must be discharged.

Rule discharged.

LORD ABINGER, C.B. and GURNEY, B. had left the court.

1837. { BOLTON, ASSIGNEE OF THORO-
April 25. { GOOD, AN INSOLVENT, v.
SHERMAN.

Insolvent — Voluntary Transfer — Evidence.

*The defendant delivered to A, some months before his insolvency, five horses to be used in a stage coach, of which he had two only remaining when he went to prison, the three others having died, and A. having bought three in their place. On the day that A. went to prison, he sent a note authorizing the delivery of the two original horses and the three new ones to the defendant. Any two of them were worth 30*l.* In trover by the assignee for the three horses, the defendant pleaded a sale of the five original horses to A, and an agreement that the defendant might retake them, or any of them, at any time, if any part of the price was unpaid, and that 22*l.* was still unpaid. No pressure or demand from the defendant was shewn:—Held, that there was no evidence to shew that there had been a bonâ fide transfer of the property in the three horses subsequently purchased to satisfy the debt of 22*l.*; and that if there was any transfer, there was sufficient primâ facie evidence that it was voluntary, within the 32nd section of 7 Geo. 4. c. 57.*

Trover for horses and harness of the insolvent.

Pleas—first, not guilty;—second, that the goods and chattels in the declaration mentioned, were not the plaintiff's property, as assignee;—third, as to the conversion by the defendant of the horses and harness, that before the insolvent petitioned for his discharge from imprisonment, to wit, on the 29th of November 1835, the defendant sold and delivered to the insolvent divers horses and harness, being the same harness as in the declaration mentioned, for 150*l.*, on certain terms agreed upon, namely, that the defendant should and might at any time, until the price of the horses and harness should be fully paid, have, take, and retain the said horses and harness into his possession, as a pledge and security for the payment of the said price thereof, or so much as was unpaid, and keep the same as such pledge and security until the said price, or such part as

remained unpaid, should be fully paid or satisfied; and that at the time of the conversion, in the declaration mentioned, the said price had not been paid or satisfied, but that 22*l.* 11*s.* 3*d.* remained, and still remains, due and unsatisfied; and that after the plaintiff, as assignee, became possessed of the horses and harness as aforesaid, as of his own goods and chattels, as in the declaration mentioned, to wit, on the 1st of May 1836, the defendant took, had, and received the said horses and harness into his possession, as such pledge and security for the payment of the said sum so then remaining due and unpaid as aforesaid, and kept and detained the same as such pledge and security from thence until the commencement of this suit, as he lawfully might, under and by virtue of the said terms and agreement on which the said horses and harness were sold by him as aforesaid,—which is the conversion in the declaration mentioned.

Replication and new assignment to the last plea, that the plaintiff issued his writ and declared thereupon, not for the supposed conversion in the introductory part of the last plea mentioned, but for that the defendant, on the 10th of August 1835, converted and disposed to his own use, divers goods, chattels, and cattle, of which the plaintiff, as assignee, was lawfully possessed as of his own proper goods, chattels, and cattle, as assignee, different to and other than the horses and harness in the introductory part of that plea mentioned, to wit, ten sets of coach harness, &c., ten horses, &c., of the value aforesaid, in manner and form, &c., and which grievances above newly assigned are other and different grievances than those in the last plea mentioned, &c. Plea, not guilty, to the new assignment.

At the trial, before Lord Abinger, C.B. at the Middlesex Sittings, after last Michaelmas term, the following appeared to be the facts of the case :—

Thorogood, the insolvent, being the coachman to a stage coach running between Dover and London, which belonged to the defendant, undertook, in November 1835, to horse the coach, one stage from Canterbury to Boughton, and, in consequence, five horses and some harness were taken by one Simkins, a person in the defendant's

employ, by the order of the defendant's foreman, from London to Canterbury, and were used in the coach, upon the above-mentioned stage. Three of these horses died, and Thorogood purchased some others in their room. On the 28th of May 1836, Thorogood, having become embarrassed, went to prison, with the intention of taking the benefit of the Insolvent Debtors Act; and having afterwards petitioned the Court for his discharge, the plaintiff was appointed his assignee. On the same day, or the day after that on which Thorogood went to prison, a servant of his delivered to the defendant a note signed by Thorogood, requiring the man, who had the care of the horses at Boughton, to deliver them up to the defendant. Five horses (three of which were those bought by Thorogood, and two of the original five sent by the defendant), with the harness, were delivered up to and taken possession of by the defendant. There was a demand and refusal of the horses and harness before action brought. It was proved that any two of the five horses were worth 30*l.* It was objected, for the defendant, that the form of the new assignment prevented the plaintiff from recovering, unless he proved a conversion of more than the five horses and the harness spoken of in the agreement in the third plea; and also that there was no evidence to shew that the horses belonged to the plaintiff as assignee, as Thorogood retained the property in them when they were re-delivered to the defendant. The learned Judge thought that the third plea could only apply to the two remaining horses of the original five; but gave the defendant leave to move to enter a nonsuit, if the Court should be of opinion, that upon these pleadings the plaintiff was not entitled to recover the other three; and he told the jury, that the question for them was, whether the transfer of the horses by Thorogood to the defendant was made voluntarily, and with the intention of taking the benefit of the Insolvent Act; that the plaintiff must give some proof of voluntariness; but he was of opinion he need not give more than he had done. The plaintiff had a verdict for 60*l.*, the value of the three horses. In Hilary term—

Bompas, Serj. moved, pursuant to leave,

upon the point as to the new assignment, and contended, that the plaintiff could not new assign the taking of other horses, as there was only one taking and one conversion. If he had taken issue on the plea, and shewn that the justification did not extend to the five horses, the defendant must have proved a lien upon all of them. He cited *Barnes v. Hunt* (1), and *Oakley v. Davies* (2).

[PARKE, B.—Under this new assignment, the plaintiff has to prove that the defendant took some horses on which he had no lien.]

In 1 *Wms. Saunders*, 299, it is said, "The plaintiff cannot new assign, unless there have been two assaults, &c., at least committed upon him, for the new assignment is an acknowledgment by the plaintiff that the defendant has justified one assault." Secondly, there was no evidence to shew any property in those horses in the plaintiff as assignee, as the re-delivery of them by Thorogood to the defendant, prevented the property in them from vesting in the plaintiff as assignee.

The Court having granted a rule upon the last point, and, after consideration, refused it upon the point of pleading,—

Kelly, Godson, and Lee, now shewed cause.—The questions are, first, whether there was any evidence of a transfer of these horses by the insolvent to the defendant; and secondly, if there was, whether the transfer was *bond fide*, or voluntary and fraudulent, under the 32nd section of the 7 Geo. 4. c. 57. Upon the evidence, there is no contract or bargain under which the defendant could set up any claim at all to three of these horses; and therefore the question, whether the transfer was fraudulent or *bond fide* does not arise. These three, which had been purchased by the insolvent, were clearly his own property, and he had them at the time he went to prison. There is no evidence that they were sent to satisfy a debt; and it will not be inferred, that they were, merely because there had been originally a delivery of five horses by the defendant. The order sent by the insolvent to deliver the horses to the defendant was no evidence of any previous sale.

(1) 11 East, 450.

(2) 16 East, 82.

[ALDERSON, B.—If a person says, "Deliver my horses to A. B.," is that evidence of a sale to A. B.; or of a deposit as a security for a debt; or of their being sent merely to be taken care of? If it is equally applicable to either view, it is not evidence of either without something further to apply it to either.]

But if any inference could arise that they were sent to satisfy a debt, it is rebutted by the evidence, which goes strongly to shew that the transfer was purely voluntary. The horses are sent when the insolvent is in prison, without any application from the defendant or any pressure whatever. The insolvent of his own accord sends an order by his own servant for a delivery to the defendant. The onus of the proof is on the assignee—*Doe d. Boydell v. Gillett* (3); and here there was strong *prima facie* evidence of voluntariness. The defendant could not be called to shew there was no pressure or solicitation on his part. This case is clearly distinguishable from *Davies v. Acocks* (4).

Bompas, Serj. and Peacock, contra.—There was sufficient evidence of an existing debt from the proof of a delivery of five horses by the defendant to the insolvent; and it was a question for the jury, whether this transfer was not intended as a discharge of that debt. This question was not asked of the jury, but only whether there was a fraudulent preference.

[PARKE, B.—There is no evidence of any sale by the defendant.]

This transfer passed the property, it having been made to satisfy a *bond fide* debt, and so the defendant was entitled to the verdict upon the second plea, as the plaintiff was never possessed of these horses as of his own property, which is alleged in the declaration. In trover, a property entitling the party to possession must be shewn; and it was necessary for the plaintiff to shew he had such a property as would draw with it the possession. But here the possession was in the defendant. Secondly, there was no evidence that the conveyance of these horses to the defendant was voluntary within the meaning

(3) 2 Cr. M. & R. 597.

(4) *Ibid.* 461; s. c. 4 Law J. Rep. (N.S.) Exch. 251.

of the 32nd section. The onus is on the party who says it is voluntary, and it was for the plaintiff to make it out. Here they have not produced all the evidence that was in their power, as the person by whom the order was sent has not been called, and the inference arising from that is against the plaintiff. The jury were not asked with sufficient distinctness, whether the plaintiff had proved the onus which was upon him or not. This is not a case where it was impossible to give direct evidence of voluntariness.

LORD ABINGER, C.B.—I think this rule must be discharged; and I cannot avoid remarking, that the controversy in this case has principally arisen from the new forms of pleading. The plaintiff brings trover for five horses, and the defendant contends they were delivered to him by the insolvent, in pursuance of a pledge, and to satisfy a debt of 22*l.* only. To this the plaintiff answers, "three of the horses, at all events, were not given under any pledge, and those are the three I go for." But, it is said, you cannot look at an admission in one plea to assist another; to which I agree; but yet, if a certain fact is admitted through the cause, it must be taken for all purposes—*Stracy v. Blake* (5). Here the plaintiff says, "I am not going for any of the original five horses mentioned in the alleged agreement, but for three others." Then the question arises on the first two pleas, whether those three horses were given in satisfaction of any debt or lien. There is no suggestion of any other debt or balance, than the 22*l.* due on the original transaction. And my opinion is, that, taking the whole case together, there was no evidence from which the jury could infer any intention in the insolvent to change the property. The only evidence of any debt at all, is to be collected from the third plea; and, it being admitted on both sides, that the balance due on that transaction is 22*l.*, and that any two of the horses sent were worth more than that sum, what inference can arise from sending the three in question to the defendant, but that they were to be kept for the insolvent till he came out of prison? But, on the

second point, I am not prepared to say that this case is denuded of all evidence on the part of the plaintiff of voluntariness. It is incumbent on him to give some evidence of that, and I think he did here. This is a case of the delivery of three horses, by a man who had just gone, or was on the point of going, to prison, and intending to apply for his discharge under the Insolvent Debtors Act. He could not apprehend any personal danger from a creditor at that time. It did not appear that any demand was made upon him by the defendant. I think that all these were circumstances tending to shew, that what the insolvent did, was voluntary.

PARKE, B.—I also think that there ought to be no new trial. I have had some doubt, whether, on the first ground, we could have disposed of this without a new trial, and whether there was not some evidence of a *bona fide* transfer, and then the case would have been decided on one or other of the first two pleas being found for the defendant. But it went to the jury on another ground, namely, whether, assuming there was a transfer of the three horses, it was a voluntary transfer or not. I think the summing up of the learned Judge was correct, as he only said that the plaintiff need not give more proof on that point than he had done; not that the onus was not upon him. There is no question as to the law. The assignee, in order to recover, must bring himself within the 32nd section of the act, and the burthen of the proof is on him; and he is entitled to recover, if he gives *prima facie* evidence that the transfer was voluntary. He might have given further evidence, but I think he was not bound to do so. He shewed enough to raise a presumption that the delivery of the three horses did not arise from the pressure or demand of the defendant. Now, the circumstances, from which it may be presumed that the delivery here was voluntary, are, the improbability of giving up five horses, any two of which were of sufficient value to satisfy the demand of 22*l.*; for what could this be but for a fraudulent purpose? The time when it is done, too, is also material—on the day of the insolvent's going to prison, when he could have no advantage from it. These two circumstances were, I think, enough

(5) 1 Mee. & Wel. 168.

to constitute a *prima facie* case of voluntariness, to go to the jury. It is only requisite here that the transfer should be voluntary, and it need not be in contemplation of taking the benefit of the Insolvent Act.

ALDERSON, B.—I am of the same opinion. The only evidence of the transfer of the property is the order sent by the insolvent. Now, how was that given? and what presumption arises from it? We must look at all the circumstances surrounding the transaction. It is shewn that any two of the horses were worth 30*l.*, and that only two of the five sent to the defendant, were originally delivered by the defendant to the insolvent. It was reasonable that those two only should be re-delivered under the original bargain, as the defendant had nothing to do with the other three. As to them, it is more reasonable to suppose that they were to be retained by the defendant, for the use of the insolvent when he came out of prison. Then, as to the second point, I think there was abundant evidence of voluntariness as to the three horses with which the defendant had nothing to do: there being no other debt shewn between the parties, it was reasonable for the jury to conclude that the transfer was voluntary.

GURNEY, B. concurred.

Rule discharged.

1837. }
May 6. } NURSE v. BAY, EXECUTRIX.

Costs—Inconsistent Pleas.

Where the plaintiff succeeds on non assumpsit, and the defendant on a plea of payment, the plaintiff will not be allowed more costs than those occasioned by placing the first plea upon the record.

To *indebitatus assumpsit*, the defendant pleaded, first, non assumpsit; secondly, payment. The plaintiff had a verdict on the first issue, and the defendant on the second. The Master, in taxing the plaintiff's costs, had allowed him, amongst others, for drawing the record; *distingas*; passing the record; *venire*; fees to counsel, and court fees.

Turner having obtained a rule for the Master to review his taxation—
Bompas, Serj. shewed cause.

Per Curiam.—The rule must be absolute. The plaintiff can only be allowed the extra costs beyond what they would have been if payment only had been pleaded; and the same rule must be applied to the court fees.

Rule absolute.

1837. }
May 8. } ALDRIDGE v. BULLER.

Outlawry—Costs—Judgment as in case of a Nonsuit.

An outlaw, who has obtained judgment as in case of nonsuit, cannot charge the plaintiff in execution.

If he sue out a habeas corpus for that purpose, the Court will set it aside on motion, provided the plaintiff apply before the return of the writ, and before anything has been done on it, and will not put the plaintiff to his audita querela.

Quære—whether the writ of audita querela lies for a plaintiff who has suffered judgment.

The defendant, in this action, having been outlawed in the month of May 1836, in an action brought against him by another party, in February 1837, obtained judgment, as in case of a nonsuit against the present plaintiff. In March last he sued out a writ of *habeas corpus ad satisfaciendum*, directed to the marshal of the King's Bench prison, in whose custody the plaintiff was in another action, for the purpose of charging him in execution for costs; and on the 29th of April—

Price obtained a rule to shew cause why the *habeas corpus* should not be set aside, without costs, on the ground that the defendant had himself been outlawed, and therefore could not set the process of the Court in motion against the plaintiff.

J. W. Smith shewed cause.—This application comes too late. The plaintiff might have moved to set aside the judgment any time after February 1837; and he might

have moved on any day in April, prior to the twenty-ninth, to set aside the *habeas corpus*.

[LORD ABINGER, C.B.—I see no principle on which we can say he is too late. The *habeas corpus* is a process by which the defendant is about to enforce his claim for costs, instead of taking out execution.]

The rule of law, which prevents an outlawed plaintiff from proceeding, does not apply to an outlawed defendant—*Saunders v. Hudson* (1).

[PARKE, B.—He is here as a *quasi* plaintiff to enforce a claim for costs.]

But he is not here of his own accord; he was forced into court by the plaintiff's suing him; and if he cannot recover execution for his costs, he has been defending himself at the risk of having to pay damages and costs in case of failure, yet with no means of indemnifying himself in case of success. If the plaintiff will sue an outlaw, he ought to take the consequences.

[PARKE, B.—How does it appear that the defendant was an outlaw when the plaintiff commenced his action?]

That may be presumed from the lapse of time between May, when the outlawry took place, and February, when the judgment was signed.

[PARKE, B.—If an action had been brought on the judgment, might not the plaintiff have set up the outlawry as a defence?]

Yes; but he must have pleaded it in abatement, and would have had only four days for that purpose; why should he be allowed twenty-nine when he comes by way of motion?

[PARKE, B.—Outlawry need only be pleaded in abatement when the cause of action is not forfeited.]

Here the costs were not forfeited.

[ABINGER, C.B.—Have you any authority for that?]

Vin. Abr. 'Outlawry,' C, *Lutw.* 216, shew, that where a demand is not reduced to a certainty at the time of the outlawry, it is not forfeited.

[ABINGER, C.B.—The principle is altogether against you. There was a case in the Common Pleas, where the Court re-

fused to set aside an annuity deed at the instance of an outlaw, though no memorial was enrolled.]

That was *Loukes v. Holbeach* (2), but there the applicant sought to impugn a just demand: here he has been dragged into court to defend himself against what the plaintiff, by suffering judgment, now confesses to be an unjust one. At all events, the Court will not interfere by motion, but will put the plaintiff to his *audita querela*; for that is the remedy, on the adoption of which the Court insists, whenever relief from a judgment is claimed on odious or doubtful grounds. Here the objection is odious, for it goes to the defendant's personal disability; and it is also doubtful. In *Simons v. Blake* (3), this Court put a defendant, who insisted that the plaintiff was a felon, to his *audita querela*.

[PARKE, B.—The words of that writ are *audita querela defendantis*. The applicant here is a *plaintiff*.]

That is the form given in the precedents; but the remedy is open to any person aggrieved by a judgment.

LORD ABINGER, C.B.—It is a perfectly clear principle, that an outlaw can come into a court of justice for no purpose except that of reversing his outlawry. He has no *locus standi*. Here he is seeking to make use of the process of the Court to enforce a claim. He has no right to do so.

PARKE, B.—The only doubt I entertained was, whether the application was in time. But I think it is sufficient that it has been made before the return of the writ, and before anything has been done upon it.

ALDERSON, B.—It has been laid down, again and again, that an outlaw cannot come into a court of justice *ad lucrandum*. What is he doing here?

Rule absolute, without costs.

(2) 4 Bing. 419; a. c. 6 Law J. Rep. C.P. 37.

(3) 2 Cr. M. & R. 416; 4 Law J. Rep. (N.S.) Exch. 259.

(1) 3 East, 143.

1837. { MORGAN V. SEAWARD AND
OTHERS.

Patent—Novelty—Improvement.

Before the date of a patent, A, by the instructions of the patentee, and under an injunction of secrecy, made a pair of wheels, on the principle mentioned in the patent, for B, which, when made, were not exposed to view at the factory, but were shortly taken to pieces, packed up, and sent abroad, for the use of a company abroad, but which had shareholders in England. B. paid A. for making the wheels:—Held, that this was not such a publication as that the invention at the date of the letters patent was not new, within the meaning of the statute 21 James 1, c. 3. s. 5.

Where a patent suggested several inventions to be improvements, some of which the jury found not to be so:—Held, that the patent was void upon the ground of fraud on the Crown.

Case for the infringement of a patent. The declaration stated, that one Elijah Galloway, before and at the time of the making of the letters patent, and of the committing of the grievances by the defendants, was the true and first inventor of certain improvements in steam-engines, and in machinery for propelling vessels, which improvements were applicable to other purposes, and thereupon his late Majesty, King George the Fourth, on the 2nd day of July 1829, by his letters patent, bearing date at Westminster the day and year aforesaid, under the great seal of the United Kingdom, (reciting the inventions as above stated) gave and granted by the said letters patent, for himself, his heirs and successors, unto the said Elijah Galloway, his executors, administrators, and assigns, his late Majesty's special licence, full power, sole privilege, and authority, that he, the said Elijah Galloway, his executors, administrators, and assigns, by himself and themselves, his servants and agents, &c., or any others with whom the said Elijah Galloway should agree during the term of years thereafter expressed, should use, &c. his said invention within Great Britain and Ireland, and his Majesty's dominions and his colonies and plantations abroad, as to them should seem

meet; to have and enjoy the powers, privileges, and advantages thereinbefore granted unto the said Elijah Galloway for the term of fourteen years from the date of the letters patent, according to the statute in such case made and provided. Provided always, and the letters patent were and were to be upon this condition, that if at any time during the said term thereby granted, it should be made appear to his said late Majesty, his heirs or successors, or any six or more of his said late Majesty's Privy Council, that the said grant was contrary to law, or prejudicial or inconvenient to his said late Majesty's subjects in general, or that the said invention was not a new invention, as to the public use and exercise thereof in England and Wales, and his said late Majesty's colonies and plantations abroad, or not invented and found out by the said Elijah Galloway, then upon signification or declaration thereof to be made by his said late Majesty, his heirs or successors, or by the Lords and others of his Privy Council, the said letters patent should forthwith cease and determine, and be utterly void to all intents and purposes. The whole of the letters patent were then fully set out in the declaration, which afterwards went on to state, that the said Elijah Galloway did, on the 23rd of December 1829, in pursuance of a proviso in the letters patent, by a certain instrument under his hand, particularly describe the nature of his invention, and how the same was to be performed, and cause the said instrument to be enrolled within six calendar months in the Court of Chancery. It then stated, that by an indenture dated October 1829, the said Elijah Galloway assigned the said letters patent unto the plaintiff for the residue of the term. It then stated an infringement of the patent by the defendants on the 1st day of June 1831, and on divers other days, in England, and that they unlawfully and unjustly, without the leave, &c., sold divers pieces of machinery in imitation of that part of the invention of the said Elijah Galloway for propelling vessels, in breach of the privilege granted to the said Elijah Galloway and his assigns, &c., and that they also made certain additions and alterations, whereby they pretended to be the inventors of the said invention, and put

X

in practice the said imitation, in breach of the letters patent, and against the privilege granted to the said Elijah Galloway and his assigns.

The defendants pleaded, first, not guilty; secondly, that the said Elijah Galloway did not by any instrument in writing particularly describe the nature of his invention, and in what manner the same was to be performed; thirdly, that the alleged invention in the declaration mentioned is not an improvement in steam-engines; fourthly, that the said alleged invention in the declaration mentioned is not an improvement in machinery for propelling vessels; 5thly, that the said alleged invention in the declaration mentioned was not at said time when the said letters patent were granted as in the declaration mentioned, new, and that the said Elijah Galloway was not the true and first inventor thereof; sixthly, that said alleged invention in the declaration mentioned was and is of no use, benefit, or advantage to the public whatsoever.

Upon these pleas issue was joined. The action was tried before Alderson, B., at the Middlesex sittings after Hilary term 1836.

The specification stated the nature of Elijah Galloway's invention to consist, "first, in an improvement of the steam-engine, whereby I am enabled to obtain a rotatory motion from the alternating action of the axis of a piston, which piston makes about three-fourths of a revolution within the steam cylinder; and secondly, in an improvement on paddle-wheels for propelling vessels, whereby the float-boards or paddles are made to enter and come out of the water in positions the best adapted, as far as experiments have determined the angle for giving full effect to the power applied." It then proceeded to describe the manner in which the invention was to be applied, by description and by reference to a plan to the specification annexed. It then proceeded thus:—"It is only necessary further to add, that the improvement in the steam-engine is applicable to engines for driving machinery on land, and for raising water, as well as for marine purposes, and that the improvement in the paddle-wheel may be applied to undershot water-wheels, as well as for propelling vessels."

The learned Judge left the following two questions of fact to the jury:—first, whether the specification sufficiently described the invention; and secondly, whether the invention in the steam-engine was useful. The jury found the specification to be sufficient, and the steam-engine not useful. And they found for the plaintiff on the first, second, and fourth pleas, and for the defendants on the third and sixth. The learned Judge also directed a verdict to be entered for the defendants on the fifth plea, upon evidence which is fully stated in the judgment in this case, giving the plaintiff leave to move to enter a verdict for him on that plea.

Sir F. Pollock moved accordingly to enter a verdict for the plaintiff on the fifth plea, upon affidavits denying the publication of the invention before the granting of the letters patent, and for judgment *non obstante veredicto*, on the third and sixth pleas. The invention consists of two parts, first, a steam-engine on a novel construction; secondly, a new mode of making the floats of the paddles strike the water with greater force, so as to prevent the back-water. Both parts are new: one is clearly useful; it is immaterial that the other is not useful. *Lewis v. Marling* (1), *Haworth v. Hardcastle* (2). *Brunton v. Hawkes* (3) is distinguishable. The Court having granted a rule to shew cause,—

The Attorney General (*Campbell*), Pollock, Alexander, and John Jervis, shewed cause.—If the third issue, which has been found for the defendants, be a material issue, it is quite unnecessary to consider whether the others are so or not. But, it cannot be the law, that the *inutility* of the invention is no objection to the validity of a patent. *Lewis v. Marling* does not support that position. In 3 *Coke's Institutes*, p. 184, the commentary upon the statute 21 James I. states, that, at common law, to support a patent, there must be *urgens necessitas et evidens utilitas*, and the statute gives the Crown no greater powers than existed at common law. It is a common plea to deny the improvement of a

(1) 10 B. & C. 22; s. c. 8 Law J. Rep. K.B. 46.

(2) 1 Bing. N.C. 189; s. c. 3 Law J. Rep. (N.S.) C.P. 311.

(3) 4 B. & Ald. 541.

patent right, which always involves the two points of *novelty and utility*.

[PARKE, B.—The question is, whether there is any authority for the proposition, that, at common law, the patent must be for something useful.]

Besides the authority in the *3rd Inst.*, *Manton v. Parker* (4) is to the same effect, and also *Edgebury v. Stephens* (5), *Rex v. Arkwright* (6), *Bovill v. Moore* (7), *Walker v. Congreve* (8), *Hill v. Thompson* (9), *Wood v. Zimmer* (10). Here, the jury having found that this was not an improvement on the steam-engine, the patent is void for that part, and, if so, is void altogether—*Branton v. Hawkes*. Secondly, there was no *novelty* in this invention; the facts shew, that there had been such a putting in use of this invention before obtaining the letters patent, as makes the patent void; the nature of the use was such as would have invalidated a patent taken out by any other person for the same invention; and, from the affidavits, it appears, there was a publication, though the communication was made only to the workmen: the two pairs of paddles that were sent to the Trieste Company, were published, being sent there for sale, and not for a mere experimental trial.

[PARKE, B.—Is this a putting it in use in *England*? There must be a new machine, which others do not use at the time.]

If the wheels had been publicly exhibited, a patent could not have been taken out: by the exhibition, the invention had ceased to be new. Here the plaintiff received and sent the wheels to Trieste as the agent of the company, and not as the patentee.

Sir F. Pollock, Sir W. W. Follett, and Butt, in support of the rule.—If this part of the invention is not useful, probably the patentee may disclaim. But, if it shall be found that the invention was published before the patent was taken out, it will be useless to entertain that question. If what the plaintiff did was merely for the pur-

pose of an experiment, there was no publication. Neither is the communication to the plaintiff by Galloway, or the assignment, a publication. The sending of the wheels abroad for the Trieste Company was not a publication. It was necessary to make a specification before an answer came from the Trieste Company, as it must be made within six months of the time of first obtaining the patent.

[ALDERSON, B.—It is most important to determine what amount of communication may be made before the patentee has deprived himself of his patent by publication. In *Lewis v. Marling* the point certainly was raised.]

The secrecy which was resorted to in making the wheels at the factory, shews it was intended as an experiment. The necessary communication to workmen, whether open or secret, is justified. Secondly, as to the utility, if the subject of the patent be *wholly* useless, and will not work, no action can be maintained for the violation of it—*Manton v. Parker*. But it is not pretended that this engine will not work.

[PARKE, B.—The objection is, that this is not an improvement in steam-engines.]

It is enough if the invention be new: it need not be useful. The passage in the *3rd Inst.* p. 184, cannot be law. *The King v. Arkwright* was not decided on that ground. Here the invention consists in improvements for propelling vessels, and also in the steam-engine; and if, on the whole, some benefit results to the public, that is sufficient.

[ALDERSON, B.—No doubt, taking the whole of this invention together, it is new and useful.]

Cur. adv. vult.

The judgment of the Court was now delivered by—

PARKE, B.—The first question in the case is, whether the verdict for the defendant on the fifth plea ought to be set aside, and a verdict entered for the plaintiff, pursuant to the leave reserved by my Brother Alderson. Unless this question should be disposed of in favour of the plaintiff, it would be unnecessary to consider, whether the plaintiff be entitled to judgment *non obstante veredicto*, on the third and sixth pleas; for if the verdict on the fifth plea

(4) Davis's Patent Cases.

(5) Salk. 447.

(6) Buller's N.P.C. 76, c.

(7) 2 Marsh. 211.

(8) Godson's Patent Cases, 68, n.

(9) 8 Taunt. 375.

(10) Holt's N.P.C. 58.

were to remain undisturbed, that would be an answer to the action. The course which was taken with respect to this plea, on the trial, was to ascertain the facts, upon which the learned Judge gave his opinion in favour of the defendant; but at the same time reserved liberty to the plaintiff to move to enter a verdict in his favour, if the Court should be of opinion, that the facts ought to have been left to the jury: that is, that they were such, that the jury might infer from them, that there had been no use or publication of the invention, so as to destroy the novelty of the patent. The evidence was, that before the date of the patent, (which was the 2nd of July 1829,) Curtis, an engineer, made for Morgan two pair of wheels, upon the principle mentioned in the patent, at his own factory; Galloway, the patentee, gave the instrument to Curtis, under an injunction of secrecy, because he was about to take out a patent. The wheels were completed and put together at Curtis's factory; but not shewn or exposed to the view of those who might happen to come there. After remaining a short time, the wheels were taken to pieces, packed up in cases, and shipped in the month of April on board a vessel in the Thames, and sent for the use of the Venice and Trieste Company, of which Morgan was the managing director, and which carried on its transactions abroad, but had shareholders in England. Curtis deposed, that "they were sold to the company," without saying by whom, which may mean that they were sold by Curtis to Morgan for the company, and Morgan paid for them. Morgan and Galloway employed an attorney, who entered a *caveat* against any other patent, on the 2nd of March, and afterwards solicited the patent in question, which was granted to Galloway and assigned to Morgan. Upon these facts, the question for us to decide is, whether the jury must have necessarily found for the defendants, or whether they might have found, that this invention, at the date of the letters patent, was "new," in the legal sense of that word. The words of the statute, 21 Jac. 1. c. 3. s. 5. are, "that grants are to be good of the sole working or making of any manner of new manufacture, to the first and true inventor or inventors of such manufactures, which others, at the time of the making

such grants, shall not use;" and the proviso in the patent in question, founded on the statute, is, that, if the invention be not a *new invention as to the public use and exercise* thereof, in England, the patent shall be void. The word "manufacture" in the statute, must be construed in one of two ways: it may mean the machine when completed, or the mode of constructing the machine. If it mean the former, undoubtedly there has been no use of the machine, as a machine, in England, either by the patentee himself, or another person; nor, indeed, any use of the machine, in a foreign country before the date of the patent. If the term "manufacture" be construed to be "the mode of constructing the machine," there has been no use or exercise of it in England, in any sense which can be called "public." If the wheels were constructed under the direction of the inventor, by an engineer and his servants, with an injunction of secrecy, on the express ground that the inventor was about to take out a patent, and that injunction was observed, and this makes the case so far the same, as if they had been constructed by the inventor's own hands, in his own private workshop; and no third person had seen them whilst in progress. The operation was disclosed indeed to Morgan, the plaintiff, but then there is sufficient evidence that Morgan, at that time, was connected with the inventor, and, designing to take a share of the patent, a disclosure of the nature of the invention to such a person, under such circumstances, must surely be deemed private and confidential. The only remaining circumstance is, that Morgan paid for the machines with the privy of Galloway, on behalf of the Venice and Trieste Steam Company, of which he was the managing director: but there was no proof that he paid more than the price of the machines, as for ordinary work of that description; and the jury would also be well warranted in finding that he did so with the intention that the machines should be used abroad only, by this company, which, as it carried on its transactions in a foreign country, may be considered as a foreign company; and the question is, whether this solitary transaction, without any gain being derived thereby to the patentee or to the plaintiff, be a use or exer-

cise in England, of the mode of construction, in any sense which can be deemed a use by others, or a public use, within the meaning of the statute and the patent. We think not. It must be admitted, that if the patentee himself had, before his patent, constructed machines for sale as an article of commerce, for gain to himself, and been in the practice of selling them publicly, that is, to any one who would buy, the invention would not be new at the date of the patent. This was laid down in *Wood v. Zimmer*, and appears to be founded on reason; for if the inventor could sell his invention, keeping the secret to himself, and when it was likely to be discovered by another, take out a patent, he might have, practically, a monopoly for a much longer term than fourteen years: nor are we prepared to say, that if such a sale were of articles that were only fit for a foreign market, or to be used abroad, it would make any difference—not that a single instance of such a sale, as an article of commerce, to any one who chose to buy, might not be deemed the commencement of such a practice, and the public use of the invention, so as to defeat the patent; but we do not think that the patent is vacated on the ground of the novelty, and the previous public use or exercise of it, by a single instance of a transaction such as this, between parties connected as Galloway and the plaintiff are, which is not like the case of a sale to any individual of the public who might wish to buy; in which it does not appear, that the patentee has sold the article, or is to derive any profit from the construction of his machine, nor that Morgan himself is; and in which the pecuniary payment may be referred merely to an ordinary compensation for the labour and skill of the engineer actually employed in constructing the machine. The transaction might, upon the evidence, be no more in effect than that Galloway's own servants had made the wheels, that Morgan had paid them for their labour, and afterwards sent them to be used by his own co-partners abroad. To hold this to be what is usually called a publication of the invention in England, would be to defeat a patent by much slighter circumstances than have yet been permitted to have that effect. We, therefore, think, that as the jury might con-

sistently with the evidence, have found on this issue for the plaintiff, the verdict ought, pursuant to the leave reserved, to be entered on that issue for him.

The next question is, whether the plaintiff be entitled to judgment *non obstante veredicto*, or a repleader, upon the finding on the issue on the third or sixth pleas. The question involved in these two issues are different. I propose to consider, first, that on the third plea, the suggestion in the letters patent is, that Galloway had invented certain improvements in steam-engines and in machinery for propelling vessels, which improvements were applicable to other purposes; and the patent is granted for the invention of those improvements. But unless the specification be referred to, to explain the title of the patent, it is doubtful whether the invention claimed is of improvements in steam-engines, as connected with the other machinery only, or of improvements in steam-engines, for whatever purpose they may be employed. Upon reference to the specification, there is no doubt that the claim is of the latter description; but that instrument is not stated in the record, and, upon what appeared on the record, it is by no means clear that the patentee does claim an improvement in steam-engines, unconnected with the machinery; and if he does not, the plea would probably have been bad on demurrer, as it is uncertain whether it does not deny the invention to be an improvement in steam-engines, unconnected with the machinery. But, after verdict, this objection is removed: for it is a rule, that if an issue could have been material, the Court, after verdict, ought to intend it to be so—*Kempe v. Crews* (11); and as the plaintiff did not demur, it must be taken that he admits that the plea is to be understood as denying the invention to be an improvement in steam-engines, in that sense in which it is used in the patent itself; and the jury must be intended so to have found. This brings me to the question, whether this patent, which suggests that certain inventions are improvements, is avoided, if there be one which is not so. And, upon authority, we feel obliged to hold, that the patent is void, upon the ground of fraud on the Crown;

(11) Lord Raym. 167.

without entering into the question, whether the utility of each and every part of the invention is essential to a patent, where such utility is not suggested in the patent itself, as the ground of the grant. That a false suggestion of the grantee avoids an ordinary grant of lands or tenements from the Crown, is a maxim of the common law; and such a grant is void, not against the Crown merely, but in a suit against a third person—*Alcock v. Cooke* (12). It is on the same principle, that a patent for two or more inventions, when one is not new, is void altogether, as was held in *Hill v. Thompson*, and *Bruton v. Hawkes*; for although the statute invalidates a patent for want of novelty; and, consequently, by force of the statute, the patent would be void, so far as related to that which was old, yet the principle on which the patent has been held to be void altogether, is, that the consideration for the grant is the novelty of all, and, the consideration failing, or in other words the Crown being deceived in its grant, the patent is void, and no action maintainable upon it. We cannot help seeing on the face of this patent, as set out on the record, that an improvement in steam-engines is suggested by the patentee, and is part of the consideration for the grant, and we must reluctantly hold, that the patent is void for the falsity of that suggestion. In the case of *Lewis v. Marling*, this view of the case, that the patent was void for a false suggestion, does not appear by the report to have been pressed on the attention of the Court, or to have been considered by it. The decision went upon the grounds, that the brush was not an essential part of the machine, and that want of utility in part of the invention, did not vitiate the patent; and besides, the improvement by the introduction of the brush is not recited in the patent itself, as one of the subjects of it, which may make a difference. We are, therefore, of opinion, that the defendants are entitled to our judgment on the third issue. It is a satisfaction to know that this objection will not necessarily, in the present state of the law, destroy the patent, as the objection is one which will probably be remedied by the Attorney General, under the 5 & 6 Will. 4. c. 83.

(12) 5 Bing. 340; a. c. 7 Law J. Rep. C.P. 126.

This view of the case makes it unnecessary to consider the effect of the finding on the last issue, as amended by the Judge's notes, that part of this invention is not useful, which is a different question from that which we have disposed of. A grant of a monopoly for an invention which is altogether useless, may well be considered "as mischievous to the state, to the hurt of the trade, or generally inconvenient," within the meaning of the statute of Jac. 1, which requires, as a condition of the grant, that it should not be so; for no addition or improvement of such an invention could be made by any one during the continuance of the monopoly, without obliging the person making use of it, to purchase the useless invention; and on a review of the cases, it may be doubted, whether the question of utility is anything more than a compendious mode, introduced in comparatively modern times, of deciding the question, whether the patent be void under the statute of monopolies. And we do not mean to intimate any doubt as to the validity of a patent for an entire machine, a subject which is, taken altogether, useful, though a part or parts may be useless; always supposing that such patent contains no false suggestion. Nor do we pronounce any opinion upon the sufficiency of this plea, in point of form; it may be, that the proper form of plea is to use the words of that statute, and not to plead the want of utility, though it would probably be too late to take the objection in the present stage. The rule, therefore, to enter the verdict for the plaintiff on the fifth plea, must be absolute, and discharged as to the residue.

Rule accordingly.

1837. { *In the matter of the estate and*
 April 17. { *effects of* MOSES ROBINSON,
 DECEASED.

Legacy Duties—Account—Costs.

On an application, under statutes 42 Geo. 3. c. 99. and 53 Geo. 3. c. 108, calling upon an administrator to account, the Court will make it part of the rule that he shall also pay the costs of the application, if any duties shall be found to be payable to the Crown.

In this case, a rule had been granted under the 2nd section of the 42 Geo. 3. c. 99, calling upon the administratrix of Moses Robinson, deceased, to shew cause why she should not deliver to the Commissioners of Stamps an account, upon oath, of all the legacies, or of the personal property paid, or to be paid, or administered by her. It was also part of the rule, that the administratrix should pay the costs of the Crown in this matter.

The Attorney General now moved to make this rule absolute, upon affidavit of service, no cause being shewn. Before the passing of the stat. 42 Geo. 3. c. 99, there were two modes by which the Crown might recover duties on legacies, by information, in the name of the Attorney General, in this court, against the parties not paying them, or by filing an information in equity for the amount. Then came the act above alluded to, which has been found very beneficial; and the only question is, as cases under it are very numerous, how the rules absolute are to be drawn up, as regards the costs of the Crown, upon the applications for them. Upon a late case, before the Lord Chief Baron, at Gray's Inn Hall, his Lordship said, what appears to be entitled to much weight, "that it was only where it should turn out that duties were due to the Crown, that the representatives should pay the costs of the application." Hitherto the course has been, that in all cases where an application has been made under the statute, the rule has been drawn up for the representatives also to pay the costs. This act of parliament is certainly silent as to costs. But in 53 Geo. 3. c. 108. s. 23. is this enactment, "And for better securing the duties in general under the management of the Commissioners of Stamps, be it further enacted," &c., and then come these important words, "It shall be lawful for His Majesty, his heirs and successors, to have and receive such duties, debts, and penalties, with full costs of suit, and all charges attending the same." Now, where duties are recoverable by the Crown, there is no discretion in the Court—*The King v. Avery* (1).

[*LORD ABINGER, C.B.*—That case decides, that if the Crown recover a penalty, not duties, it is entitled to costs.]

(1) 1 Anst. 178.

That was on the 9 Ann. c. 20. The words of the 53 Geo. 3. are stronger.

[*PARKE, B.*—The question is, whether we can grant this in the first instance conditionally, or whether we must wait for the event.]

[*LORD ABINGER, C.B.*—What are the terms in the rule that you propose?]

That if, on delivery of the account of the intestate's property, there shall be found to be any duties payable to His Majesty, the administratrix do pay the costs of the Crown in this matter, to be taxed in the usual manner.

[*ALDERSON, B.*—The difficulty is, that you are asking the Court to award costs on the decision of the commissioners, not on the decision of the Court, who may decide whether a proper account has been rendered, and whether there is anything due upon it. If there is any dispute upon it, surely that should be decided before the Court awards costs.]

It is to save the expense of another application to the Court, that it is proposed to take the rule conditionally.

Cur. adv. vult.

Upon a subsequent day, the judgment was delivered by—

LORD ABINGER, C.B.—This was a rule moved for by the Attorney General, with reference to the legacy duty. He desired that the rule might be made absolute, and, for the purpose of saving the expense of a further application to the Court, that an addition should be made to the rule, for the Crown to be entitled to costs, in case it should appear upon the statement made by the administratrix, that there were legacy duties due from her which ought to have been paid. We think, there is no objection to granting the rule in that form. It will save the expense of any further application; and, therefore, let the rule be made absolute, that the party shall pay such costs as shall be taxed by the Master, in case it shall appear, when the account is rendered, that legacy duties were due from her which she refused to pay: that is, in the terms prayed for by the Attorney General.

Rule absolute.

1837. }
 April 24. } LAIDLER v. BURLINSON.

Vendor and Purchaser—Trover—Bankrupt.

An agreement between J. L., a ship-builder, the plaintiff, and other parties, set forth the particulars of the build and description of a new ship, one-third built, in the yard of J. L., specifying the dimensions and materials of the vessel, and that it was to be completed, fitted out, and launched by a given time for a certain sum, the plaintiff and the other parties engaging to take shares "in the before-mentioned vessel, as set opposite to their names," and also for payment by bills, cash, and materials. J. L. having become a bankrupt before the vessel was completed:—Held, that the plaintiff could not maintain trover against J. L.'s assignees, as the agreement did not amount to a sale of the vessel in its then present state, but was an entire contract to purchase when finished,—until which time, no property passed to the purchaser.

Trover for one-fourth part of a ship. At the trial, a verdict was found for the plaintiff, subject to the opinion of this Court on a special case; and the question upon which the judgment was pronounced was, whether the plaintiff had acquired any property in the subject-matter of the action, under the following circumstances.

In the year 1833, and until the time of his bankruptcy, James Laing carried on business as a ship-builder, at Middlesborough, in the county of York. An agreement signed by James Laing and the plaintiff, and the other parties whose names purport to be thereunto signed, was produced in evidence at the trial, and which agreement, is as follows, that is to say:

"Middlesborough, 10th of June 1833.

"Particulars of build and description of a new ship now about one-third built, in the yard of James Laing. Length of keel aground 75f. 6in., rake forward 7f., rake of post 1f. 6in., extreme breadth 24f. 4in., depth of hold 13f. 4in., and will admeasure 200 tons register, and carry 14 keels of coals at 12f. 9in. water, Keelfiner's Eng. elm forward and aft, Am. in midships, frame all Eng., also stern, sternpost, and hooks, floors 10½ to 11 inches, sided and moulded, first futtocks 8½ by 9, second

ditto 7½ by 8, top timbers 7 by 6 at the wales, and 4 inches top height, kelsons Am. oak, outside plank below the light-marks Am. elm, birch, or Eng. beach 2½in. in the flat, 3 strakes of 4in. in each bidge, and 2 strakes of 3in., and 2 and a half upwards, from thence three inches oak to the wales, the wales 3 strakes of 4in., 2 black strakes 3in., and 2½ top, sides 2½in., paint strake and covering boards 3in., waterways 4in. all oak, decks 3in. red pine, ceiling 1 strake of 3in., next the kelson part of floor 2½in., 3 strakes of 3½in. in the bidge, from thence 2½in. in the midships, and 2in. the ends, 2 strakes of 3in. beam-clamps, 4in. stringer above the HB, and ceiling between decks 2in., and one strake of 3in. deck-beam clamp. To have 11 HBeams, and 15 deck-beams, fastened with wood or iron, lodging knees to have 5 hooks forward, to have sufficient coaming, windlass, bit, catheads, rudder, capstern, boats, chocks, hatches, bulkheads, and the hull to be completed in every respect with carpentry, joiner, blacksmith, turner, painter, and plumber work, long boat and skiff, and to be fitted out with all spars, mast, cordage, chains, anchors, cooper's stores, and every other stores sufficient and as usual in the coal trade, and ready to take in a cargo of coals, without any extra whatever, and to be launched in the early part of September next, 2 chain cables 85 fathoms each, 1 chain hawser, 60 fathoms hempen tow line, and 2 warps, a spare top-sail, fore-sail, and fore-topmast stay-sail, the paint strakes to be Eng. oak,—for the sum of 1,750*l.*, and payment as follows, opposite to each respective name." This agreement was signed by James Laing, and after his signature, followed these words: "We, the undersigned, hereby engage to take shares in the before-mentioned vessel, as set opposite to our respective names; and also the mode of payment.

"Tees Coal Company, payment for one, 6 mo. 29, bill 200*l.*, 7 mo. 12, cash 233*l.* 2*s.* 11*d.*, James Laing.

"John Atkinson, one-eighth, payment in rope and canvas.

"Thomas Laidler, one-fourth.

"William B. Earle, one-eighth.

"William Fairbridge, one-sixteenth, cash 55*l.*, July 25, 1833.

"Philip and Joseph Heselton, one-eighth.

"Anthony Harris, one-sixteenth, cash and goods 103*l.* 1*s.* 9*d.*, 12 mo. 5, 1833, James Laing.

"Middlesborough, 14th of July 1833, I hereby agree to accept the above price and mode of payment.

"James Laing."

In the month of October 1833, the plaintiff entered into and signed the agreement; William B. Earle, and P. and J. Heselton afterwards, and before the act of bankruptcy, at separate times entered into and signed the agreement; Anthony Harris, whose name appears last as a party subscribing the agreement, on the 18th of January 1834, and not before (although it purports to bear date in December), the day after James Laing committed the act of bankruptcy on which the fiat hereinafter mentioned is founded, entered into, and signed the agreement in question. It is to be taken, for the purpose of this case, that whatever might be the effect of the agreement, as to passing the property in the respective shares to the several parties, that, at all events, one-sixteenth, which A. Harris agreed to buy, did not pass to him, but became vested in the defendant, as assignee of James Laing, under his bankruptcy. In order to prove payment by the plaintiff to Laing, for his proportion of the ship, he gave in evidence the following facts, viz. that in the month of June 1833, he had accepted a bill for 30*l.*, drawn by Laing upon him, and which was paid by him when due; also that another bill dated the 29th of October 1836, was drawn by Laing upon and accepted by the plaintiff for 293*l.* 6*s.* 8*d.*, and he then proved that on the 5th of December 1833, timber to the amount in value of 129*l.* 12*s.* 9*d.* was supplied by him to Laing, which was expressly agreed at the time of the supply to be taken in part payment for the said vessel.

In the month of June 1833, the said James Laing had the ship, in respect of which this action is brought, about one-third built, and in his ship yard; and he had at that time no other ship upon the stocks; and from that time until the time of the bankruptcy of James Laing, he proceeded with the building of this ship; and

after the signature of the plaintiff to the agreement, James Laing, before his bankruptcy, expended large sums of money in and about building the said ship. The Tees Coal Company, whose signature appears to the agreement, consisted at that time of two persons called Taylor and Harris; Harris used to go and look at the vessel when building, and occasionally found fault with the work, which was improved in consequence, and the bankrupt had told his foreman to act under Harris's direction. On the 17th of January 1834, Laing committed an act of bankruptcy, and on the 25th of the same month, a fiat issued thereon against him, under which he was adjudged a bankrupt; and the defendant was duly appointed assignee of his estate and effects. At the time of the bankruptcy, the frame of the said vessel was on the stocks in Laing's building-yard, in an unfinished state; and after the bankruptcy, some men continued to work and receive their money from Harris.

The messenger under the fiat seized and took possession of the ship in the building-yard of James Laing.

The vessel was ultimately completed.

Temple, for the plaintiff.—The property in the one-fourth of the ship passed to the plaintiff. If an artisan is directed to make an article, and when he has executed the order he has the power, within the terms of the contract, of delivering that, or some other article, no property passes till actual delivery; but if the article is made at the time, the property vests in the purchaser; and the artisan is bound to deliver it—*Mucklow v. Mangles* (1), and *Woods v. Russell* (2).

[ALDERSON, B.—In *Woods v. Russell* this was not the important point. All the authorities were considered in *Clarke v. Spence* (3).]

The observations of Abbott, C.J. (4) in *Woods v. Russell*, are important: "This ship is built upon a special contract, and it is part of the terms of the contract, that given portions of the price shall be paid according to the progress of the work:

(1) 1 Taunt. 318.

(2) 5 B. & Ald. 942.

(3) 4 Ad. & El. 448; s. c. 5 Law J. Rep. (N.S.) K.B. 161.

(4) 5 B. & Ald. 946.

part when the keel is laid, part when they are at the light plank. The payment of these instalments appears to us to appropriate specifically to the defendant the ship so in progress, and to vest in the defendant a property in that ship; and that as between him and the builder, he is entitled to insist upon the completion of that very ship, and that the builder is not entitled to require him to accept any other." In *Woods v. Russell*, no ship was in being at the time of the contract, and no property passed till the first instalment was paid, but here the ship was one-third built, and the agreement was made with respect to the specific article, so that the bankrupt would have been compelled, in pursuance of that agreement, to finish the particular ship. It is true, that in *Woods v. Russell*, there was the usual certificate of the builder, which vested the general property of the ship in the vendee, but the judgment also proceeded on the ground, that the property vested by the payment in respect of an existing chattel. Abbott, C.J. says, "In order to register the ship in the defendant's name, an oath would be requisite that the defendant was the owner; and when the builder concurred in what he knew was to lead to that oath, must he not be taken to have consented that the ownership was really as that oath described it to be?" It shewed, not an actual delivery of the ship, but that the bankrupt testified by it that the ownership had passed from him to the plaintiff. So here, it is a proof of Laing's consent to the purchase.

[LORD ABINGER, C.B.—In *Clarke v. Spence*, the work was done under a superintendent appointed by the purchaser: it was part of the stipulation.]

Here there was, in fact, a superintendence by Harris, though there was no stipulation to that effect. If there was a right to controul and superintend by the bankrupt, it is a recognition of the general right of the purchaser.

W. H. Watson, for the defendant.—The contract describes and contemplates a vessel to be ultimately completed, not the hull of an existing ship.

[PARKE, B.—The builder might be guilty of a breach of contract, if he did not complete it; but could the purchaser maintain trover if it were delivered to another?]

If it had been the sale of one-third of a vessel which was to be completed, it would be like the case of *Woods v. Russell*, but it is an agreement "to take shares" merely, and there was no superintendent by the agreement, or in fact, for Harris looked over the work merely as a party interested.

[LORD ABINGER, C.B.—The purchaser might refuse the property, if not built according to contract.]

The power of rejection shews that the property did not vest.

[LORD ABINGER, C.B.—Suppose a carriage were bought, and the coachmaker did something to injure it before delivery.]

[PARKE, B.—If the parties agreed to the purchase of the identical thing as it stood, and that it was to be finished in a particular way, the property passed: if the agreement was to deliver a ship when it might be produced, it did not. The builder could not satisfy the contract, except by delivering the particular vessel: but still it is a question, whether the action should be for a breach of contract or in trover.]

In *Clarke v. Spence* it was said, that the property passed by implication, because payments were made as the work went on, and every plank was put in under superintendence. There was no power of rejection there.

[ALDERSON, B.—The payment corresponding with the quantity of work done, was a purchase of a specific part.]

Woods v. Russell has no application to this case; the contract was the same as in *Clarke v. Spence*, and it was decided on the signing the certificate for registry.

[LORD ABINGER, C.B.—No part of the ship was built in those cases; here one-third was completed.]

No general rule is established by them, they were decided on the implied intention of the parties. In *Goode v. Langley* (5), the purchaser recovered in trover against the sheriff, but the ground of the decision was, that the defendant had made a second seizure of the goods, and could not protect himself under it; not that the selection of part of the chattel passed the property in it. An appropriation of goods to the vendee by the maker, will not enable the latter

(5) 7 B. & C. 26; s. c. 5 Law J. Rep. K.B. 353.

to maintain an action for goods bargained and sold, because the property does not vest in a party who has not given an order for the specific goods—*Atkinson v. Bell* (6). The observations of Bayley, J., in that case (7), apply here. The ship was the ship intended, but the intention might have been altered. The property might have passed if the plaintiff had assented, but there was no assent here after the ship was finished. The difficulty is increased, as several have a share.

Temple, in reply.—It is said, that this is not a contract for the ship in its then state, but when completed. The words, “we hereby engage to take shares in the above-mentioned ship,” mean “we hereby agree to buy,” and shew a present intention. If actual payment is important to shew a purchase at the time of a specific article, according to *Woods v. Russell* and *Clarke v. Spence*, here there has been an appropriation by payment.

[*PARKE, B.*—The agreement there, by itself, was evidence that the parties meant to transfer the work at the time. This case would have been like those, if the agreement had been to pay so much down, and so much when the ship was finished.]

The contract vests a property at the time of signing.

[*ALDERSON, B.*—The contracts for shares were signed at different times. What specific portion in the congeries of planks does each buy?]

It was the purchase of a ship which was described to be in a certain condition in June 1833, and it continues to exist, although then in progress, and although afterwards more work was done to it. The vendor signs only once, not at different times, a contract for the sale of a different article. It does not appear expressly by the judgment in *Woods v. Russell*, that it was decided on the ground of the certificate for registry being evidence. That case takes up the contract at a different period to the present; the question here is that which would arise there after payment of the first instalment. It is obvious, from the language of the contract, and from the payment of the money, that the contract

was for a specific chattel, not for a thing when it might be finished; and the interest was to take place from that moment, not from the completion of the vessel. The signature of the bankrupt is equivalent to evidence that he intended the property to vest then in the purchaser.

LORD ABINGER, C.B.—There is no occasion to qualify the doctrine laid down in *Woods v. Russell*, or *Clarke v. Spence*. I consider the principle to be, that a man may purchase a ship as built; and by the terms there, the contract was of that character. A superintendent was appointed, and money paid at particular stages. The Court held, that that was evidence of the purchase of the particular ship, and that it then vested in the purchasers. Suppose the builder had died after the first instalment, the ship in that state would have been in the purchaser, not in the executors. A man may agree to purchase a ship as she stands, and contract to have her finished, or may contract to buy her when finished. Of which sort is this contract? Did it pass the property to the purchaser presently, or was it to pass when the ship was finished? I think it is a contract of the latter description. There would have been a specific sum appropriated, if a sale “in the then present state” had been intended. The contract is also for goods to be supplied, cables, &c. when she was finished. If the seller had become bankrupt or had died, what sum would have been recoverable? No price is appropriated by the parties. It is not till she is finished, that it takes effect.

PARKE, B.—The question resolves itself into a construction of the contract. Was it a bargain and sale of the materials of the ship lying there? If a man bargain for a specific chattel, though it is not delivered, the property passes, and an action lies for non-delivery or in trover—*Langfort v. Administratrix of Tyler* (8), *Shep. Touch.* 224, 5. But it is equally clear that a chattel which is to be delivered *in futuro*, does not pass by the contract. Two questions arise: first, is this an article which would correspond with the terms of the contract? secondly, is it a contract for an article to be finished? In the latter case the article

(6) 8 B. & C. 277; s. c. 6 Law J. Rep. K.B. 258.

(7) 8 B. & C. 287.

(8) 1 Salk. 113.

must be finished before the property vests. In the first, an action would lie for not delivering. The plaintiff is a purchaser of one-fourth. It is clear that he was not to pay for the materials as then existing, and also that many others, according to the stipulations, were to have an interest in the ship when finished. This is like the case of *Mucklow v. Mangles*. There is no sum here which can be said to be the price of the chattel in its then state. In *Woods v. Russell*, there were three ingredients; first, a sum was paid which appropriated the work as then finished; secondly, a superintendent was employed; thirdly, there was the certificate of registry. In *Clarke v. Spence*, two of those circumstances concurred. The payment by instalments was evidence of appropriation of the work as the instalments were paid. But here is no sum which can by any possibility be construed to purchase the parts then put together. It was an entire contract to purchase when finished, and no property passes till then.

BOLLAND, B.—In *Woods v. Russell* and *Clarke v. Spence*, the contract was made for a specific thing in existence. Here it is treated as executory.

ALDERSON, B.—To vest property, the identical goods should be sold, and the price fixed. What were the specific goods? If one-third of the ship was sold, it would vest, but if it was to be "the ship when complete," that was not ascertained at the time, and did not pass. In *Woods v. Russell*, the contract was for the sale of a specific part of the ship, at the time the money was paid. That was the construction of the contract; and on similar words in *Clarke v. Spence*, the same construction was put by this Court.

Judgment for the defendant.

1837. } NORMAN v. WESTCOMBE AND
Jan. 15. } ANOTHER (1).

Pleading and Evidence—New Assignment—Administrator.

Where to a declaration in trespass the defendant pleads a justification, and the

(1) This case was decided in Hilary term, and is reported by W. G. Lumley, Esq.

plaintiff replies that he brings his action for other and different causes and trespasses, he does not thereby admit, for the purposes of that action, the truth of the facts alleged in the defendant's plea.

Trespass for breaking and entering the plaintiff's house.

Pleas—First, not guilty; second, that one W. F., before the said time when &c., held and enjoyed a certain dwelling-house of the defendant T. W., under a demise, at a yearly rent of 8*l.*, payable from the said W. F. to the said defendant, and that just before the said time when, &c. a large sum, to wit, the sum of 8*l.* for one year of the said demise, was owing from the said W. F. to the defendant; and while the same was in arrear, and within thirty days before the said time when, &c. the said W. F. fraudulently and clandestinely conveyed away and carried off and from the premises, so held and enjoyed by the said W. F., certain goods and chattels, to wit, &c. of the said W. F., to prevent the defendant from distraining the same for the rent so due, and for that purpose conveyed them to the said dwelling-house in which, &c., without leaving any goods and chattels on the said premises, sufficient to satisfy the said arrears of rent; that the defendant requested the plaintiff to allow him to enter his dwelling-house to seize and take the said goods, which he refused to do; that a warrant to search the said plaintiff's house was then obtained from two Justices; and the defendants justified the entry, under that warrant, to search for the goods so clandestinely removed.

Replication—That the plaintiff declared for that the defendants broke and entered the said dwelling-house upon a different occasion, and upon another and different part of the day from that in the plea supposed, and stayed and continued therein for a long space of time, to wit, for six hours *modo et formâ*, which said trespasses newly assigned are other and different trespasses. Verification.

To this new assignment the defendants pleaded the same defence as to the declaration, merely alleging that it was before the trespasses newly assigned; and the plaintiff replied *de injuriâ*.

At the trial, before Williams, J. at the

last Summer Assizes for Somersetshire, the defendants proved that W. Fuke had removed his goods to the plaintiff's house to avoid the distress, and that the defendant, who was the landlord of Fuke, had gone to the plaintiff's house to demand the goods on the 19th of April. He then entered with the plaintiff's licence. On the 20th he came again with the other defendant Sayer, and left him there at eleven o'clock, in order to obtain a warrant. He returned at one o'clock, and, together with Sayer, who had been turned out of the house in the interval, entered under the warrant. No proof was given of the demise to Fuke, nor of the arrears, but it was contended, that these facts were admitted on the pleadings; and the learned Judge directed a verdict for the defendants. In Michaelmas term last, a rule had been obtained for a new trial, on the ground of a misdirection, against which—

Erle now shewed cause.—The facts stated in the defendants' plea to the new assignment had been admitted by the plaintiff on the record, and therefore did not require to be proved at the trial. The plea to the new assignment is to be referred in its construction to the plea to the declaration—*House v. the Thames Commissioners* (2). Although in the plea to the new assignment, a demise and arrears are stated, yet they have been already stated in the plea to the declaration, and admitted by the plaintiff. It was enough for the defendant to apply those facts by parol evidence to the same premises and the same time, which was done. In all continuous pleadings, everything not traversed is admitted, and the whole of the pleadings in the present case are continuous. The new assignment, therefore, admits the truth of the justification—1 *Wms. Saund.* 299, a; *Oakley v. Davis* (3). The case of collateral pleadings is different.

[PARKER, B.—Under the issue on the new assignment, it must be proved that Fuke was tenant at the precise part of the day on which the plaintiff proves that the defendants entered.]

It is submitted, that that is done by the aid of the parol evidence.

[LORD ABINGER, C. B.—You seek to

(2) 3 Brod. & Bing. 117.

(3) 16 East, 82.

help out the admission on the pleadings by parol evidence.]

[PARKER, B.—Can you use parol evidence to apply the admission on the pleadings to the facts? You cannot call in aid an admission in one plea to prove another.]

No, that cannot be done where there are collateral pleadings, but it is different where they are continuous. This case may be illustrated by other analogies. Suppose a trespass *quare clausum fregit*, or an assault, and a right of way be pleaded to the former, and a justification to the latter; if there be a new assignment of *extra viam*, or excess, the justification in each case is admitted.

[LORD ABINGER, C. B.—If there had been two counts in trespass, and the defendant had pleaded a justification to each, which had been admitted by the plaintiff as to one count, and traversed as to the other; the former plea would have been as though it were struck out of the record, and the trial would have been on the other. The question on the new assignment is the same.]

The two counts are as two actions, and it may be treated as collateral pleadings; but even then probably the admission in the one might be used in the other, provided there were a proper application by parol evidence. Again, take the case of an action on a bill of exchange, and for goods sold, for which the bill was given; and the defendant pleads to the count on the bill, payment, to which the plaintiff enters a *nolle prosequi*, and to the count for the goods a satisfaction by the bill; the defendant might shew that the plaintiff has admitted the payment of the bill.

Crowder and Ball.—The plaintiff does not, by the new assignment, admit the facts alleged in the plea. He avoids the discussion on the trespass, justified by the defendants; but he does not admit or deny it. He takes issue on all the facts alleged by the defendants, in answer to the trespass, of which he does not complain. In the case of the justification, under the right of way, the plaintiff, when he replies *extra viam*, necessarily admits the way; but there is no connexion between the two entries. And this is not like the case of one assault, for which two actions are brought, in one of which the defendant succeeds, when undoubtedly the record in

one action may be used in the other. Here, however, there is nothing more than an avoidance of the contest, and no admission.

LORD ABINGER, C.B.—The ingenious argument for the defendants raised a considerable doubt in my mind. If this had been parallel to the cases suggested, of two separate counts, with an admission of certain facts in the pleadings to one, or of two separate actions, to one of which there was a plea admitted by the plaintiff, or the defendants had recovered a verdict thereon, I should have thought it worthy of consideration, whether the admission or verdict would not have been evidence in support of the pleadings to the other count or action. But those are distinguishable from the present case. A new assignment does not admit the facts stated in the plea, but is merely an assertion, that the plaintiff does not investigate the subject-matter set forth in the plea. It is not an admission, but is the same as if the plaintiff were to say, "I do not choose, and never intended to go for that trespass, which you have attempted to justify." Suppose a plaintiff embraces several matters in his declaration, to one of which the defendant pleads a justification, which the plaintiff cannot deny, and he agrees to have it struck out of the declaration, and obtains an order for that purpose, and goes to trial on the other matters, that would be taken from the consideration of the Judge and jury, and would not be evidence in support of the other issues. Here the pleadings, previous to the new assignment, are to be taken as if they were in point of fact struck out of the record, and the defendants had no right to use them on the trial of the other issues.

PARKE, B.—I entertained no doubt when this case was moved, but I have been led into a doubt by assuming that the new assignment admits the truth of the matter previously pleaded. But when we examine the nature of a new assignment, we find that it only admits the existence of another trespass, as to which the plaintiff wholly abandons all inquiry. Its effect, as Mr. Crowder says, is not an admission of the facts stated in the plea, but an assertion that that is not the cause of action of

which the plaintiff complains. Then the other pleadings, previous to the new assignment, being out of the case, the defendants cannot make use of any admission of the facts stated in the plea to the declaration.

BOLLAND, B. concurred.

Rule absolute.

1837. } **JONES v. TURNBULL.**

Bankrupt—Attorney's Lien—Costs.

Where an uncertificated bankrupt brought an action for work and labour, &c. as a builder, which was referred, and the arbitrator awarded in favour of the plaintiff, and the assignees claimed the sum awarded,—upon an interpleader rule obtained by the defendant,—Held, that the assignees, to be entitled to the benefit of the award, must satisfy the lien of the bankrupt's attorney for his costs in the action and reference.

Platt, on behalf of the defendant in this case, had obtained a rule, under the 1st section of the Interpleader Act, for relief against the adverse claims of the plaintiff, and of the plaintiff's assignees. It appeared from the affidavits, that the plaintiff, who was by trade a builder, became bankrupt in July 1835, but had not obtained his certificate. In October 1836 he brought an action against the present defendant **Turnbull**, for work and labour, &c. as a builder, but was nonsuited, on the ground that the credit agreed to be given for payment had not expired. The matter being afterwards referred, the arbitrator awarded that the sum of 124*l.* should be paid by the defendant to the plaintiff, after deducting the costs of the nonsuit. The assignees of the plaintiff claimed this sum from the defendant; and the plaintiff, likewise, commenced this action against him on the award. The attorneys, who had been employed by the plaintiff to conduct the former unsuccessful action against the defendant, and also to attend the reference, stated, in their affidavit, that at the time they brought the former action, they were not aware that the plaintiff was uncertificated; that they had lent to him the sum of 40*l.* for the

purpose, as the plaintiff informed them, of paying the workmen employed by him in the work for which the action was brought, and that they claimed a lien on the sum awarded to the plaintiff by the arbitration, for the sum of 40*l.*, and for the costs of the former action, and of the reference.

Chandless, for the assignees.—It does not appear when the work was done, for which this action was brought. The assignees rest their claim on the general principle, that they are entitled to all the property of the bankrupt before he obtains his certificate. The plaintiff's claim was in respect of his work and labour as a builder, and it had passed to his assignees—*Crofton v. Poole* (1).

[LORD ABINGER, C. B.—This was not such personal labour as the plaintiff might sue for *suo jure*.]

With respect to the lien claimed by the attorneys for 40*l.* lent, as they state, to the plaintiff, in order to pay the workmen, the assignees are not acquainted with the nature of the work which has been done. If the assignees had brought an action against the defendant, he could not have set up as a defence any claim by the plaintiff or by his attorneys; nor payment to the plaintiff, after notice from the assignees. As to the costs of the action, the attorneys were employed to bring an action for money which belonged to the assignees, but they were not employed by the assignees. The latter have the higher title, and the attorneys' claim is superseded.

[PARKE, B.—Would not the attorneys have a lien against the plaintiff upon the sum recovered by this award for their whole bill of costs? As the assignees come in now and take the benefit of the award obtained by the labour of the attorneys, can they intervene and take away the lien?]

The question must be considered as if the assignees had brought an action against the defendant. He could not have pleaded that the attorneys had a lien. His right and liability are not altered by reason of his claiming the benefit of the Interpleader Act.

[ABINGER, C. B.—If you had brought an action on the award, you must have produced it in evidence, and the attorneys

would have said, "You shall not have the award unless you pay off our lien." They had the right of possession.]

The defendant ought to have paid the money to the assignees under the award.

[PARKE, B.—If you had brought an action for the work and labour of the bankrupt after the bankruptcy, would the award have been a defence? If you claim through the award, you must allow the attorneys their lien in some degree.]

The award did not alter the nature of the demand. Even if it created a new demand, it would vest in the assignees.

[PARKE, B.—Yes; but if you claim through the award, you must pay the costs of it.]

If it created a new demand, the assignees, it is conceded, ought to pay the costs of the reference.

Kelly, for the plaintiff and for the attorneys.—This case is quite distinct from any which has been presented to the Court. In *Crofton v. Poole* the question was, whether the defendant was liable to pay twice. Here a portion of the fund is in court to be disposed of. Here are four parties, each having separate and distinct interests, before the Court, which can decide upon the claims of any one or more of them, to the whole, or any portion of the fund. (He was stopped by the Court.)

LORD ABINGER, C. B.—We are disposed to think that the attorneys have a lien for all their costs, (exclusively of the 40*l.*), both of the action and of the award. We need not now discuss the surplus. It is not fair that the assignees should stand aloof and wait until the award is made, and then step in and claim the benefit of it, unless they pay the costs of it. Let the bill of the attorneys be taxed and paid.

PARKE, B.—It is clear that the bankrupt is entitled to nothing here. It must be referred to the Master, and the defendant shall be exonerated *pro tanto* on paying to the plaintiff's attorneys what the Master may order. If it turn out that their demand absorbs the sum in court, they must have it. Then the defendant is released from all further demand by the assignees or by the plaintiff.

ALDERSON, B. concurred.

(1) 1 B. & Ad. 568; s.c. 9 Law J. Rep. K.B. 59.

1837. } ATTORNEY GENERAL *v.* HAN-
May 8. } COCK AND READE.

Legacy Duty.

Where a testator, who died before the passing of 36 Geo. 3. c. 52, directed the residue of his estate to be laid out in land, and such residue was not paid or satisfied until after the 31st of August 1815 :—Held, that it was liable to the legacy duty imposed by 55 Geo. 3. c. 184. sched. tit. 'Legacy.'

A legacy which devolves on a succession of persons, and is finally paid and satisfied, after the 31st of August 1815, is liable to duty in respect of that payment, notwithstanding the previous enjoyment of the legacy by others, according to the directions of the will.

Information stated that Samuel Malbon, in the year 1790, made his will, and thereby appointed Mr. Vivian and Mr. Gorst his executors, and bequeathed to them all the residue of his personal estate, (after payment of his just debts and certain legacies and annuities,) as also all such real estates as he was seised of as mortgagee in fee, unto his said executors, their heirs, executors, administrators, and assigns, upon trust to convert the whole of the said residue of his personal estate into money, and to lay out and invest the same as soon as conveniently might be, in one or more purchase or purchases of freehold lands, tenements, or hereditaments in the said will mentioned and described to be conveyed to the said Vivian and one Morrell, their heirs and assigns, upon certain trusts in the will mentioned ; and the testator directed, that, until such purchases were made, his said executors should place out or continue all such residue of his personal estate at interest, in the names of the said executors, on mortgage of real estate, or if the same should not offer, then the said residue should be placed out at interest in the public funds, and that the clear yearly interest thereof should from time to time be paid to, and received by, such person or persons to whom the rents and profits of the real estate therewith to be purchased, would for the time being belong, by virtue of the said will. The information then stated, that the testator died on the 30th of April 1791, and that

Vivian and Gorst, on the 6th of May 1791, took upon themselves the burthen of the execution of the will ; that Vivian died on the 1st of January 1825, leaving Gorst him surviving ; and that Gorst died on the 11th of December 1825, having made a will, by which he appointed Hancock and Reade, (the defendants,) his executors, who afterwards took upon themselves the burthen of the execution of the said wills of Malbon and Gorst respectively. The information then proceeded to state, that after the 31st of August 1815, to wit, on the 26th of January 1832, the said residue of the personal estate of the said Samuel Malbon was of great value, to wit, of the amount of 14,000*l.*, and that the same at the time of the payment thereafter mentioned, had not been nor was any part thereof applied in the purchase of any real estate whatsoever ; and that on the day and year last mentioned, the defendants paid and satisfied the said residue of the said personal estate of the said Samuel Malbon to one John Malbon, he being entitled thereto under the will, without having received or deducted the duty chargeable upon the said residue ; and that the duty chargeable amounted to 560*l.* ; and as a breach it was alleged, that such duty continued unpaid.

Plea—That the said Samuel Malbon, by his will, gave and devised all his real estate, except mortgages in fee, to Vivian and Morrell, their heirs and assigns, to the use of Gorst, (who was one of the executors,) and his assigns, for and during the term of his natural life, on condition that he should take the name of Malbon, and from and after the determination of that estate to the use of Vivian and Morrell, and their heirs, in trust for the children of Gorst, with an ultimate limitation to his own right heirs. The plea then stated, that the will, after giving divers legacies, &c., gave and devised all the residue of the personal estate, and also such real estate as Samuel Malbon was seised of as a mortgagee in fee, to Vivian and Gorst, their heirs, &c., upon trust to convert the whole of the residue of his personal estate into money, and to lay out and invest the same as soon as conveniently might be, in the purchase of freehold lands, tenements, and hereditaments, in Cheshire or Staffordshire, to be conveyed to Vivian and Morrell, their

heirs and assigns, upon the same uses and trusts as were declared concerning the estates thereinbefore devised to them, and that the executors should and might, until such purchases could be made, put and place, and continue all and every part of the personal estate out at interest, in their names, on a mortgage or mortgages of real estates, and if the same should not offer, then in the funds; and, in the meantime, and until the residue of the personal estate should be laid out in such purchase or purchases, the clear yearly interest or produce thereof should from time to time be paid to and received by such person and persons, and for such uses, and to whom the rents and profits of the estates therewith to be purchased as aforesaid, (if purchased,) would for the time being belong, by virtue of the said will; and the testator by his will appointed Vivian and Gorst (afterwards Malbon,) his executors. The plea then stated the death of the testator, and that the executors on the 11th of August 1792, according to the will, placed out at interest in their names 7,000*l.*, parcel of the residue, on mortgage of certain premises in Cheshire, which were before the 31st of August 1815, sold, released, and mortgaged to Gorst Malbon and Vivian, and their heirs, in manner specified in the plea; and a further charge of 7,000*l.* upon the same premises, was made by the mortgagor in 1793,—which sums together amounted to and were the entire residue of the testator's estate.

The plea then went on to state, that in 1797, Vivian died, leaving Gorst Malbon him surviving; and that the said Gorst Malbon, being by virtue of the will entitled thereto for his own sole and individual use and benefit, did at divers times receive from the mortgagor divers large sums, as and for interest on the monies lent to him on mortgage. And the defendants alleged, that by the putting of the said monies out at interest as aforesaid, and the receipt and payment of such interest according to the will of Samuel Malbon, the said sums of 7,000*l.* became and were paid, appropriated, satisfied, and discharged, before the 31st of August 1815; and they further alleged, that for the use and benefit, and at the request and on the account of the said John Malbon, in the information mentioned, they

received the said sums of money which were so lent upon mortgage, and paid and satisfied the same to the said John Malbon, being so entitled as in the information mentioned.

General demurrer.

The Solicitor General for the Crown.—The question to be determined by the Court is, whether, within the meaning of the statute 55 Geo. 3. c. 184, this is a clear residue, devolving to a person by virtue of a testamentary disposition, "paid, delivered, retained, satisfied, or discharged, after the 31st of August 1815." These are the words of the schedule in that act, under which the duties in question are claimed. It is important to consider, what were the acts that imposed duties on legacies, with a view to ascertain the changes in the law produced at various periods, down to that of 55 Geo. 3. Previously to the statute 36 Geo. 3. c. 52, the duties were affixed to the receipts, which were required to be given for legacies, and not to the legacies themselves, (20 Geo. 3. c. 28, 23 Geo. 3. c. 58, 29 Geo. 3. c. 51). By the 1st section of 36 Geo. 3. c. 52, the duties imposed by those previous acts were made to cease as to such legacies as were made subject to any duty imposed by that act; and the second section specifies the new duties, which were then for the first time made to attach on the legacy itself, instead of the receipt or discharge for it. But this section applied only to legacies given by persons who died after the passing of the act—that is, after April 26, 1796. Then comes the 19th section, which commences with a declaration, that "money directed to be applied in the purchase of real estate, shall be charged with and pay duty as personal estate," which must be considered as introduced for greater caution, and not as an enactment of anything new. Then follows an exception of the case, where such money is so given to be enjoyed by different persons in succession, with a provision for various events that might happen in such a case; and it may be contended, that the object of the clause was not to give anything that was not given before then, but to exonerate from the payment of duty a legacy to be invested in the purchase of an estate to be enjoyed by parties in succession, provided

it was invested before the duty accrued. The act also provides the mode in which the duty shall be paid by parties entitled in succession, and by the 12th and 13th sections directs that such parties shall pay as annuitants for the amount which they are to receive, until the money given is actually laid out in the purchase of land, when all liability to duty shall cease. The next statute was 44 Geo. 3. c. 98, which passed on the 26th of April 1804, when new stamp duties were charged in lieu of the existing duties; and by the 12th section, reciting the three earliest acts which imposed duties on receipts for legacies, and that under those acts duties were charged in respect of legacies given by persons who died previous to the 27th of April 1796 (when 36 Geo. 3. was passed), and it was expedient to continue them for two years from the 10th of October 1804, it was enacted, that such duties should be continued for that period, and afterwards that every receipt for legacies given by persons who died either before or after the 27th day of April 1796, should be liable to the higher rate of duty. It is unnecessary to dwell upon the two next statutes, namely, 45 Geo. 3. c. 28, and 48 Geo. 3. c. 109; and then comes the 55 Geo. 3. c. 184. That statute, in the very schedule upon which the present claim is founded, makes a distinction between persons who died before, and persons who died on or after the 5th of April 1805, and imposes a higher rate of duty on legacies given by the latter class. In this instance, then, as in all the others of the previous acts specified, the legislature made a retrospective enactment, by which property became taxable, for the first time, long after the date of the bequest; and thus is met the objection, that it could not have been intended to impose a tax, which would not have been payable if the duty had been satisfied before 1796. Then, is this a legacy or residue "paid, delivered, retained, satisfied, or discharged, after the 31st of August 1815"?—[He then went into the consideration of this point; but, as the Court in their judgment held, that, by the facts admitted on the pleadings, it appeared that the payment and discharge did not take place till the year 1832, the argument is omitted. The cases cited by him were *The Attorney General v.*

Lady Louisa Manners(1), *Hill v. Atkinson* (2), *The Attorney General v. Wood* (3), *Coombe v. Trist*(4).] Then, it is clearly the principle of the act that the tax shall be paid at the time when the parties entitled receive the accession of property, and it is therefore a payment in respect of the sum received. This is shewn by the 12th section of 36 Geo. 3, which provides as to the period and mode of obtaining the duty in cases of successive interest like the present. If the money is paid to the trustee, who is to execute the will, he is to be treated in the same way as the executor would be if it had not been to be paid to the trustee: where there is a succession of interests and various rates of duty, the trustee is to be treated as an executor.

Kelly, for the defendants.—The principal question is, whether any of the acts which have been passed since 36 Geo. 3. have given to it an *ex post facto* operation, which it did not possess till then. The duties now claimed were, for the first time, made payable by that act, but they were not made payable retrospectively; that is, on legacies given by persons who had died before the passing of that act, nor has any subsequent statute given to it such an operation. If this information had been filed before the year 1796, the Crown would not have been entitled to any duty, and the subsequent acts were not meant to apply to such a case; for, though in various instances they have altered and raised the amount of duty previously imposed, and to this extent have a retrospective effect, yet in no instance are any duties imposed by those subsequent acts upon legacies, which are subject to duty only by virtue of 36 Geo. 3. It is submitted, that money to be laid out in land was subject to duty only by virtue of that act. Previously to it, the duty attached upon the receipt or discharge given by the legatee to the executor. The legacy itself was never taxed *eo nomine*. The executor would not have been required to have a legacy stamp affixed to an instrument given to him as a release or discharge by a legatee, who, instead of land directed to be purchased,

(1) 1 Price, 411.

(2) 2 Mer. 45; a. c. 3 Price, 339.

(3) 2 Y. & J. 290.

(4) 1 Myl. & Cr. 69.

preferred to take, and did take, the money wherewith the executor was directed to purchase it. A bequest of money to be laid out in land, would, in any case arising upon the legacy duty, independently of any point about a receipt being given, be treated as land itself; for equity considers that as being done, which it is the duty of the executor or trustee to do, and therefore would consider the money to be actually laid out in land; and so it is laid down in the judgment of Chief Baron Thompson in *The Attorney General v. Holford* (5), which case was the converse of the present. There land was directed to be sold, and the money was to go as residue (after payment of debts, &c.) to a stranger in blood to the testator. It never was sold, but the Court held that it must be treated as if actually sold according to the directions of the will; and, therefore, that the bequest was in the nature of a legacy, and subject to duty. Here, upon the same principle, the bequest is in the nature of a devise of land, and before the statute 36 Geo. 3. could not be charged with any duty. Then, that statute is entirely prospective, nor would it be contended that this claim could have been maintained in the interval between the passing of that act, and of the act of 44 Geo. 3. c. 98. Now, no greater effect can be given to that latter statute, than that whereas, up to the year 1804, there were two classes of duty payable on legacies, a lower duty upon such as were given by persons dying before 1796, and a higher duty on such as were given by persons dying subsequently to that year, it was enacted, that these several duties should continue for two years, and afterwards be equalized by rendering both classes of legacies liable to the higher rate of duty, so that the act was retrospective as to the amount of duty, but not retrospective so as to make parties liable who claimed under wills of persons who died before 1796, unless they were so made liable by the act of 1796 itself. This section in 44 Geo. 3. recites the three acts of parliament, which imposed the duties on receipts for legacies, and therefore particularly points to the species of legacies upon which the legislature meant to attach

additional duties; and, so far, it is a retrospective enactment. But, there is nothing in the language of that section to shew that it was intended to comprise other legacies, on which previously there had been no duty at all; and the principle is, that no tax is to be imposed except by clear words. The case of *Hill v. Atkinson* is an authority to shew that the act of 36 Geo. 3. is not retrospective, and is not made so by the 44 Geo. 3. c. 98. The question there was similar to the present, whether money paid into the Court of Chancery prior to the year 1796, was liable to duty by any retrospective efficacy given to 36 Geo. 3. by the enactment of 44 Geo. 4.; and Lord Eldon held that it was not. The 25th clause of 36 Geo. 3. which relates to money in the Court of Chancery, is similar to the 19th clause, which relates to money directed to be laid out in land, and the decision upon the one governs a case upon the other. The argument applicable to the statute of 1804, equally holds good with respect to the act of 1815, which is in the same general terms, and merely raises a similar distinction between persons dying before 1805, and after 1805, which the act of 1804 raises with respect to persons dying before 1796, and after 1796.—[He then went into the question of appropriation, and contended, that it had taken place before 1815.]

Mr. Solicitor General, in reply.—It may be much doubted, whether the duty upon money given to be laid out in land was not a duty, just as much attachable under the former acts as under the act of 1796. That which rendered any duty at all payable under those acts was the receipt; and the only reason why, in many instances, no duty was paid on money directed to be laid out in land, was because the money was probably invested, and no receipt at all taken for it. But if the legatee, being entitled to an estate of inheritance in the land to be purchased, had taken from the executor the money in lieu of it, the receipt for it would certainly have been liable to a legacy duty; for a sum of money, given to be laid out in land, is a legacy to all intents and purposes, and does not cease to be a legacy, because a particular appropriation is directed of it. But, even if such legacies were not subject to a duty previ-

ously to 1796, still there is no reason why the act of 1804 should not be retrospective in this respect as much as it clearly is in other respects. That such was the intention, might be shewn by many supposable cases, where legacies given before 1796 to trustees for particular purposes would otherwise be free of duty. Nor did Lord Eldon, in *Hill v. Atkinson*, mean to decide that there was no retrospective operation in any part of these acts or either of them. His judgment proceeded upon the particular circumstances of the appropriation in that case, and was not intended to lay down any general rule of construction.

LORD ABINGER, C.B.—This is a question which may involve a great mass of property in the Court of Chancery, and on that account we wish to take time to consider it.

Cur. adv. vult.

On a subsequent day, his Lordship gave judgment.

The case of *The Attorney General v. Hancock* arises upon a demurrer, in answer to a plea by the defendants. This was an information to recover the duties upon a certain legacy of the residue of the personal estate of Samuel Malbon, which was alleged by the information to be paid and satisfied to John Malbon in the year 1832. There is a plea by the defendant, setting forth the facts, and to this plea there is a demurrer.

The testator died in 1791. The residue of the estate, by the will of the testator, was to be invested in land, to the same uses as the real estate before devised, that is to say, to the use of William Gorst, for his life, with remainder in tail to his issue, and for default of issue, with remainder to the use of Samuel Malbon for his life, with remainder in tail to his issue, in strict settlement, remainder to Ralph Malbon for his life, with remainder in tail to his issue. The residue was to be in the hands of his executors until invested, and the interest and dividends, until vested in land, were directed to be applied to the same uses as the land.

The residue was ascertained to be 14,000*l.*, and was invested in mortgage in the names of the executors William Gorst and William Vivian, before the year 1796, and before the act 36 Geo. 3. c. 52. After

which, William Vivian died, and William Gorst, who enjoyed the interest during his life, became the surviving executor. He died without issue in 1825, and appointed the defendants his executors. The money has remained, as originally invested, on mortgage, and has now become the property of John Malbon, as one of the persons in remainder under the will; and it is charged in the first count of the information, and admitted in the plea, that the defendants, as executors of the original testator, having taken upon themselves the execution of his will, have, in the year 1832, paid and satisfied the residue aforesaid, to the said John Malbon, as the person entitled under this will. The question arises upon the application to these facts, of the act of the 55 Geo. 3. c. 184. The material words to be found in the third part of the schedule to that act, relating to legacies and successions to personal estate, are these: "Where the testator or intestate died before or upon the 5th of April 1805, for every legacy, specific, pecuniary, or of any other description, of the amount or value of 20*l.* or upwards, given by will of any person, who died on or before the 5th of April 1805, out of his personal or moveable estate, and which shall be paid, delivered, retained, satisfied, or discharged after the 31st of August 1815; and for the clear residue when devolving on one person, and for every share of the clear residue when devolving on two or more persons, of the personal estate of any person who died before the 5th of April 1805, when the same shall be paid, delivered, retained, satisfied, and discharged after the 31st of August 1815," certain rates of duty, not material to be stated.

Now, it is clear in this case, that the testator died before the 5th of April 1805; and it is admitted by the pleadings, that the clear residue of his personal estate not being laid out in land, was paid and satisfied by the defendants to John Malbon, the person now entitled to it under the will, after the 31st of August 1815. Therefore, the case falls precisely within the words of the schedule, and must be governed by them, unless it can be gathered by some necessary inference arising from the several acts *in pari materid* taken together, that it is an excepted case.

Accordingly, it has been contended, that it appears by the pleadings that the clear residue was appropriated and paid to the first person entitled to it under the will, in the year 1793, before any of the acts existed which could have related to this will. And if the only person entitled to this residue had been William Gorst, the first taker, there might have been great force in that argument; the legacy might have been considered as paid and satisfied to him, by the final application of its ascertained amount to his use, before any of the statutes could reach it. But, upon looking at the will, it appears, that by the course of events, this same residue might devolve upon a succession of persons before it was laid out in land, and that the executors are expressly charged to keep it in their controul, until laid out in land; and it appears by the pleadings, that events have happened, by which the residue, still being personal estate, has devolved upon John Malbon, under the provisions of the will, and that it was paid and satisfied to him in the year 1832 by the defendants, in the execution of this will. It was, therefore, in the state and form to which the act of the 55 Geo. 3. c. 184. applies, and it was paid within the time which that act embraces.

No question can arise upon any former appropriation or supposed payment of it, as it is clear that, if a legacy passing to several persons in succession, according to the directions of a will, can be properly said to be paid and satisfied to each of them in turns, the words of the schedule, and of the statute 36 Geo. 3. c. 52, which provides for such cases, may apply to the last of these payments, if made after the 31st of August 1815, although one or more of the first payments may have taken place before that date. It is not necessary, therefore, to refer to the cases which have been cited at the bar, to ascertain what shall be deemed a payment and satisfaction of a residue, and at what time it shall be deemed to have taken place, where, by the admitted facts which appear upon the pleadings, the payment and discharge in question did not take place till the year 1832.

The main ground on which the defendants' counsel relied, was, that the act 55

Geo. 3. c. 184, although retrospective as to the rate of duties which were payable under the former existing acts, upon legacies left by persons dying before the 5th day of April 1805, was not retrospective of those wills, upon the legacies under which no duty was payable:—in other words, that the act was intended to raise the duty, where a duty was before payable, but not to impose a duty upon any legacy which was before subject to none,—as the equity of the duty on legacies and successions to personal estate, was supposed to consist in this, that, though a direct tax upon capital, it affected no existing interest; and, as all direct taxes upon capital must be unjust, if they are partial, the Court, not only lent a willing ear to this argument, but would gladly have discovered any legal grounds for excluding by construction any imposition of the tax, even by way of increase, upon interests not in hope, expectancy, or speculation, but actually existing and forming part of the calculation and lawful resources of individuals.

But, upon a careful examination of the statutes, no such distinction can be found. It is remarkable, that the act which first imposed a duty upon legacies themselves, as contra-distinguished from the duty upon the mere receipts—namely, 36 Geo. 3. c. 52, is an act confined to that subject, and with a title importing the subjects, and that the act which first charged duties upon legacies payable out of land—namely, the 45 Geo. 3. c. 28, in like manner is confined to the subject, and has a title to attract attention to it, in both of which acts there are express clauses to confine their operation to wills subsequently made; whereas the retrospective enactments are to be found only in the schedules to general stamp acts.

It appears, then, that by the 44 Geo. 3. c. 98. s. 12, the duties on receipts for legacies, which were imposed by the acts previous to the 36 Geo. 3, were continued for two years only; and that, by the schedule to the same act, the new duties upon legacies were imposed after the expiration of those two years, by retrospect, upon legacies under wills of persons who had died at any period antecedent to the 5th of April 1805, when those legacies should be

paid after the expiration of those two years; and by the schedule to the last act of the 55 Geo. 3. c. 184, before referred to, the duties which existed at the time of passing that act are charged by retrospect upon all legacies left by persons dying before the 5th day of April 1805, and which should be paid after the 31st of August 1835. There is no exception, therefore, to be found in favour of any actual interest, for whatever length of time it might have been vested, provided it was not actually reduced into possession, and the executor fully exonerated before the last-mentioned period.

An attempt was made in the argument to distinguish from others the cases of legacies left to be laid out in land, as if these were in the nature of devises of land; and it was said, that the act of 36 Geo. 3. c. 52. was the act that first charged this sort of legacy with a duty, confining it to the cases of persons dying after the passing of the act, as if that act had merely increased the rate of duty upon the legacies, but imposed for the first time a duty upon the legacies to be laid out in land. If there were any ground for this distinction, the consequence would not follow, that legacies of this kind should be excepted from the retrospective clauses in the subsequent acts. But, in truth, the distinction does not exist. There is no reason for supposing, that legacies to be laid out in land were not within the scope of the former acts, imposing a stamp duty upon receipts, wherever a receipt for such legacy might be given. Nor does the act of 36 Geo. 3. c. 52. impose a duty upon the legacy itself in these cases, any more than it does upon legacies of mere personal estate. Both classes are for the first time made subject to duties, independently of the Stamp duties upon the receipts, and receipts are for the first time made imperative for both, under a penalty; and the executors, as well as the legatee, are made for the first time accountable parties for both. There is no more reason, therefore, for excepting this class of legacies to be laid out in land, than there is for excepting all others from the operation of the retrospective schedules. Upon these grounds, we are of opinion, that judgment upon this demurrer ought to be entered for the Crown.

I cannot help observing, that the clauses which are retrospective, are to be found only in the schedule. Those acts that impose duties upon the produce of legacies, both the 36 Geo. 3, which imposed duties for the first time upon the corpus of the legacy, and the statute of the 45 Geo. 3, which imposed the duties upon legacies out of land for the first time, were both bills brought into parliament expressly for those purposes. And I may observe, from my own memory, that in 1804, the schedules were not printed, and no question was at all advanced upon those retrospective clauses; and the same may be said of the year 1815. However, they are in the schedules, and of the same force as if in the body of the act.

1837. { AUGARD AND OTHERS, ASSIGNEES OF LAST, v. THOMPSON.

Bankrupt—Election.

To constitute an election under 6 Geo. 4. c. 16. s. 59, a plaintiff must either prove or have his claim entered on the proceedings before the commissioner.

The defendant in this action, on the 4th of November (which was after plea pleaded), became a bankrupt. On the following day, a notice was given by the plaintiffs' attorney, that the plaintiffs had elected to prove under 6 Geo. 4. c. 16. s. 59, and that no further proceedings would be taken in the action. On the 9th of November the defendant served the plaintiffs with a rule to reply, upon which the plaintiffs applied for, and on the 14th of November obtained, a rule for a stay of proceedings under the 59th section of the Bankrupt Act. On the 16th of November, the plaintiffs' attorney attended with the assignees before the commissioner for the purpose of proving the debt, and evidence was gone into; but, Last being absent, the further consideration of the proof was adjourned. There was another attendance by the same parties, but, from the same cause, nothing further was done. Several ineffectual attempts having been made to secure the attendance of Last, the plaintiffs' attorney

desisted from further proceedings before the commissioner; but his affidavit stated, that from the time when the defendant's name appeared in the *Gazette*, the plaintiffs intended to relinquish, and did relinquish the suit, intending to prove the debt under the fiat. On the 13th of January—

Crowder obtained a rule to shew cause why the defendant should not be at liberty to sign judgment for want of a replication, and why the rule of the 14th of November should not be rescinded. The affidavit stated, that on the 9th of November the plaintiffs had been served with a rule to reply; that on the 4th of January, Last, the bankrupt, attended before the commissioner, when he and the defendant were examined, and that upon Last's stating that the defendant's account was correct, and a balance due to him upon it, the commissioner refused to allow the plaintiffs to prove any debt.

Against this rule—

Platt and *Hughes*, in Hilary term last, shewed cause.—The question is, whether the plaintiffs have done that which will bring them within the 59th section of the Bankrupt Act. If they have either proved or claimed within the meaning of that section, then they cannot be called upon to proceed in the action. In *Ex parte Woolley* (1) it was held, that the proof or claim in itself operated as a discontinuance; and in *Kemp v. Potter* (2) a mode was suggested by the Court of securing the defendant against any further proceedings in the action, by some entry or suggestion on the record, to shew that the plaintiffs had made their election, and would not carry the action further. This might have been done by the defendant here. The clause was intended to give a mutual protection, whereas the defendant seeks to deprive the plaintiffs of all benefit from it. As the act of claiming was itself a discontinuance, the plaintiffs were disabled from proceeding in the action, and there cannot be judgment against them for not having done so.

Crowder, *contra*.—The object of the statute was to prevent the creditor having two remedies. But he has done nothing

here to deprive himself of one of them. A claim must be by some specific act. There should be some specific claim so as to have an entry on the proceedings before the commissioner; for the act contemplates that in the early part of the 59th section, which may be taken as a definition of the word "claim." It is a statutable discontinuance when the claim is properly made by being so entered, but not till then. He cited *Ex parte Frith* (3) and *Ex parte Glover* (4).

In this term—

LORD ABINGER, C.B. said—In this case a doubt arose, whether the plaintiffs had made an election to prove within the meaning of 6 Geo. 4. c. 16. s. 59. We think that a party cannot be said to have made his election, unless he has proved or entered a claim upon the proceedings under the commission. And till one or other has been done, we do not think that a plaintiff can have the privilege of discontinuing without payment of costs. Neither has been done; and therefore the rule must be discharged, as to so much as relates to the defendant having the liberty to sign judgment; but the order to stay the proceedings must be rescinded.

Rule absolute.

1837. } GOUGH v. WHITE.

Judgment as in case of Nonsuit.

In a town cause, the rule for judgment as in case of nonsuit cannot be obtained, until two terms have elapsed since issue joined.

This was a town cause, and issue being joined in the vacation after Trinity term, in Hilary term a motion was made for judgment as in case of nonsuit. The rule stood over, that the Judges of the other courts might be consulted, as to whether the application was not too soon; and in this term—

Per Curiam.—The rule for judgment as in case of nonsuit cannot be obtained

(1) 1 Rose, B.C. 394.

(2) 6 Taunt. 549.

(3) 1 Glyn & Jam. 115.

(4) 1 Glyn & Jam. 270.

until two actual terms have elapsed since issue was joined.

Rule discharged.

Heale v. Curtis, 2 Mee. & Wels. 76, s. c. ante, 23; and *Williams v. Edwards*, 1 Cr. M. & R. 583, s. c. 4 Law J. Rep. (N.S.) Exch. 40, were cited.

1837. } *Doe d. Lewis Lewis v. Rees*
Jan. 26. } *Davies*.*

Trust—Covenant to stand seised.

A grant to trustees may be good as a covenant to stand seised, though the trustees are strangers to the grantor; and though there is no covenant that the cestui que trust should hold and enjoy.

Ejectment. At the trial, before Lord Denman, C.J., at the Cardigan Summer Assizes, 1836, the lessor of the plaintiff claimed part of the premises as heir-at-law of his mother, Ann Lewis the elder, and the residue as heir-at-law of his sister, Ann Lewis the younger.

The defendant, in answer, sought to establish a life estate therein, under an indenture of the 15th of November 1822, made between the said Ann Lewis the elder, of the first part, the said Ann Lewis the younger, of the second part, himself, the said Rees Davies, of the third part, and Lewis Lewis and David Davies, of the fourth part, whereby, after reciting that a marriage was intended to be solemnized between the defendant Rees Davies and the said Ann Lewis the younger, and that it had been agreed upon between them, that the said Ann Lewis the elder should convey unto the said L. Lewis and D. Davies, and their heirs, in trust, for the uses and purposes thereafter mentioned, in consideration of 2*l.* to be paid to her by the said Rees Davies, the said messuages, &c. (describing the premises belonging to Ann Lewis the elder); and the said Ann Lewis the younger did undertake to convey the premises belonging to her, to the same trustees and their heirs, subject to the same uses;—it was witnessed, that in con-

sideration of the sum of 2*l.* to the said Ann Lewis the elder paid by the said Rees Davies, and that the same was in full for the absolute purchase of the hereditaments thereafter granted, enfeoffed, or intended so to be, and the fee simple and inheritance thereof, in possession, free from incumbrances; and for and in consideration of the said intended marriage, and of the—[here was an erasure in the deed], paid by the said R. D., at the request of the said Ann Lewis the younger, the receipt whereof was thereby acknowledged, and also for and in consideration of the sum of 10*s.* paid by the trustees, Ann Lewis the elder, and Ann Lewis the younger, did grant, bargain, sell, alien, enfeoff, and confirm unto the said trustees in fee (the premises in question)—*tam amplo modo*, &c., to have and to hold the same respectively unto the said trustees in fee, to the use of the said Rees Davies and his assigns during the term of his natural life, without impeachment of waste, and, after his decease, remainder to the use of A. L. for life, with divers remainders over. The indenture was admitted to have been duly executed by Ann Lewis the elder, Ann Lewis the younger, and Rees Davies, the defendant, and it appeared that the defendant married Ann Lewis the younger shortly after the execution of the deed, and had been in possession of the premises for fourteen years, from thence up to the time of the trial. There was an indorsement of a livery of seisin with blanks for the date, and without the names of any witnesses, and no positive evidence was given of livery of seisin having been made; nor was it shewn that Lewis and Davies (the trustees) were in any way related to the settlors.

It was contended, at the trial, on the part of the defendant, first, that from the length of possession the jury might infer livery of seisin; and secondly, that the conveyance being in consideration of marriage, the instrument operated as a covenant to stand seised; thirdly, that as regarded the premises belonging to Ann Lewis the elder, it would operate as a grant. The learned Judge left the first question to the jury, who were satisfied, by the length of possession, that there had been livery of seisin, and accordingly found for the defendant; but

* This case was decided in Hilary term.

his Lordship, on the authority of *Doe v. the Marquis of Cleveland* (1), directed the verdict to be entered for the plaintiff, giving the defendant leave to move to enter a verdict, or for a nonsuit on all the points taken.

J. Wilson having obtained a rule accordingly—

E. V. Williams and *Nicholl* shewed cause.—The plaintiff was proved to be the heir-at-law, and the defendant claimed to be tenant for life, but no livery of seisin was shewn, and the deed was therefore inoperative. It is contended, first, that the possession was long enough to warrant a presumption of livery of seisin; second, that the deed operated as a covenant to stand seised; third, or as a grant of the moiety. The jury found that there had been livery; but the Judge was right in directing the verdict to be entered for the lessor of the plaintiff. In *Doe v. the Marquis of Cleveland* all the cases were considered. Presumptions depend upon rules of law, and twenty years is the shortest time which the law allows as furnishing a presumption of title to recover in ejectment. Secondly, this cannot operate as a covenant to stand seised. If there had been no interposition of trustees, the covenant being to a relation or to a husband, it might have operated as such; but as it is, the use does not arise. *Hore v. Dix* (2) is an authority to this effect; for though several resolutions in that case have been overruled, yet this, which is the first, remains unimpeached. The grant here is to the trustees; the agreement is with them; and there is no covenant that the *cestui que trust* shall enjoy. In *Thorn v. Thorn* (3) there was such a covenant. In *Doe v. Simpson* (4) it was covenanted that the premises should remain to the uses specified; and the case of *Hore v. Dix* was recognized in the judgment. So in *Roe v. Tramarr* (5). Hitherto, there has always been an express grant to a relation, or an express covenant that the estate shall remain to the uses. Thirdly, as to the moiety

passing by way of grant, there is no evidence of the mother being in possession as tenant to the daughter. They also cited 2 *Saund.* 'Uses,' 83, *Osman v. Sheaf* (6), *Baker v. Lade* (7), *Com. Dig.* 'Covenant,' G, 2.

J. Wilson, contra.—The defendant is entitled to retain his possession. The first question, as to livery of seisin, was to be determined by the jury, and no improper evidence was admitted. There was evidence of possession for thirteen or fourteen years, and, without livery of seisin, the party so in possession would have been a trespasser. The jury therefore were warranted in presuming a rightful possession. But even if wrong, the verdict is according to the justice of the case, and the Court will not reverse it—*Wilkinson v. Payne* (8). Secondly, the deed operates as a covenant to stand seised to the use of the husband; and it is not admitted that the use arises to the trustees. The question is, whether, where there is a covenant with a stranger that he shall stand seised to the use of a relation, the use does not arise. *Thorn v. Thorn* is the first case after *Hore v. Dix*. It did not depend on the covenant that the *cestui que trust* should enjoy. The decree (as appears upon a reference to the register's book,) takes no notice of that covenant. Here, there was a clear intention to give an estate for life to the defendant, and that intention will be aided—*Sleigh v. Metham* (9). Moreover, in all the cases, words of conveyance have been treated as words of covenant. *Hore v. Dix* must be considered as overruled. It is so treated in the note to *Chester v. Willan* (10). And *Roe v. Tramarr* and *Doe v. Salkeld* are authorities for the defendant. A question was made as to the consideration, but, looking at the whole of the deed, it sufficiently appears that the intended marriage was the original object of the deed. Here the covenant is with the defendant himself, though in the form of a recital; but it is immaterial in what part or in what form the covenant is expressed; and the word "grant" is sufficient to make a covenant.

(1) 9 B. & C. 864; s. c. 5 Law J. Rep. K.B. 74.

(2) 1 Sid. 25.

(3) 1 Vern. 141.

(4) 2 Wils. 22; s. c. *nomine Doe v. Salkeld*, in *Willes*, 673.

(5) *Willes*, 682; s. c. 2 Wils. 75.

NEW SERIES, VI.—EXCHEQ. PL.

(6) 3 Lev. 372; s. c. *Carth.* 307.

(7) 3 Lev. 29.

(8) 4 Term Rep. 468.

(9) 1 Lutw. 306.

(10) 2 *Saund.* 97, a.

He cited *Tebb v. Popplewell* (11), 10 *Bythwood's Conveyancing*, by *Jarman*.

The Court having taken time to consider, judgment was delivered, in the present term, by—

PARKE, B.—This case was argued before my Brothers Bolland, Gurney, and myself, in the course of last term, on shewing cause against a rule *nisi* to enter a nonsuit. It was an ejectment brought to recover a small estate in Cardiganshire. Ann D. Lewis was seised of a part of the lands, her daughter Ann Lewis of another part. Ann Lewis married the defendant. The defendant, on his marriage, went to live with his wife's mother, upon the premises, and continued to live there until and after her death, which happened about 1831, and down to this time. The defendant's wife died about 1835. The lessor of the plaintiff was the heir-at-law both of Ann D. Lewis and Ann Lewis; and sought to recover the lands in question in that character.

On the marriage of Ann Lewis, in December 1822, a settlement was executed, which was drawn in a very inartificial manner, and on the legal operation of which the principal question in the case depends. [Here his Lordship stated the deed.]—The defendant raised three objections to the right of the lessor of the plaintiff to recover, and contended, that he was entitled to the whole estate by virtue of the settlement. First, because the deed operated as a feoffment, as livery of seisin might be presumed by the jury from the fact of possession by the defendant; and secondly, if it was not to be presumed, the deed would operate as a covenant to stand seised; thirdly, he also contended, that as to the share of the daughter, the mother was tenant in possession, and that the deed would operate as a *grant* of the reversion. Upon referring, however, to the evidence, it appears there was no proof that the mother was tenant to the daughter, and therefore this objection fails.

Lord Denman, before whom the cause was tried, was of opinion, in conformity with the decision of *Doe d. Wilkins v. the Marquis of Cleveland*, that the possession ought not to be left to the jury, as evidence

of livery of seisin, as it was for a less period than twenty years; but, in order to save expense, he left the question to the jury, who found the fact, that livery of seisin was made: but notwithstanding that finding, his Lordship directed a verdict for the plaintiff, reserving to the defendant liberty to move to enter a nonsuit; and he also reserved the question as to the operation of the deed.

As we are all of opinion that the deed operated as a covenant to stand seised, it is not necessary to decide whether the evidence of possession ought to have been left to the jury or not; but we by no means wish to be understood as intimating any doubt as to the propriety of the decision of the Court of King's Bench in the case cited, that is, in effect, that if the fact of livery of seisin is sought to be inferred from possession alone, such possession ought to have existed for twenty years. The question then is, as to the effect of the settlement. The rules, as to the exposition of deeds and their operation in a manner different from that intended, are now fully settled, and very distinctly stated in the judgment of Lord Chief Justice Willes, in the two cases of *Roe v. Salkeld* and *Roe v. Tramarr*, (and reported in *Willes*, 673, 682,) more particularly in the latter. It is there stated, that in more recent times the Judges have been much more liberal than formerly, and have had more consideration for the substance, i. e. the passing of the estate, according to the intent of the parties, than the shadow, namely, the manner of passing it; and it is laid down, in respect to covenants to stand seised, that there is no conveyance that admits of such a variety of words; and it is sufficient, if these five things concur:—that there be a deed; words sufficient to make a covenant; that the grantor must be actually seised at the time; that his intent be plain to raise the uses; and that there be a proper consideration to raise it. In the present case all these circumstances are found. There is a deed; the word "grant" is sufficient to make a covenant; the two grantors were both seised; the intent that the husband was to have the use for life is abundantly clear; and the marriage with the daughter is unquestionably a sufficient consideration.

(11) Roll. Abr. 'Uses,' O, 1.

The only objection which can be raised as to the operation of the deed is, not that the intent to raise an use was not plain, but that the intent was to raise that use out of the seisin of the trustees, and not out of that of the grantors, and that *such interest* could not operate, as the trustees could not, it is admitted, take any estate at all: and this objection was grounded on the authority of the case of *Hore v. Dix*, where it was held that a covenant with strangers, that *they* should hold the land to the use of the grantor for life, and remainder to the son, was void. But Willes, C.J. considers this very objection in the case of *Roe v. Tranmarr*, and intimates his dissatisfaction with that decision upon this point. He says, that he should have been of another opinion, "because in a covenant to stand seised, the estate properly arises out of the estate to the grantor, and his intent that it should not, signifies nothing; for though his intent is to be regarded, as to what estate is to pass, and to whom, it is not at all to be regarded as to the manner of passing it (of which he is supposed to be ignorant), if it was, it would overturn almost all the cases." And though the learned Chief Justice distinguishes the case then under consideration from that of *Hore v. Dix* and *Samon v. Jones* (12), there can be no doubt but the learned editor of the valuable edition of *Saunders's Reports* is right in stating, to his

note in *Chester v. Willan* (13), that *Hore v. Dix* and *Samon v. Jones* are in effect overruled by this decision.

It is true, that in most, indeed I believe all, of the cases there has either been a grant to the relation without the intervention of the trustees, or there has been a covenant that the relation should hold and enjoy, but it is clear that the decisions have not proceeded upon the ground that one of those is essential.

In the cases of *Doe v. Salkeld* and *Roe v. Tranmarr*, in which there was such a covenant, Willes, C.J. mentions its existence; but it is evident he does not rely upon it as necessary to the judgment. And in the case of *Thorn v. Thorn*, Lord Keeper Nottingham decided expressly and without difficulty, that the grant to trustees to stand seised to the use of three brothers in consideration of blood, worked as a covenant to stand seised, and the express covenant that the *cestui que trust* should enjoy was not taken notice of. And the report is confirmed, as we were informed by Mr. Wilson in the course of the argument, by a reference to the register's book. This case is an authority precisely in point, and is so much in unison with the more liberal spirit and sound reason of the more modern decisions on this subject, that we do not hesitate to abide by it.

The rule must therefore be absolute to enter a nonsuit.

(12) 3 Vent. 910.

(13) Vol. 2, 97, a.

CASES ARGUED AND DETERMINED

IN THE

Court of Exchequer of Pleas.

TRINITY TERM, 7 WILL. IV.

1837. }
May 22. } KENYON v. WAKES.

Particulars—Pleading—Evidence.

The plaintiff's bill of particulars stated a claim for wages at a certain rate per week, and admitted payments on account. The defendant, contending that the plaintiff was to be paid at a lower rate per week, put the particulars in evidence, under a plea of non assumpsit, to shew that at that lower rate, the credit given would destroy the balance claimed; and the jury found for the defendant:—Held, that the particulars were properly admitted in evidence.—Held, also, that the verdict ought not to be disturbed, on the ground that such evidence was not in bar of the action, but in reduction of damages only; the defendant having omitted to raise that point at the trial.

Quære—whether it is necessary to plead payments which are admitted in the particulars.

Assumpsit for wages.

Pleas—non assumpsit, and two others, which were unimportant.

At the trial, before Lord Abinger, C.B. at the sittings after Hilary term, the plaintiff proved his service to the defendant,

and claimed payment for it at the rate of 15s. a week. The defendant contended, that he was liable to pay at the rate of 7s. a week only; and if so, that the whole demand was satisfied. To establish this, he relied on the plaintiff's particulars, which were in the following form:

This action is brought to recover the sum of 78l. 1s. 2d.

To money paid by plaintiff for the defendant, and for money lent by plaintiff to defendant, at various times, from May 1833 to September 1836	11	18	8½
To wages from April 22 to September 26, 1833, at 15s. per week.....	16	17	6
To wages from October 1, 1833 to October 22, 1836, at 15s. per week ..	119	5	0
	148	1	2½
Payments on account	70	0	0
	78	1	2½

It was objected, first, that the defendant could not use the particulars without taking the whole together, in which case they would disclose a balance against him; and secondly, that they could not be used at all without a plea of payment. His Lordship, however, received the evidence, and the jury found that the plaintiff was entitled to 7s. a week only, and thereupon gave a verdict for the defendant.

Humfrey, for the plaintiff, having obtained a rule for a new trial—

Thesiger shewed cause.—By the particulars the case is the same as if 70*l.* were struck out of the accounts between the parties, and all that the plaintiff goes for is the balance of 78*l.* The case of *Booth v. Howard* (1) only decided that the particulars are not a part of the declaration. It has no bearing on the present case. The particulars shew that the claim is for a balance, and that balance is destroyed by the finding of the jury. There was at no time a promise to pay the sum so alleged to be due.

[LORD ABINGER, C.B.—These particulars shew the precise question between the parties, that is, what was the rate of wages.]

Platt and *Humfrey*, contra.—It is clear that the particulars cannot be incorporated with the declaration. According to the case of *Ernest v. Browne* (2), decided last term in the Court of Common Pleas, payment must be pleaded notwithstanding an admission of it in the particulars.

[PARKE, B.—How can a plaintiff avoid the costs of a *nolle prosequi*, if he discontinues on a plea of payment, otherwise than by an admission in his particulars?]

By excluding that sum from his declaration, or by expressly admitting it in his pleading, as a payment made on account—and then alleging a promise to pay the difference.

[PARKE, B.—That seems a singular course. Would the payment admitted be a traversable fact?]

[LORD ABINGER, C.B.—What would non assumpsit go to in such a case?]

The promise alleged, which is, to pay the difference.

[PARKE, B.—You would have to prove such a promise. From what time would the Statute of Limitations run?]

[LORD ABINGER, C.B.—You would make the declaration a special contract on an account stated.]

Such a form is not now unfrequent in practice. At all events, the defendant, not having pleaded payment in bar, can only avail himself of the particulars to reduce the damages.

(1) 5 Dowl. P.C. 438.

(2) 6 Law J. Rep. (N.S.) C.P. 211.

LORD ABINGER, C.B.—That point was not raised at *Nisi Prius*. The particulars were put in, to shew that the plaintiff limited his own claim to the balance, if any, due for wages. The jury found that there was no balance.

PARKE, B.—I think that the rule should be discharged, because the point, as to whether the plaintiff was not, at all events, entitled to nominal damages, was not raised at the trial. Had it been raised, we should have had to consider a question, which must soon be determined, as to whether a payment admitted by the particulars need be pleaded. Before the case in the Common Pleas I had a strong opinion, and so expressed it in *Coates v. Stevens* (3), that such a payment need not be pleaded. I thought that the particulars were given as an instruction to the defendant what to plead, as well as to restrain the plaintiff's proof of the claim in his declaration. In that view I agree with Pattenon, J., who, in *Booth v. Howard*, held, that the particulars were for the benefit of the defendant; and the plaintiff there was seeking that benefit for himself. It is said, that in *Ernest v. Browne* a distinction was taken between debt and assumpsit with reference to this point. I cannot understand that; nor am I at present inclined to alter the opinion I expressed in *Coates v. Stevens*. As to the necessity that the jury should take the whole particulars together, it is every day's practice to leave to a jury the credit which a statement by a party in his own favour is entitled to, and they may discredit that side of the account, and believe the other.

Rule discharged.

1837. }
May 23. } STANDRING v. GRUNDY.

Trover—Conversion—Evidence.

In an action of trover for deeds, the plaintiff, to shew a conversion, proved that the seals had been cut off by the defendant, and also gave in evidence a statement by him, in which he admitted having done this act, but asserted an authority for doing it:—Held, that this assertion did not necessarily destroy

(3) 2 Cr. M. & R. 119; s. c. 4 Law J. Rep. (N.S.) Exch. 167.

the effect of the admission ; and even if it did, still that it did not disprove the conversion, which was shewn by an act independently of the defendant's statement.

Trover for deeds.

Pleas—First, not guilty ; second, that the deeds were not the property of the plaintiff.

At the trial, before Patteson, J. at Liverpool, it appeared that the deeds related to a right of way claimed by the plaintiff, and had been in possession of the defendant, who was executor of one Wrigley, by whom the way was granted. It was proved that the seals of the deeds had been cut off by the defendant ; and it was also proved by the plaintiff, that, upon an arbitration which had taken place some time before, the defendant had admitted his having so cancelled the instruments, but at the same time alleged, that they had been given to him for that purpose by the party having the legal title to them. Upon this, the learned Judge directed the jury to find for the defendant, on the ground that the whole statement of the defendant being made evidence by the plaintiff, must be taken together, and that the conversion was therefore negatived.

Atcherley, Serj. having, last term, obtained a rule for a new trial, on the ground of misdirection,—

Cresswell, Alexander, and Watson, shewed cause.—The statement of the defendant in explanation of his own act is made evidence by the plaintiff ; and that being so, it disproves a conversion.

[*ALDERSON, B.*—Still, it should have gone to the jury.]

Not so, because there was no conflicting evidence on the point.

LORD ABINGER, C.B.—It is every day's practice to leave a statement in writing by a party to the jury, asking them to believe or not the fact in his own favour. There was a case⁽¹⁾ of the kind in this court very lately, where the defendant put in the plaintiff's bill of particulars, as evidence of a payment admitted by it ; and it was contended, on the other side, that if he did so, he must take the rest of the plain-

tiff's statement, which would shew a balance against him ; but the answer was, that the jury might believe the one part and not the other. If you prove a conversion by demand and refusal only, then you must take all the defendant says at the time together ; and a qualified refusal will not be enough ; but here is an act of conversion, and you must shew, by something more than his mere statement, that such an act was in furtherance of the original intention for which the deeds were intrusted to him. Try it in this way : but for the second plea, the Judge would have nonsuited ; then would he have been justified in so doing on this evidence ? The plaintiff has a right to say, I demand proof of what the defendant asserts, namely, that he had authority for destroying the deeds, even if there were no other evidence of his destroying them than his own admission. Here, however, that was evidence of the act.

ALDERSON, B.—It is reasonable where the conversion is wholly proved by a declaration, that the whole should be taken together. Here it is proved by an act, i. e. the cutting off of the seals. That takes place under a claim of authority, which would excuse the act, if proved ; but you must prove it.

BOLLAND, B. and GURNEY, B. concurring,
Rule absolute.

1837. }
May 29. } *ASHBY v. HARRIS.*

Sheriff—Debt for Extortion—Pleading.

In an action of debt against the sheriff for extortion, the declaration alleged that the defendant levied, under a writ of fi. fa., and took from the plaintiff more and other consideration and recompense for executing the writ than by the statute is allowed (that is to say), the sum of 11. 16s. more than in that statute is limited.

Semble—bad on demurrer, for not stating either what was the precise sum taken, or else that a larger sum was taken than the 1s. in the pound, allowed by the statute 29 Eliz. c. 4.

Debt, on the 29 Eliz. c. 4, against the sheriff for extortion.

(1) *Kenyon v. Wakes*, ante, p. 180.

The declaration stated, that a writ, indorsed to levy 22*l.* 17*s.* 6*d.*, was delivered to the defendant, and that he seized under it divers goods and chattels of the plaintiff of that value; yet the said defendant, so being sheriff, not regarding his duty in that behalf, nor the statute in such case made and provided, under colour of the said writ, wrongfully had and received from the said plaintiff, for the serving and executing of the said writ of execution, more and other consideration and recompense than by the statute in such case made and provided is in that behalf allowed, that is to say, the sum of 1*l.* 16*s.* 2*d.* more than in that statute is limited and appointed, contrary to the form of the statute in such case made and provided.

Demurrer, assigning for cause, that the plaintiff had not, in or by the declaration, stated or alleged how much the defendant had received and took of and from the plaintiff, for the serving and executing of the said writ of execution, but merely that he received 1*l.* 16*s.* 2*d.* more than by the statute is allowed; and the plaintiff, by such allegation, has so mixed up the law and fact, that the Court cannot tell, on the face of the declaration, whether or not the defendant had taken, had, or received more than by law allowed, and the defendant cannot take issue on the allegation without leaving it to the jury to determine the law, and to say whether the defendant has taken more than by law allowed, whereas it is the province of the jury to say merely how much the defendant took, by way of such consideration and recompense, and the province of the Court to say, whether such sum is more than allowed by the statute; and the plaintiff ought therefore to have stated, in the declaration, how much the defendant took as such consideration and recompense.

Peacock, in support of the demurrer, contended, that the declaration was bad for the cause assigned. He cited *Com. Dig.* 'Pleader,' E, 34, where it is laid down, that "if fact is complicated with matter of law, so that it cannot be tried by the Court or jury, the plea is bad;" for which reason a plea, that "the action was not brought within the time limited by law," without stating what time, would be bad. A difficulty might arise upon the

law, as in *Paget v. Foley* (1). Here, the Judge cannot decide the fact, nor the jury the law, which are so intermixed as not to be separable. The statute, on which this action lies, is curiously worded; and a question was raised upon it in *Lister v. Bromley* (2), as to the proportion of the sheriff's fee, where more and where less than 100*l.* was levied. The declaration should state, either that the defendant took more than 1*s.* in the pound on the whole amount, or else the precise sum taken.

The Court here called upon *Humfrey*, and suggested an amendment, which was adopted.

1837. { TIMMIS AND ANOTHER, EXECUTRIX AND EXECUTOR OF RICHARD TIMMIS, v. PLATT.
May 29. }

Pleading — Promissory Note — General Issue.

Declaration by an executor on a promise to him to pay a note due to his testator, is not a declaration on a promissory note within the meaning of the rule (Hilary term, 4 Will. 4.) which prohibits the plea of non assumpsit in such actions.

Declaration, that defendant, on the 11th day of March, A.D. 1815, in the lifetime of Richard Timmis, made his promissory note, and thereby promised to pay him, the said R. T., the sum of 100*l.*; and the said note being due and unpaid, the defendant, after the death of R. T., to wit, on the 14th day of April, A.D. 1831, promised the plaintiffs, as executrix and executor as aforesaid, to pay the said note when requested.

Plea—As to the said supposed promise alleged to have been made to the plaintiffs as executrix and executor as aforesaid, non assumpsit.

Demurrer.

Richards, in support of the demurrer.—The plea is against the rule, that in actions upon bills of exchange and promissory notes, the plea of non assumpsit shall be inadmissible. This is an action upon a

(1) 2 Bing. N.C. 679; s. c. 5 Law J. Rep. (N.S.) C.P. 258.

(2) Cro. Car. 286.

promissory note, for there is no binding promise, in fact, to pay the executor without the note, which is the consideration for that promise, and therefore the foundation of the action. Before the new rules of pleading, on this issue the note must have been proved, and even if, by the plea, the making of the note is admitted, which may be questioned, still that does not alter the nature of the action. If, in a declaration upon a note more than six years old, the plaintiff alleged an express promise within six years, the action would be founded, not upon the subsequent promise, but upon the promissory note, and this plea would be inadmissible.

PARKE, B.—In the case put, I am not prepared to say whether the plea of non assumpsit would be allowed or not; but in the present case it is clearly admissible. The rule prohibits it only where the promissory note or bill of exchange is the sole ground of action, that is, it may not be pleaded to the promise contained in the bill or note. Here an express promise to the executor is alleged in the declaration, and without proving such express promise, the action could not be maintained. The law does not imply a promise to an executor; if it did, the Statute of Limitations would run from the death of the testator. This, then, is not an action upon a promissory note in the sense intended by the rule; but an action upon an express promise to the executor, and therefore the plea is good.

ALDERSON, B.—The whole rule taken together means that the promise contained in the note may not be traversed, though you may traverse any matter of fact upon which that promise is founded.

BOLLAND, B. concurred.

Leave given to amend.

Wightman for the defendant.

1837. }
June 2. } WALKER v. KING.

Practice.—Amending Postea.

The Court will allow the postea to be amended by the sheriff's notes, in an action tried before him.

This action was tried before the sheriff, and a verdict was found for the plaintiff, but wrong damages were marked on the postea.

Turner moved for the production of the postea, to have it amended by the sheriff's notes.

Rule granted.

1837. }
June 10. } FOULKES v. BURGESS.

Prisoner—Time for charging in Execution.

Declaration against the defendant, a prisoner, in Hilary term, trial on the 31st of March, and final judgment in Easter term:—Held, that, under rule 85, Hilary term, 2 Will. 4, the plaintiff should charge the defendant in execution some time in Easter term.

A writ of detainer, in this cause, having been delivered on the 5th of January, the plaintiff declared in the course of Hilary term, and proceeded to trial on the 31st of March, and signed final judgment in Easter term following; but not having charged the defendant in execution during that term—

Richards obtained a rule to shew cause why the defendant should not be discharged out of custody, contending, that by rule 85, Hilary term, 2 Will. 4, the plaintiff was now too late to take any proceedings against him.

Barston shewed cause, and, admitting that the latter part of the rule, if construed strictly, warranted this application, yet urged that the former part, taken in conjunction with it, shewed the meaning to be, that the plaintiff should in all cases have three terms before he was required to proceed to final judgment; that he might also have three terms before he proceeded to trial, but in that case he must count the term in or after which the trial was had, as one for the purpose of execution.

[GURNEY, B.—Are you aware of the case of *Borer v. Baker*? (1).]

ALDERSON, B.—Unless the words have no meaning, the plaintiff should have charged the defendant in execution some time in Easter term.

Rule absolute.

(1) 2 Dowl. P.C. 608; s. c. 1 Ad. & El. 860.

1837. } JOHNSON AND OTHERS v.
May 24. } DODGSON.

Statute of Frauds — Memorandum in Writing.

A memorandum written by the defendant, and containing his name thus at the beginning of it,—“Sold John Dodgson,” &c., and signed by the plaintiffs’ agent, is a sufficient memorandum within the Statute of Frauds to charge the defendant.

Assumpsit to recover the price of hops.
Plea—the general issue.

At the trial, before the Lord Chief Baron, at Guildhall, at the sittings after last Michaelmas term, it appeared, that the plaintiffs, by one Morse, their agent, had sold to the defendant a quantity of hops on the 19th of October 1836, and that the defendant wrote the following memorandum in the note-book :—

“Leeds, Oct. 19, 1836.

“Sold John Dodgson 27 pockets Playsted 1836, Sussex, at 103s.; the bulk to average the sample; 4 pockets Selmes, Beckley, at 93s., samples and invoice to be sent per Rockingham coach; payment in Banks, at two months. Signed for Johnson, Johnson & Co.

“D. Morse.”

All this memorandum was in the defendant’s handwriting, excepting the signature, “D. Morse,” which was written by the plaintiffs’ agent. It also appeared, that, on the same day, the defendant wrote the following letter to the plaintiffs :—

“Leeds, Wednesday evening,
Oct. 19, 1836.

“Messrs. Johnson, Johnson & Co.—Gentlemen, please to deliver the 27 pockets Playsted, and the 4 pockets Selmes, 1836, Sussex, to Mr. Robert Pearson, or bearer, to be carted to Stanton’s Wharf, 20 pockets of Playsted to be forwarded per first ship, and the remaining 11 pockets per the second ship, and you will oblige, gentlemen, your most obedient,

“John Dodgson.”

It was objected, upon this evidence, that there was not any sufficient note or memorandum in writing, signed by the party to be charged, to satisfy the 17th section of the Statute of Frauds: the Lord Chief Baron overruled the objection, and thereupon the plaintiffs had a verdict.

NEW SERIES, VI.—EXCHEQ. PL.

Cresswell having obtained a rule to set aside the verdict and enter a nonsuit,—

Thesiger shewed cause (*Erle* and *J. Evans* were with him).—This entry, made by the defendant himself, in his own book, and signed by the traveller of the plaintiffs, is a complete contract to satisfy the statute. *Saunderson v. Jackson* (1) is a decisive authority; *Schneider v. Norris* (2) is to the same effect. But, if there is any doubt of the sufficiency of the entry in the note-book, the letter subsequently written so expressly refers to the purchase entered in the note-book, as to be a recognition of it. It begins, “Please to deliver the 27 pockets;” the two may be taken together—*Saunderson v. Jackson*. This is a stronger case than *Allen v. Bennett* (3), and *Jackson v. Low* (4).—[He was then stopped by the Court.]

Cresswell and *Wightman*, contra.—This memorandum is not sufficient, and this case is distinguishable from those cited. There has been no case yet where the party has been charged by such a document as this, nor unless he wrote his name, intending by that name to bind himself. Here, by writing his name at the beginning of the entry, he had no such intention. In *Saunderson v. Jackson* there was a memorandum signed by the party to be charged, and sent by him to the plaintiff. So in *Schneider v. Norris* the binder’s name was in print, and a bill of parcels was sent by the defendant to the plaintiff. Here, the whole is *diverso intuitu*. In all the cases the paper has been delivered by the party to be charged. Then the letter cannot be used to assist the entry in the book. It is conceded, there must be an express reference to the contract. Here this letter contains no price, and no time for payment.

[*PARKE, B.*—The letter does not say, “Please to deliver the hops for which I wrote a memorandum in my own book.” In *Jackson v. Lowe*, the letter mentioned all the ingredients of the contract, and supplied the place of any other.]

[*LORD ABINGER, C.B.*—If you could shew any other contract existing, there would be an end of the letter.]

(1) 2 Bos. & Pul. 238.

(2) 2 Mau. & Selw. 286.

(3) 3 Taunt. 169.

(4) 1 Bing. 9.

Suppose the letter had been "Please to deliver the hops," and no more; that could not be explained by parol. Under Lord Tenterden's act, 9 Geo. 4. c. 14, it has been held, that any letter relating to a debt, must clearly shew what the debt is.

[PARKE, B.—No. The decision is the other way—*Lechmere and others v. Fletcher* (5).]

LORD ABINGER, C.B.—This point is clear. If the case rested upon a recognition of the first note by the second letter, there might have been some doubt, though I should have had none; but it is not necessary to decide that here. I think no man can doubt that the defendant intended this to be a complete memorandum in writing. It is one of the strongest cases I have heard. It is quite sufficient whether the signature is in the middle or the beginning, and equally within the spirit of the statute. Where the name is merely inserted by the party to be charged, but not signed by him, as in the case put by Mr. Cresswell, it is always a question for the jury, whether the party so writing intended it as a contract; but where the party intended to enter into a contract, it does not signify where he writes his name. Here he desires the plaintiff's servant to sign, that both parties may be bound.

PARKE, B.—I am of opinion also, that this rule must be discharged. A memorandum in a book, in which the name of the defendant is in his own handwriting, and which is signed by the plaintiff, is enough to satisfy the 17th section of the Statute of Frauds. *Saunderson v. Jackson* and *Schneider v. Norris* have decided that. Here the request by the defendant, that Morse should sign, is quite sufficient to shew it was intended as a contract. I should have doubted if there was sufficient recognition of the contract by the letter, but it is not necessary to decide that.

BOLLAND, B.—I think the letter contains such a reference to the entry in the book, that it may be looked at, if necessary, to make up the contract; but I quite agree that there is sufficient in the note-

(5) 1 Cr. & Mee. 623; n. c. 2 Law J. Rep. (N.S.) Exch. 219; and see *Bird v. Gammon*, 6 Law J. Rep. (N.S.) C.P. 258.

book to satisfy the statute, and charge the party.

GURNEY, B. concurred.

Rule discharged.

1837. } HUTCHINS v. SCOTT.
May 26. }

Distress—Altered Agreement—Evidence.

A landlord's broker sent to the tenant's premises to distrain, refrains from doing so, on receiving from the latter the amount of rent claimed and expenses, which the tenant pays under protest. In an action against the landlord for an excessive distress,—Held, that it was not competent to the defendant under these circumstances to deny the fact of a distress.

By an agreement between the plaintiff and defendant, a house, No. 38, was let by the latter to the former. After the agreement had come into the possession of the plaintiff, the number was altered without the knowledge of the defendant, from 38 to 35, which was the real number of the house demised, and occupied by the plaintiff. In an action for an excessive distress,—Held, that notwithstanding such alteration, the agreement was properly receivable in evidence, in order to shew what was the rent reserved.

Case for distraining upon the plaintiff for 21l. for rent, when 10l. 10s. only was due.

At the trial, before Williams, J., at the last assizes for Taunton, the plaintiff put in an agreement for a lease, dated Sept. 8, 1835, by which he agreed to take a lease of a house stated in the agreement to be No. 38, in Broad-street, for seven years at 42l. per annum, payable quarterly, the first payment to be made on the 25th of March following. The distress was for half-a-year's rent, alleged to be due at Lady-day, 1836. The broker went to the premises, but took nothing, and the plaintiff paid the rent and 3l. 3s. for expenses under protest, and then the broker withdrew. It also appeared, that after the agreement had come into the plaintiff's possession, the number of the house in the agreement had been altered from 38 to 35, without the knowledge of the defendant. The plaintiff had a verdict for 13l. 13s., and the learned Judge

gave the defendant's counsel leave to move to enter a nonsuit, if the Court should be of opinion, 1st, that half a year's rent was due; 2nd, that no actual distress was made; 3rd, that the lease was void from the alteration made by the plaintiff.

Erle, on a former day, moved accordingly.—One quarter's rent was due at Christmas, and the question is, to what time that quarter is postponed.

[*PARKE, B.*—The last payment would be at Christmas 1842, after the tenancy had expired; and the only difference would be, you could not distrain for it.]

Secondly, there was no actual distress: nothing was taken, and no person remained upon the premises—*Swann v. Lord Falmouth* (1); here there was no inventory taken.

[*LORD ABINGER, C.B.*—You go to the premises, and say, 'Unless you pay 10*l.* 10*s.* for rent, and 3*l.* 3*s.* for expenses, we will distrain.' You cannot say you make no distress.]

Thirdly, this agreement, being altered after it was delivered to the plaintiff, is void. This was an essential document for the plaintiff, and the jury have found it was altered without the defendant's knowledge. The Court having granted a rule upon the last point only—

Bompas, Serj. and *Halcomb* now shewed cause.—The only point is, whether, under these circumstances, the deed is void. It is quite immaterial here how the alteration was made, and the deed is not vitiated. There was never more than one house demised to the plaintiff, and the distress was taken in that. The plaintiff was obliged to put in the deed to shew the reservation of the rent.

[*ALDERSON, B.*—There is distinct evidence that the alteration was made after the execution, but it does not seem that the jury were distinctly asked, whether it was made by the plaintiff or not. If that is so, must there not be a new trial?]

It was not material to leave this distinctly to the jury, as fraud will not be presumed. There was no evidence that it was altered by the plaintiff; but, even if altered by him merely to correct a mistake, and not *animo cancellandi*, it will not be vitiated

—*Perrott v. Perrott* (2). What effect alterations have upon a deed, is considered in *Sugden on Powers*, 412, 5th edit. There are also the cases of *Bates v. Grabham* (3), *Motteux v. London Assurance Company* (4), *Roe v. the Archbishop of York* (5); and besides, there is a class of cases, where alterations have been made in bills of exchange—*Kershaw v. Cox* (6), *Brutt v. Pickard* (7), *Jacob v. Hart* (8), *Cole v. Parkin* (9). But, secondly, if the deed is avoided by the alteration, it may be looked at to ascertain the terms of holding. There being only the plea of not guilty, the situation of the parties as landlord and tenant is admitted on the record under the new rules, Hilary term, 4 Will. 4. The tenancy being admitted, the only question was, whether one or two quarters' rent were due, and this instrument might clearly be looked at for that purpose.

[*ALDERSON, B.*—Suppose you had a letter from the defendant, mentioning the terms, that would clearly be evidence: why may you not also shew it in this way? or if the parties had agreed to tear off the seal, would not the document be admissible to shew the terms of the holding?]

Crowder, contrà.—If a party produces an instrument, upon which appears an erasure made after execution, it lies on him to explain it. No presumption arises that the erasure was made by any person but the plaintiff. In *Kershaw v. Cox*, *Cole v. Parkin*, and other cases cited, the alterations were with the consent of the parties, and might be taken to be a re-execution. Here the defendant never saw the deed after its execution. This is a material part of the instrument, and any alteration in a material part is fatal. Thus it was held in *Markham v. Gonaston* (10), that an alteration made by the lessee for the benefit of the lessor, will render the deed void. And *Fenner, J.* there cited a case, where an alteration of a lease as to the amount of rent made according to the

(2) 14 East, 423.

(3) Salk. 444.

(4) 1 Atk. 545.

(5) 6 East, 86.

(6) 3 Esp. 346.

(7) Ry. & Moo. 37.

(8) 6 Mau. & Selw. 142.

(9) 12 East, 471.

(10) Cro. Elis. 642.

(1) 8 B. & C. 456; s. c. 6 Law J. Rep. K.B. 374.

intention of the parties, had the like consequence. So also it is laid down in *Pigott's case* (11). Suppose the declaration had stated the number of the house,—No. 35, then it would not have been supported, because the demise had been altered in a material point; if No. 38, the result would have been the same, because no facts would be applicable to such an alleged holding. It is said, that though void as a demise, it may be good to shew the amount of rent; but if No. 35 is not demised, how can the supposed rent be shewn to issue out of it?

LORD ABINGER, C. B.—There are no grounds for making this rule absolute, nor do I think that the case has been rightly understood. Suppose the question was, whether an alteration confessedly in the plaintiff's own handwriting, ought to make the deed void, though it might be impossible for him to sustain an action upon it as lessee, yet it does not follow that he might not give it in evidence for some other purpose than that of enforcing the contract. In the case put of a lessee altering for the benefit of his lessor, it may be true that he lost the benefit of the term, yet the instrument would be available, even though altered by him, in order to shew the amount of bygone rent due for the occupation. But this case is even different from that. The point in issue is, whether the distress was for more rent than was due. All the evidence applied to No. 35, and none to any other house. To shew the amount of rent due for such a house, this instrument was put in, and the attesting witness called. Now, suppose the landlord had insisted that the lease was for a house No. 38, in a particular street, might not the lessee have shewn that the landlord had no house of that number, or that there was no house of that number in that particular street, or any other fact to shew that the description was immaterial? Suppose 35 to have been the house really intended, and 38 to have been inserted by mistake, it is clear that parol evidence would be admissible to shew that. We must here take the fact to be, that the parties intended to treat as to the house No. 35, and the whole controversy was as to the terms of that house.

(11) 11 Co. 27.

If anything has occurred to terminate the interest of the tenant, still the deed may be used to shew the terms of the holding up to that time. It would be otherwise, if there were any suggestion of fraud, or if the jury thought that some other than No. 35 was really intended. It is unnecessary to go into all the learning upon this subject. Undoubtedly the old law was more strict than now. It is but a modern practice of pleaders, growing out of a decision of Lord Mansfield, to plead a lost grant; but if that is a permitted course, if a deed lost or destroyed does not preclude evidence being given of its contents, or vitiate the contract between the parties, why should it though altered? It is sufficient here to prove the terms of the holding, and there was no evidence of any other holding than that of the house No. 35.

BOLLAND, B. concurred.

ALDERSON, B.—This is an agreement, and the rules as to deeds, to which you may plead *non est factum*, are not applicable. The only question is, what was the agreement between the parties?

Rule discharged.

1837. }
May 26. } BARRY v. GOODMAN.

Agreement—Stamp.

An instrument in these words, "I hereby certify, that I remain in the house, No. 3, Swinton Street, belonging to W. G., upon sufferance only, and agree to give immediate possession to him at any time he may require," is not an agreement for a tenancy requiring a stamp.

Trespass for turning the plaintiff out of his house, and taking his goods, to which the defendant pleaded *liberum tenementum*.

At the trial, before Lord Abinger, C.B. at the sittings after last term, it appeared from the evidence that, whilst the plaintiff was in possession, the party under whom he occupied conveyed the premises in question to the defendant, at which time the plaintiff gave the defendant a memorandum, in writing, as follows: "I, David Barry (the plaintiff), hereby certify, that I remain in the house, No. 3, Swinton Street, belonging to Mr. William Goodman

(the defendant), upon sufferance only, and agree to give immediate possession to the said William Goodman, at any time he may require. 6th July 1836." Upon the defendant offering this document in evidence, it was objected, that it could not be read for want of a stamp, as it was an agreement for a tenancy, and not an attornment. The learned Judge admitted the evidence, and the defendant had a verdict.

Kelly now moved for a new trial.—This was an agreement for a tenancy, though at sufferance only, and required a stamp—*Cornish v. Searell* (1). This did not operate merely as an attornment: it is not that plaintiff will hold of the defendant on the same terms as before, but at sufferance till something else is done. It is not a mere exchange of one landlord for another.

[LORD ABINGER, C.B.—If it is an agreement for a tenancy it would require no stamp; the matter thereof not being of the value of 20*l.*, unless it be for an interest in land.]

It is an agreement under which the party has become tenant; without this document there is no privity between the plaintiff and defendant. If the former had originally entered under the latter, it would have been different.

LORD ABINGER, C.B.—I thought it a mere admission that the house was the house of Goodman, and that the plaintiff had no interest at all. His agreeing to give it up, follows as a matter of course.

Rule refused.

1837. }
June 10. } HEDGER v. STEVENSON.

Promissory Note—Notice of Dishonour—Pleading.

*A notice in these terms, "Sir, I am desired by Mr. H. to give you notice, that a promissory note (describing it) became due yesterday, and has been returned unpaid. I have to request you will please remit the amount thereof, with 1*s.* 6*d.* noting," is a sufficient notice of dishonour.*

The declaration stated, that S. T. made his promissory note payable to the defen-

dant's order, at Messrs. B. & T, and that defendant indorsed it to plaintiff, and promised to pay the same according to the tenor and effect thereof; but the said Messrs. B. & T. did not, nor did S. T. nor the defendant, nor any other person, pay the said note, though the same was presented at Messrs. B. & T's on said day when it became due, of which the defendant then had notice. On motion in arrest of judgment, held, that neither the promise nor the breach was incorrectly alleged.

Declaration, that one Samuel Thompson, on the 10th day of August, in the year 1835, made his promissory note in writing, and thereby promised to pay to the order of defendant, at Messrs. Barclay, Tritton, & Barclays', London, 99*l.* 18*s.*, two months after the date thereof, for value received, which period had, at the time of the commencement of this suit, elapsed, and then delivered the said note to the defendant; and the defendant then indorsed the said note to the plaintiff, and then promised to pay the same according to the tenor and effect thereof. But the said Messrs. Barclay, Tritton, & Barclays did not, nor did the said Samuel Thompson, nor the defendant, or any other person, pay the said note, although the said note was presented at Messrs. Barclay, Tritton, & Barclays' aforesaid, on the day when it became due, of which the defendant then had notice.

4th Plea—That the defendant had not due notice of the non-payment of the said note in the said first count mentioned, in manner and form as the plaintiff has above in that behalf alleged.

At the trial, before Parke, B. at Guildhall, the following letter was put in as notice of dishonour:

"Sir—I am desired by Mr. Hedger to give you notice, that a promissory note, dated August the 10th, 1835, made by Samuel Thompson, for 99*l.* 18*s.*, payable to your order two months after date thereof, became due yesterday, and has been returned unpaid. I have to request you will please remit the amount thereof, with 1*s.* 6*d.* noting, free of postage, by return of post."

(Signed by the attorney for the plaintiff.)

It was objected, that this was not a proper notice of the dishonour of the note;

(1) 8 B. & C. 471; s. c. 6 Law J. Rep. K.B. 265.

and a verdict having been found for the plaintiff on that issue,—

W. H. Watson moved to enter a verdict for the defendant, relying on a case of *Bolton v. Welsh* (1), decided last term in the Common Pleas, and also in arrest of judgment, on two grounds: first, that the promise alleged was not consistent with the obligation; the obligation of the defendant, as indorser, being to pay on request after non-payment and dishonour; whereas, the promise, as laid, was to pay according to the tenor and effect, &c., the one being conditional, the other absolute. The second ground was, that if the promise was rightly laid, then the breach was wrong, as it imported a non-payment only on the day when the note became due, but did not allege non-payment afterwards. A rule having been granted on all these points,—

Humfrey and Hoggins shewed cause.—This notice could not be otherwise understood than as a notice of dishonour. The statement that “the note had been returned unpaid,” is equivalent to a statement that it had been dishonoured. The case of *Bolton v. Welsh* cannot be supported. It goes beyond the previous cases of *Hartley v. Case* (2) and *Solarte v. Palmer* (3), and is directly at variance with an unreported case of *Grugeon v. Smith*, which was an action tried at Liverpool, before Patteson, J., and in which the following notice of dishonour was, by that and learned Judge, held sufficient: “Your bill, due this day, has been returned with charges, to which we request your immediate attention.” A motion was made in the King’s Bench for a new trial, on the ground of the alleged insufficiency of such notice; but the rule was refused. The notice in this case is even more explicit, as it contains a charge for noting. Then as to arresting the judgment,—the promise as to the note need not be alleged at all in the declaration; and, with regard to the breach, it is not confined to non-payment of the note, then and there when presented, but avers a non-payment by each and all of the parties generally.

W. H. Watson, in support of the rule.—

(1) Vide 6 Law J. Rep. (N.S.) C.P. 243.

(2) 4 B. & C. 339; a. c. 3 Law J. Rep. K.B. 262.

(3) 7 Bing. 530; a. c. 9 Law J. Rep. Exch. 121; a. c. in error, 1 Bing. N.C. 194; 2 Cl. & F. 93.

The authorities shew that a notice of dishonour should, in express terms or by necessary implication, contain an intimation of the fact of dishonour, and that which, by one construction, may be an equivalent, is not enough. The judgment in *Solarte v. Palmer*, both in error and in the House of Lords, supports this doctrine, and the case of *Grugeon v. Smith* is the only one at variance with it. Now, the notice in this case does not necessarily allege the dishonour of the note; for it may have been returned unpaid, though not presented, or, if presented, on the wrong day, or returned from the party’s own agent, or any other person. By the general law of merchants, bills unpaid, when due, should be protested; and perhaps it is only in our own country that a notice of dishonour is known. The statute 9 & 10 Will. 3. c. 17. established the form of protest; and the particularity required by it, should be observed in a notice of dishonour, which is a mere substitution for protest. Secondly, the judgment must be arrested. Though the law would have implied a promise if none had been alleged, yet if a promise is alleged, and it is wider than the legal obligation, it is bad, even after verdict. The obligation of the indorser of a note is conditional only; but the promise here laid, is an absolute promise to pay according to the tenor and effect thereof, that is, of the note. Now, though every indorser of a bill, by his indorsement becomes a new maker, yet the indorsement of a note imports only a promise to pay in case of presentment and dishonour, and due notice thereof. Further, the breach is wrong, for the payment negated is a payment at the time when the note became due, that is, at a time when the indorser was not liable to pay; and it is consistent with this allegation, that he may have subsequently paid it.

PARKER, B.—The rule for entering a nonsuit must be discharged, and also the rule for arresting the judgment. The first question, which is one of considerable importance, is, whether there is a sufficient notice of dishonour. The law upon this point is established by the decision in *Solarte v. Palmer*, which confirmed that of *Hartley v. Case*, against the previous opi-

nion of the profession. It is certain, that after the case of *Tindal v. Brown*, there had been an impression that it was sufficient, if the notice conveyed an intimation that the party to whom it was given was looked to for payment of the bill or note. *Hartley v. Case* first made an alteration in the law, and decided that the view so taken was not correct. Lord Tenterden there laid it down, that though no precise form of words is necessary to be used in giving notice of dishonour, yet, that the language used must be such as to convey notice to the party what the bill is, and that payment of it has been refused by the acceptor. Upon the authority of that case, the Court of Exchequer Chamber and the House of Lords decided *Solarte v. Palmer*, and held the notice there used insufficient. By that decision we are bound, though I am not prepared to say that I am bound by all the reasoning or language of the learned Judges in giving their opinion, and therefore should myself doubt, whether we should go so far as to say, that it ought to appear upon the face of the instrument, by express terms or necessary implication, that the bill was presented and dishonoured; it seems to me enough, if it appear by reasonable intendment, and would be inferred by any man of business, that the bill has been presented to the acceptor and not paid by him. But supposing that we are bound by the precise expression of Tindal, C. J. in delivering judgment in the Exchequer Chamber, we ought not to put a strict construction on the term "necessary implication;" for, were we to do so, it would be difficult for any mercantile man to conduct business without the constant aid of a solicitor. We must not put such a meaning on it as would exclude the possibility of any other inference, than that the bill had been so presented, and returned unpaid. The extent to which necessary implication should be carried, is stated by Lord Eldon, who says, "necessary implication means not natural necessity, but so strong a probability that an intention, contrary to that which is imputed, cannot be supposed—*Wilkinson v. Adam*" (4). If we adopt such a rule in the present case, could it be doubted by any mercantile man that

the bill had been presented to the acceptor when due, and was not honoured? Look at the language of the notice. "I am desired to give you notice, that a promissory note (describing it), payable to your order, became due yesterday, and has been returned unpaid. I have to request you will remit the amount thereof, with 1s. 6d. noting." Can any one doubt the use of the term "returned unpaid"? The word "returned" is almost a technical term in matters of this nature, and means that the bill has come to maturity, and has not been paid. Upon reading this notice I should say, it appears, by necessary implication, (in the meaning I attach to the term,) that the note has been duly presented and dishonoured. This is the opinion which I should have formed previously to the case of *Bolton v. Welch*, and we are not called upon to overrule that case, without some authority to the contrary. The notice in *Grugeon v. Smith* is in the same terms as the present; and as we must determine to which of the two cases we will subscribe, I must say, I think that the one in the Common Pleas is not rightly determined. There is, indeed, one circumstance mentioned in this notice of dishonour, which does not appear in the notice in *Bolton v. Welch*, viz. that the bill had been noted: that constitutes a distinction between the two cases; but I disclaim to go on that distinction. In *Solarte v. Palmer* it was contended, that there was no intimation that the bill had been presented for payment, or that it was unpaid, or even that it was due, and the argument for the sufficiency of the notice rested on its containing sufficient information that the party was held liable to the holder. In the present case, no mercantile man, upon reading the notice, could possibly misunderstand its meaning.

It was also contended, that the judgment should be arrested on two grounds: first, that the promise laid in the declaration is not the correct legal promise; I before thought, and still think, that this is not an incorrect mode of laying the promise, especially after verdict; it is the promise which results from the fact of the indorsement. The declaration states the note to have been drawn by Thompson, payable to the order of the defendant, and

(4) 1 Ves. & Bea. 466.

delivered to him, and by him indorsed to the plaintiff; and that the defendant promised to pay according to the tenor and effect of the note and of the indorsement. That is not an improper description of the liability of the indorser; it means that he will pay the note when due, after presentment and notice of dishonour. The second ground, in arrest of judgment, was, that there was no sufficient breach. I am of opinion, that the breach may be so read as to constitute a good breach, viz. a non-payment by the indorser after presentment of the note, and after non-payment by the maker, and due notice that it was unpaid. The allegation is, that Messrs. Barclay & Co. did not, nor did the said Thompson, nor the defendant, or any other person, pay the note, although the said note was presented at Messrs. Barclay & Co.'s on the day when it became due. It does not say that the defendant did not pay when the note was presented, but at any time, and imports no more than this, that, although presented, neither of the parties paid it at any time. That is a sufficient breach after verdict. As to whether or not it might have been bad on special demurrer, we are not called upon to give an opinion.

BOLLAND, B.—I am of the same opinion upon both points. We ought not strictly to construe an instrument of this nature; provided it contain a notice that the bill has been dishonoured, and that the party by whom it was given is considered liable, that is sufficient. Let us look at the circumstances by which matters of this nature are accompanied. Long acquainted as I have been with mercantile affairs, not only professionally but practically, I for one do not feel inclined to fetter these transactions with difficulties; nor will I do so unless I am compelled by the authority of decided cases. Let us look at this case, and see whether any man, who had been only a week conversant with business, could have doubted that this instrument had been dishonoured, and that he was held liable to pay the amount due upon it. In the first place, it is a returned note, an expression which is perfectly understood in the city of London. Then looking at the notice; it describes the note, the amount is given, and it is stated to be due

the day before, and goes on to request that the defendant would remit the amount, and adds further, that he claims 1s. 6d. for noting, which, though he was not entitled to request it, was, nevertheless, some further information with respect to the note. Considering the terms of the notice, I think that even the most unpractised man would be perfectly satisfied with what had happened to the bill.

ALDERSON, B.—The only conclusion to be drawn from the cases of *Hartley v. Case* and *Solarte v. Palmer* is this, that a notice of dishonour must not merely convey information that the party is held liable, but also that the note or bill has been dishonoured. I likewise disclaim being bound by the express words of the Judges, if the term, "necessary implication" is used by them in a strict sense. It must have that reasonable construction which is given in the judgment of Lord Eldon, cited by my Brother Parke. In that view of the case, the requisites are fully satisfied by the terms of this notice; the presentment and dishonour are to be inferred necessarily from the words here used.

GURNEY, B.—I do not think *Bolton v. Welsh* is governed by the cases of *Hartley v. Case* and *Solarte v. Palmer*, and we are fortified in our opinion, that this notice is sufficient, by *Grugeon v. Smith*, in which the terms of the notice were not so strong as in the present case.

PARKE, B. stated, that he might add, that Lord Abinger had no doubt of the notice being sufficient.

Rule discharged.

1837. }
June 10. } WARNE v. BERESFORD.

Pleading—Repealed Statute—Judgment non obstante veredicto.

The defendant pleaded a plea given by a statute which afterwards, and before the trial, was repealed. A verdict having been obtained by the defendant, the Court ordered judgment to be entered for the plaintiff, non obstante veredicto.

To a declaration for goods sold, &c., the defendant, on the 29th of November 1835, pleaded, in the form pointed out by

the Westminster Court of Requests Act, 23 Geo. 2. c. 27. s. 8, that the defendant was indebted in the sum of 40s.; and, at the commencement of the action, was inhabitant and resident within the city and liberty of Westminster, &c.

Replication, that the defendant was indebted in the sum of 40s.; and upon this issue a verdict was found for the defendant. After plea pleaded, and before trial, the statute 23 Geo. 2. c. 27. was repealed by 6 & 7 Will. 4. c. 137, s. 86, which substituted the sum of 5l. for the former sum of 40s., without providing for actions then pending. A rule having been obtained to enter up judgment for the plaintiff, *non obstante veredicto*,—

Payne shewed cause.—The plea being good at the time when pleaded, a subsequent repeal of the statute cannot make it bad. It tenders a material issue, and that issue is well taken. In *Charrington v. Meatheringham* (1), an application was made for treble costs on a nonsuit, under a statute, which was repealed after the nonsuit, but before judgment signed; and there Lord Abinger made a distinction between a penalty and a protection given by a repealed statute,—intimating, that the latter might remain, though the former were taken away. And for this reason a party has not been allowed to enter a suggestion upon a repealed statute.

ALDERSON, B.—The issue here is on the amount only; that is in effect a suggestion, and brings this case within those which you say have already been decided. But the question is upon the facts found on this record—what must be the judgment of the Court according to the law now in existence? The rule must be made absolute.

BOLLAND, B. and GURNEY, B. concurred.

Rule absolute.

1837. }
May 26. } WHEATLEY v. PATRICK.

Case for Negligence—Liability.

Where A. borrowed a chaise and horse, and permitted B, who accompanied him, to

(1) 2 Mee. & W. 281; s. c. 6 Law J. Rep. (N.S.) Exch. 23.

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drive, and B. drove against and killed a horse of C:—Held, that A. was liable in case for negligent driving.

Case. The declaration stated, that the plaintiff was possessed of a horse, at that time drawing in an omnibus, and that the defendant was possessed of a chaise and a horse, then harnessed to and drawing the chaise, and which chaise and horse were under the care, management, government, and direction of the defendant, who was driving the same; yet that the defendant so negligently and improperly drove and directed his chaise and horse, that by the negligence and improper conduct of the defendant, the defendant's chaise ran and struck against the plaintiff's horse, and killed it.

Plea—Not guilty.

At the trial, before Lord Abinger, C.B., at Westminster, at the Sittings after Easter term, it appeared in evidence, that the defendant had borrowed the horse and gig of a Mr. Delafosse, and that a Mr. Nicholls accompanied the defendant in it, on an excursion into the country; and that when the accident happened to the plaintiff's horse, Mr. Nicholls was driving. The Lord Chief Baron, on these facts, directed the jury to find a verdict for the plaintiff, and gave the defendant's counsel leave to move to enter a nonsuit, if the Court should be of opinion, that the defendant was not liable under these circumstances.

Sir W. W. Follett now moved accordingly.—The question is, whether the defendant is here responsible. He is not responsible, unless he could have an action over against Nicholls. He could have no such remedy in this case, and Nicholls should have been sued. There is no doubt Nicholls would have been liable, whether he owned or borrowed the chaise or not. A master is answerable for the act of his servant; but he has his remedy over. Again, if a coachman permits a passenger to drive, and an accident happens, the coachman is liable; but that is because he commits a breach of duty. Here, no duty was imposed on the defendant to drive this chaise; nor could Mr. Delafosse have maintained any action against him, for allowing Nicholls to drive.

2 C

LORD ABINGER, C. B.—I think there is no ground for the objection. The declaration charges, that the defendant was himself possessed of a chaise and horse, and that it was under his direction, and that he was driving. Now, having borrowed the chaise and horse, under these circumstances he may be treated as the person possessed. Then, being so possessed *suo jure*, may he not in the declaration be charged as having the controul over the chaise, and as driving at the time? I think he may be so charged: he borrowed both horse and chaise of Mr. Delafosse; he had the management of it, and is responsible to the public. I think the action rightly brought against him, for the accident occasioned by his permitting Nicholls to drive. There must be no rule.

BOLLAND, B.—I am of the same opinion. It seems to me, that this is not to be decided by the test, whether the defendant would have a remedy over against Nicholls or not. If an action had been brought by Delafosse against the defendant, for any accident to the chaise or horse, he would have been liable. The chaise and horse were lent to the defendant, and he is answerable in this action for permitting Nicholls to drive.

ALDERSON, B.—The only plea is, not guilty, by which the inducement in the declaration is admitted, and the only fact put in issue is, whether there was negligent driving by the defendant; I think there was, as he put the reins into the hands of Nicholls.

Rule refused.

1837. }
May 27. } EVANS v. CHESTER.

Execution—Baron and Feme—Affidavit.

Where a plaintiff sued as a feme sole, married before declaration, and was afterwards proceeded against to final judgment, and thereupon taken in execution, an affidavit for her discharge, which stated that no settlement was made on her marriage, was held insufficient.

In this case, an action was commenced against the defendant while she was a

single woman; but before declaration she intermarried with Chester. The plaintiff proceeded against her to final judgment, and took her in execution under a writ of *capias ad satisfaciendum*.

Dowling moved for her discharge from the custody of the sheriff of Somersetshire, upon an affidavit which disclosed these facts, and which also stated, that no settlement was made upon her on her marriage.

W. H. Watson shewed cause.—She is not entitled to be discharged—*Cooper v. Hunchin* (1). The husband is not a party, and the affidavit does not state that the defendant had no separate property.

PARKE, B.—The husband must be left to his writ of error. If both had been sued in this action, and execution had issued against both, she would not have been entitled to her discharge on this affidavit, as she does not swear she has no separate property, but only that no settlement was made on her marriage. The affidavit is defective in this respect, and the rule must be discharged, with costs.

BOLLAND, B., ALDERSON, B., and GURNEY, B. concurred.

Rule discharged.

1837. } DAWES v. ANSTRUTHER.

Bill of Exchange—Bill of Particulars.

Where the sum indorsed on the writ for bail was 260l. 6s. 4d., and 3l. 10s. for costs, and the declaration contained two counts upon two bills of exchange, amounting together to 500l., and the plaintiff stated on delivering his declaration, that the particulars of his demand were contained in these counts, the defendant having obtained an order at chambers, for better particulars, Lord Abinger, C.B., Bolland, B., and Gurney, B. refused to rescind that order—(dissentiente, Alderson, B.)

This was an action by the indorsee against the acceptor, upon two bills of exchange, dated in the year 1830, amounting together to 500l. The sum indorsed

(1) 4 East, 520.

on the writ for bail was 260*l.* 6*s.* 4*d.*, and 3*l.* 10*s.* for costs, and the plaintiff delivered a declaration, containing two counts, one upon each bill, and with it his particulars of demand, in which he stated, that he went for the sum mentioned in the two counts of the declaration. An order had been made by Gurney, B., at chambers, for further and better particulars.

Ogle having obtained a rule to rescind that order,—

Thesiger shewed cause.—These bills having been overdue some time, the learned Judge ordered a further and better account in writing of the plaintiff's particulars, with dates, &c.

[LORD ABINGER, C.B.—The usual rule is, that particulars are not necessary in actions upon bills of exchange; but if there is an open account, it is different, and here the plaintiff himself has volunteered to furnish some particulars.]

He holds to bail for 260*l.* and upwards, and then states, that his particulars are to be found in the two counts of the declaration, which claim 500*l.*, the full amount of the two bills.

[ALDERSON, B.—You are asking now in fact for a bill of discovery. You had better go into equity for that. The plaintiff has only to add to his particulars the amount for which he goes, and then the point will be raised at chambers, as to whether he has not complied with the learned Judge's order.]

He referred to *Brooks v. Farlar* (1).

Ogle, in support of the rule.—These particulars are as full as can be, as there are only two counts in the declaration in which the dates of the bills already appear. Though the indorsement on the writ is only for 260*l.*, the plaintiff is not by that precluded at the trial from recovering the full amount of the two bills. As to any delay here, proceedings were first taken against the drawer, but they were not successful, and it became necessary to proceed against the defendant as acceptor. There is no rule of court or case which restrains the plaintiff from recovering a larger sum than is indorsed on the writ. In *Brooks v. Farlar* it is said, that the party applying for better particulars, ought to depose

(1) 3 Bing. N.C. 291; s. c. 6 Law J. Rep. (N.S.) C.P. 26.

that he does not know for what amount the plaintiff is suing him: here, there is no such statement.

LORD ABINGER, C.B.—I think this rule must be discharged, and though generally a bill of particulars is not necessary in actions upon bills of exchange, I think, under these particular circumstances, this is a case where particulars should be given.

BOLLAND, B.—I agree with the Lord Chief Baron. In the case of a bill of exchange, there must be a clear and specific ground for asking for a bill of particulars; and, here, the indorsement on the writ for bail, connected with the reference to the two counts of the declaration, as containing the particulars of the plaintiff's demand, makes it reasonable that the party who has volunteered these particulars should make them clearer, especially when the date of the bills is adverted to.

ALDERSON, B.—I am of a different opinion. I have always understood a bill of particulars to be only necessary where the declaration is general, and there the defendant has a right to call upon the plaintiff to state what he goes for; but where there is a special count, stating upon the face of it what is the demand, the declaration itself is the particular, and this has been the universal practice ever since I have known anything of the law. There is only one expression in favour of requiring better particulars here, made use of by the Lord Chief Justice, in the case of *Brooks v. Farlar*; but that was not necessary to decide that case. I think this rule ought to be made absolute.

GURNEY, B.—I agree with the Lord Chief Baron. I have never before ordered particulars to be given in an action on a bill of exchange; but I thought the particular circumstances of this case warranted me in departing from the usual practice.

Rule discharged.

1837. }
June 12. } GILLET V. ROXBURGH.

Bill of Exchange—Pleading—Promise.

Since the new rules, Hil. term, 4 Will. 4, tit. 'Assumpsit,' the omission to state a promise in the declaration, in an action against

the indorser upon a bill of exchange, is no ground for arresting the judgment.

This was an action by the indorsee against the indorser of a bill of exchange. The declaration contained a special count upon the bill, which exactly followed the form given, as to bills of exchange, in the general rules of Trinity term, 1 Will. 4, 1831, and also the usual money counts. The special count contained no promise by the defendant to pay the monies therein mentioned; but the promise was confined to the money counts.

Plea—No notice; upon which issue was joined.

At the trial, at the sittings after last Easter term, the plaintiff had a verdict.

Mansel having obtained a rule *nisi* to arrest the judgment, on the ground, that the count upon the bill was bad, for not alleging a promise by the defendant, on the authority of *Henry v. Burbidge* (1),—

Fish shewed cause.—The question is, whether an omission formally to allege a promise, in an action on a bill of exchange, makes the declaration bad after verdict, or whether the objection should not have been taken on special demurrer. Where the declaration states facts, from which the law necessarily implies a promise, it need not be alleged formally—1 *Chitty on Pleading*, 4th edit. p. 265; *Starkey v. Cheeseman* (2), and *Corbet v. Packington* (3).

[ALDERSON, B.—Here it is a legal liability merely. It is unnecessary to state the word "promise," where there are equivalent words in the declaration.]

In an action for goods sold and delivered, the law implies no promise to pay for them; it must, therefore, be alleged in the declaration—*Lee v. Welsh* (4). Here, the allegation, that the defendant indorsed the bill, is tantamount to a promise by him to pay. Lord Holt says, "the drawing of a bill is an actual promise"—*Starkey v. Cheeseman*. In *Bayley on Bills*, p. 330, it is stated, a promise to pay is unnecessary, in an action against either the acceptor of

a bill, or the maker of a note; and it may be doubted, whether it is essential in any other; and *Wegerslofe v. Keene* (5) is cited. The indorsement is quite as much a promise as the acceptance. But whatever might have been the effect on special demurrer, this declaration is good after verdict—1 *Saunders's Reports*, p. 227.

[ALDERSON, B.—The only issue is, whether the defendant had due notice. If the plea had been non assumpsit, in the old form, the argument would have been stronger in your favour; the reason it would under that plea have been cured by verdict is, that the presumption would be, that it was proved at the trial. Now, upon this issue, the promise need not have been proved to obtain a verdict, and so the verdict does not aid you.]

He also cited on this point *Spiers v. Parker* (6).

Mansel, *contra*.—Here, there is an imperfect title on the face of the declaration, and the judgment must be arrested. This is different from an acceptance, as here the defendant's is a secondary liability, and he became liable to pay, because another party had made default. Anterior to the rules of Hilary term, 4 Will. 4, 1834, the plea would have been non assumpsit; that shews a promise is a necessary part of the declaration.

[ALDERSON, B.—Then, if those rules state, that the plea of non assumpsit shall not be admissible upon bills of exchange, does not that shew that no promise is necessary?]

The defendant is not sued on the mere liability, but on the promise. The word "undertook" is equivalent; but here are no sufficient or equivalent words. In *Starkey v. Cheeseman*, though no express promise was laid, the custom of merchants was set out, which was urged as sufficient in that case; here, no custom is alleged.

[ALDERSON, B.—It is strange to say, that a declaration is bad for not containing that which an act of parliament has said, the defendant cannot deny by pleading. It appears, that the attention of the Court was not drawn to that, in the case of *Henry v. Burbidge*.]

(1) 3 Bing. N.C. 501; s.c. 5 Law J. Rep. (N.S.) C.P. 110.

(2) 1 Salk. 128; s.c. 1 Ld. Raym. 538.

(3) 6 R. & C. 268; s.c. 5 Law J. Rep. K.B. 142.

(4) 2 Stra. 793.

(5) 1 Stra. 214.

(6) 1 Term Rep. 141.

Some particular fact must be denied, and non assumpsit cannot be pleaded; but the necessity of a promise in assumpsit on a bill of exchange is left altogether untouched. If it is correctly stated in *Starkey v. Cheeseman*, "that it is sufficient to count upon the custom, because the custom makes both the obligation and the promise," here, there being nothing about the custom, only part of the obligation is set out.

BOLLAND, B.—It appears to the Court, that the objection in arrest of judgment is not available. *Starkey v. Cheeseman* seems to be a decisive authority against it. It is attempted to distinguish that case from this, because, there, the custom of merchants being alleged, it was unnecessary to allege a promise in the declaration; but in *Bayley on Bills*, p. 307, it is stated, "It is not requisite to set out any part of the custom, and even a reference to it is unnecessary;" and *Soper v. Dible* (7), and *Erskine v. Murray* (8), are referred to. The rule must be discharged.

ALDERSON, B.—I am of the same opinion. It is not necessary to set out a promise to pay in the declaration, when the defendant cannot deny it, by pleading non assumpsit. It might have been different before that was the case. The defendant must now traverse some matter of fact; and if upon the trial all matters of fact as alleged in the declaration are proved to be true, a promise to pay necessarily follows.

GURNEY, B. concurred.

Rule discharged.

1837. }
June 5. } WOODS v. REED.

Municipal Corporation Act—Retrospective Rate.

A retrospective rate made under the 92nd section of the Municipal Corporation Act, is invalid.

[For the report of the above case, see 6 Law J. Rep. (n.s.) M.C. p. 105.]

(7) Lord Raym. 175.

(8) Lord Raym. 1542.

1837. }
June 12. } WRIGHT v. LAINSON AND
ANOTHER.

Sheriff—Case—Not guilty, Effect of—Bankrupt—Witness.

Under the plea of "not guilty," in an action against the sheriff for a false return to a writ of fi. fa., the only matter in issue is the fact of the sheriff having made a false return.

Semble, that in an action against the sheriff, the petitioning creditor (not having indemnified the sheriff,) is a competent witness to prove his debt, upon which the fiat issued.

Semble, that the dates of I O U's, given by the bankrupt to the petitioning creditor, are not of themselves evidence to shew they were in existence before the fiat, although they bear date before it was issued.

This was an action upon the case against the defendants, who were sheriffs of Middlesex, for a false return to a writ of *fi. fa.* The declaration stated, that a judgment was obtained by the plaintiff in the Court of King's Bench, against one Joseph Hayes, for 200*l.*, and 3*l.* 5*s.* for damages; that the plaintiff sued out a writ of *feri facias*, directed to the sheriff of Middlesex, to levy of the goods and chattels of the said Hayes the debt and damages aforesaid, and to bring the money into court, immediately after the execution of the said writ. It then alleged, that the writ was duly indorsed to levy 78*l.* 2*s.* 6*d.* and delivered to the defendants, as sheriff of Middlesex; by virtue of which writ, the defendants seized and took in execution divers goods and chattels of the said Hayes. Breach—that the defendants being such sheriff, and not regarding their duty, but contriving, and wrongfully and unjustly intending to injure, prejudice, and aggrieve the plaintiff, had not the money so levied, or any part thereof, in court, according to the exigency of the said writ, but therein wholly failed and made default, and have not paid the said sum of 78*l.* 2*s.* 6*d.*, or any part thereof, to the plaintiff, and that the defendants, after the said levy, to wit on the 28th of September, *falsely and deceitfully returned* to the said court of our said lord the king, upon the said writ, that the said Hayes had not any goods or chat-

tels in the bailiwick of the said sheriff, whereof they, the defendants, could cause to be levied the debt and damage aforesaid, or any part thereof.

Plea—Not guilty.

At the trial, before the Lord Chief Baron, in London, at the sittings after last Hilary term, it was contended on behalf of the defendants, that they were entitled upon the plea of not guilty, to give evidence of the bankruptcy of Hayes, by which his goods would vest in his assignees, and so shew that the defendants had made no false return. The Lord Chief Baron received the evidence, giving the plaintiff leave to move to enter a verdict for 78*l.*, if the evidence was inadmissible. The defendants also offered in evidence certain I O U's in the handwriting of Hayes, the bankrupt, but in the possession of the petitioning creditor, to prove the petitioning creditor's debt; they also called the petitioning creditor himself (who had not indemnified the defendants), as a witness to prove the same facts. The above evidence was also objected to, but all admitted; with a like liberty to the plaintiff to move to enter a verdict, if it ought not to have been received. The jury found a verdict for the defendants.

Bompas, Serj. having obtained a rule to shew cause accordingly upon the leave reserved,—

Alexander, Butt, and C. Kennedy shewed cause.—The first question is, whether the evidence of the truth of the return was inadmissible under the plea of not guilty. The rule is, that "in actions on the case, the plea of not guilty shall operate as a denial only of the breach of duty or wrongful act, alleged to have been committed by the defendants, and not of the facts stated in the inducement." What is inducement? that only which the plaintiff must aver to maintain his action. In this case the inducement ends at the averment of the delivery of the writ to the sheriff. Before the new rules, in actions upon the case, this would have been traversable under the general issue; and anything might have been given in evidence which went to shew that no cause of action ever existed. Accord and satisfaction, or a release, or anything that went to defeat a right of action once existing, must have been specially pleaded, and these are the matters referred

to in the latter part of the rule. It is contended, that the seizure of the goods should have been traversed; but that is not the gist of the action; it is, that the sheriff did not properly execute the writ. All the averments go to that point, that the sheriff did not do his duty.

[*PARKE, B.*—The delivery of the writ to the sheriff raises in him some duty, but not that breach of duty alleged here: his duty is to look out for the goods, and when he has found them, to levy and sell, and after the sale, to bring the money into court, and have it ready to pay to the plaintiff. Would this have been good, if all about the return had been left out?]

Here the *quality* and not the *fact* of the return is traversable. In *Frankum v. Lord Falmouth* (1), the fact of the diversion was held to be the only thing put in issue under the plea of not guilty; but the charge here is, that a false return was made, which involves the character, but not the fact of the return; and under the plea of not guilty, anything that goes to prove or disprove the falsity of the fact done, may be given in evidence. There are several cases to shew that the plea of not guilty does not merely deny the act, but the wrongful character of it—*Thomas v. Morgan* (2), *Spencer v. Dawson* (3), *Collen v. Browne* (4). Secondly, the I O U's were admissible as evidence of the debt of the petitioning creditor: there were three of them, and they all bore date before the bankruptcy.

[*LORD ABINGER, C.B.*—You did not shew them in existence previously to the bankruptcy: although they are dated before it, they might have been given afterwards.]

The date is evidence that they were in existence at the time of the date—*Taylor v. Sherlock* (5), *Obbard v. Beetham* (6), *Gleadon v. Atkin* (7), *Smith v. Battens* (8).

(1) 2 Ad. & El. 452; s. c. 4 Law J. Rep. (N.S.) K.B. 26.

(2) 2 Cr. M. & R. 496; s. c. 5 Law J. Rep. (N.S.) Exch. 64.

(3) 1 Moo. & Ro. 552.

(4) 3 Ad. & El. 312; s. c. 4 Law J. Rep. (N.S.) K.B. 184.

(5) 1 Stark. 175.

(6) 1 Moo. & Mal. 486.

(7) 1 Cr. & M. 310; s. c. 2 Law J. Rep. (N.S.) Exch. 153.

(8) 1 Moo. & Ro. 311.

[PARKE, B.—It is very difficult to find any principle upon which the date should be evidence.]

Thirdly, the petitioning creditor was a good witness, and required no release. He had no interest at all, there being no connexion between him and the defendants on the record. Nor is he incapacitated because he has given a bond to the sheriff under the 13th section of 6 Geo. 4. c. 16. The trial at law there spoken of is one to which the assignees are parties—*Green v. Jones* (9), *Carter v. Pearce* (10).

Bompas, Serj. and Gurney, in support of the rule.—The plea of not guilty does not allow the defendants to set up the defence urged by them at the trial. The rule of Hilary term, 4 Will. 4, is divisible into two parts; the first part states, “that the plea of not guilty shall operate as a denial only of the breach of duty, or wrongful act alleged to have been committed by the defendant”—on that part, no breach can be alleged, which is not a wrongful act; and the second part which states, “and not of the facts stated in the inducement,” explains the meaning of the first.

[LORD ABINGER, C.B.—It is worth considering, whether you can call the levy inducement.]

The wrongful act is not bringing the goods into court, not the act of seizure; a specific false return is charged. It is inducement as long as it is a performance of duty; but a breach, when that has been done, which gives the right of action. The cause of action is sufficiently set out in the declaration, if the word “falsely” is struck out: the return is, that the defendants had not the goods, which is against the truth. In *Thomas v. Morgan*, the keeping of the dog was the wrongful act itself—not the inducement. So in *Spencer v. Dawson*. In an action of assumpsit, the plea of *non assumpsit* does not put in issue the soundness. *Cotten v. Browne* is within the decision of *Thomas v. Morgan*: the sole wrongful act there was the maliciously indicting.

[LORD ABINGER, C.B.—I always considered inducement to be nothing more than a mere statement of those preliminary mat-

ters, which are necessary to the understanding of what is the wrongful act.]

This case is not distinguishable from *Frankum v. Earl of Falmouth*. In the example in the new rules, Hilary term, 4 Will. 4, Case, Escape, if the words, “false return” are substituted for “escape,” that example is exactly applicable here.

[LORD ABINGER, C.B.—Do not “preliminary proceedings” there allude to matters of law?]

[PARKE, B.—Could you have brought an action upon the case without any averment of a false return? No doubt the sheriff would have been liable to an action, but could you have brought it in this form for money had and received, supposing there had been no false return?]

The distinction between the cases relied upon on the other side and *Frankum v. Lord Falmouth* is pointed out by Patteson, J. in *Cotten v. Browne*. Here the defendants should have denied those rights, the breach of which is complained of. Secondly, the dates of the I O U's were no evidence of the time when they were made.

[LORD ABINGER, C.B.—You need not trouble yourself as to that.]

Thirdly, the petitioning creditor was not a good witness: the words of the 13th section of the act are very general. In every instance he must have an interest to prove the validity of the commission.

[LORD ABINGER.—It is in evidence that he had not indemnified the defendants. This verdict would be neither evidence for him nor against him: he has no interest at all.]

[PARKE, B.—Are you to read the bond in its strict grammatical sense, or, to avoid an absurdity, must not some limitation be put upon it?]

They also cited *Wilson v. Milner* (11), *Tomlinson v. Wilkes* (12), *Ex parte Osborne* (13).

Cur. ado. vult.

LORD ABINGER, C.B. now delivered the judgment of the Court.—This was an action against the sheriff for a false return: the declaration stated a judgment—the

(9) 2 Campb. 411.

(10) 1 Term. Rep. 163.

(11) 2 Campb. 452.

(12) 3 Brod. & Bing. 397.

(13) 1 Rose, 387.

writ to the sheriff—the levy by him, and that he falsely returned *nulla bona*. The plea was “not guilty.” At the trial, my Brother Bompas proposed to give evidence of the return of *nulla bona*, and contended that nothing else was in issue. On the other hand, it was contended on the part of the defendants, that they had an opportunity of shewing that they had not levied the goods of Hayes. We are of opinion, that, by virtue of the new rules, the only matter in issue is the fact of the sheriff having made a false return, and that there must be a verdict for the plaintiff. The rule is, that “In actions on the case, the plea of not guilty shall operate as a denial only of the breach of duty, or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement; and no other defence than such denial shall be admissible under that plea; all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration.” “Inducement” in the terms of the rule, is everything which does not involve a specific charge of a breach of duty. It cannot be said, that the defendants committed a breach of duty in executing the writ; they executed the writ upon the goods of the debtor, and then came the allegation, that they neglected to bring that money into court, and returned falsely, that there were no goods in their bailiwick. The breach of duty then consists of two parts: first, of the fact of not having the money in court; and secondly, of making such a return. A doubt occurred to me at the trial, whether the plea of not guilty was confined merely to proof of the return, and that was matter of record. Upon consideration, I am of opinion, that it involves matter of fact, as well as matter of record; and the rule of pleading is, that where matter of record and of fact are blended together by a single issue, that must go to the jury. The plaintiff is entitled to recover; but, as it is the first time the question has arisen (supposing the defendants could give any evidence of the truth of the return) the Court would be disposed to allow a new trial, upon payment of costs, with liberty to amend the plea.

Rule accordingly.

1837. }
June 12. } OAKES AND WIFE v. WOOD.

Trespass—Replication de injuriâ.

Trespass for assaulting, beating, and ill-treating A. B. Pleas, not guilty; secondly, that A. B. was making a noise in defendant's house, and disturbing and disquieting the defendant and his family, whereupon the defendant requested her to leave the house, and, upon her refusal, turned her out. Replication, de injuriâ.—Held, that the facts of a noise and disturbance in the house being proved, and therefore the defendant having an authority to turn her out on that account, the motive and intention with which he did so, could not be considered upon the general traverse, de injuriâ.

Trespass for assaulting the female plaintiff, and with a truncheon striking her on the head, ribs, and legs, and bruising, wounding, and ill-treating her, and with the truncheon striking and thrusting her upon the ground, by which means she was hurt, bruised, and wounded, &c., and her thigh-bone was broken, against the peace, &c.

Pleas—1st, Not guilty; and, secondly, as to assaulting, beating, and ill-treating the female plaintiff, that before and at the time when, &c., the defendant was lawfully possessed of a public house, into which the said female plaintiff, a little before the time when, &c., entered and made a great noise and disturbance therein, and behaved and conducted herself in a rude, quarrelsome, and uncivil manner there, and disturbed and disquieted the defendant and his family in the peaceable occupation and enjoyment of his house; whereupon the defendant requested the female plaintiff to cease from making such noise and disturbance, and depart from the said public house, which she refused to do, whereupon the defendant, in defence of the possession of his house, gently laid his hands upon the female plaintiff and gently pushed her, in order to remove, and did then and there remove her from the said house, as he lawfully might, &c., which are the said supposed trespasses, &c. *Replication, de injuriâ.*

At the trial, before Bosanquet, J., at the last Spring Assizes for Chester, it appeared,

that the plaintiff Oakes, being in the defendant's public-house at Stockport, lost some rabbits, which he had taken into the house with him. His wife, coming in to take him home, he refused to go until he had found his rabbits, upon which his wife used very abusive language to the defendant and his guests, and there was a great noise and disturbance in the house. The evidence was contradictory as to whether Oakes or the defendant struck the first blow; but, after several blows between them, the defendant produced a constable's truncheon, with which it was sworn he struck the female plaintiff down, and, in her fall, she broke her thigh. The learned Judge, in summing up, told the jury to consider, first, whether the defendant had committed the assault; and, secondly, he told the jury, that he was of opinion, that if the defendant endeavoured to turn the female plaintiff out, not for making a noise and disturbance in the public-house, but on account of the demand for the rabbits, he was not justified on these pleadings. The jury found a verdict for the plaintiffs, damages 20*l*.

Jervis having obtained a rule nisi for a new trial, on the ground of misdirection, contending, that the *motive* of the defendant was not here put in issue (distinguishing *Lucas v. Nockells* (1), but that by the replication *de injuriâ*, the alleged cause was denied,—

Evans shewed cause.—Upon this replication the direction of the learned Judge was right. Everything stated in the plea which is essential to the defendant's justification, is put in issue. The replication is, that the defendant committed the trespass of *his own wrong*, and without the cause, &c. In the old pleadings, it is called the general traverse, and puts the whole in issue. Here the defendant says, "The female plaintiff was making a noise in my house, and I turned her out in consequence;" and it was essential for him to shew that the cause alleged for turning her out was the real cause: it is a matter of fact, essential and traversable—*Lucas v. Nockells*.

[ALDERSON, B.—This difficulty arises: you first put the defendant to prove the

fact of a disturbance, and then say it has nothing to do with it. It cannot be doubted that the fact, whether she made a disturbance or not, is in issue.]

Here a great many facts constitute one matter of justification, and they must be proved. Suppose there was a previous quarrel, and *that* was the cause of the beating and attempting to turn the plaintiff out of the house, can the defendant justify on the entirely different ground, that she was making a noise? Here the jury, by their verdict, have found that a dispute and quarrel had arisen respecting the loss of the plaintiff's rabbits.

[PARKER, B.—The whole difficulty arises from *Lucas v. Nockells*. I should have none if it were not for that case, and should have thought that the motive was wholly immaterial, if the defendant had authority to turn her out, and did no more than was necessary for that purpose.]

At all events, the plaintiff is entitled to retain his verdict upon the general issue. —[He was then stopped.]

Jervis and *Welsby*, *contrâ*.—*Lucas v. Nockells* is clearly distinguishable from this case. There, there was no traverse of *motive*, but the question simply was, whether the goods were *bona fide* taken in execution, and the Judges cautiously abstain from allowing that the motive or intention were put in issue. In 10 *Bing.* p. 193, Mr. Baron Bayley says, "Where a *virtute cujus* is a mere inference of law, drawn from premises previously stated, I agree it cannot be traversed; but if it is a pure question of fact, it may be traversed." Here it is a mere inference of law. In *Reece v. Taylor* (2), the proposition contended for on the other side was carried to the utmost extent; but, in *Penn v. Ward* (3), the opinion of Mr. J. Little-dale in the former case was retracted. If *Lucas v. Nockells* is carried to its full extent, a new assignment will hardly ever be necessary; but that case only decided that the matter of fact, whether the goods were taken under a *fi. fa.* or not, was traversable. Secondly, as to the form of the plea:—it professes to justify

(2) 4 N. & M. 470; s. c. 4 Law J. Rep. (N.S.) K.B. 74.

(3) 2 Cr. M. & R. 338; s. c. 4 Law J. Rep. (N.S.) Exch. 304.

(1) 4 *Bing.* 729; s. c. 10 *Bing.* 157; 2 Y. & J. 304.
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everything complained of. The assault, beating, and ill-treating, are justified.

[PARKE, B.—Your plea makes no mention of the wounding and bruising, and does not justify the beating with the truncheon at all: no doubt the principal cause of action is uncovered.]

Cur. adv. vult.

PARKE, B. now delivered the judgment of the Court.—The declaration stated, that the defendant assaulted Elizabeth, the wife of the plaintiff, and with a truncheon struck her on the head, ribs, and legs, and bruised, wounded, and ill-treated her, and with the truncheon struck and thrust her upon the ground,—by which means she was hurt, bruised, and wounded, and her thigh-bone broken; so that there is a distinct allegation of bruising, wounding, and ill-treating, independently of the blows with the truncheon. To this declaration there is first a plea of not guilty, and secondly, as to the beating, bruising, and ill-treating (saying nothing of the striking with the truncheon, or thrusting down with the truncheon), the defendant justifies the beating, that he was lawfully possessed of a public-house, and that the wife of the plaintiff was making a noise and disturbance therein, and annoying the defendant's customers, and that, being requested to go out, she refused, wherefore the defendant gently laid hands upon her, in order to put her out. To this, there was a replication, *de injuriâ*. It is clear that this plea does not attempt to justify either the blows with the truncheon, or the thrusting the female plaintiff down with the truncheon; consequently, if these facts were proved to the satisfaction of the jury, the plaintiff was entitled to damages for them upon the plea of not guilty; and, on reference to the report, it admits of no doubt that those trespasses were so proved, and that the damages were given for them, as there was not any distinct evidence of any other trespasses; consequently, supposing the learned Judge to have been wrong in his direction to the jury, and that it was not competent upon the issue of *de injuriâ*, &c., to inquire into the motive and intention with which the violence was inflicted by the defendant, and, therefore, the special plea ought to have been

found for the defendant; still, the plaintiff would have been entitled to his verdict and the damages on the plea of not guilty; and, if the plaintiff will consent to allow the verdict to be entered on the special plea for the defendant, no new trial ought to be granted.

We cannot help thinking that the learned Judge was not right in the opinion he expressed. Before the case of *Lucas v. Nockells*, there could have been no doubt but that, under this general traverse, the only question to be tried would have been, whether the defendant was authorized to lay his hands upon, and remove the female plaintiff from the house; that is, whether the house was the defendant's; whether (if it was a public-house) the female plaintiff was behaving herself in the manner described by the pleas, was requested to depart, and refused. The defendant's motive for using force to turn her out, whether it was from a previous feeling of hostility to her, or from a sudden transport of passion, excited by the blows of the husband, could not have been made matter of inquiry. If more than necessary violence had been used on that occasion, it ought to have been the subject of a replication, and would have made the defendant a trespasser *ab initio*: if the plaintiff was proceeding for an assault, committed at a time when the authority given by the law did not exist, a new assignment would have been necessary. The whole difficulty as to the law upon the question, arises from the case of *Lucas v. Nockells*, by the decision of which we are bound; and if that case had established the general proposition that the motive and intention with which an authority given by law was exercised, could have been inquired into on the general replication *de injuriâ*, we must have held, that such course might have been pursued in all cases, though it might be at variance with the supposed rules of law existing before. But, we do not find any such general proposition established, either by the opinion of the majority of the Judges, or the judgment of the House of Lords, so far as can be collected from the report of their Lordship's proceedings. Lord Wynford and Mr. Justice Gaselee proceed in a great degree under the new assignment, although they also consider that the subsequent disposition of

the effects under the writ was in issue. In that case (as the Exchequer Chamber had done before)—Mr. B. Bayley, Mr. J. Little-
dale, and Mr. J. Bosanquet, disclaimed proceeding upon the new assignment. My Brother Bosanquet thought that the sale and levy, in satisfaction of the debt, were properly in issue, admitting that the object and motive with which the process of the law was put into execution, were not the subject of the traverse. Mr. J. Little-
dale seems, from expressions (4), to have been of opinion, that motive could not be inquired into, if all, and no more than all, was done, which the law requires to be done, to comply with the exigency of the case. Mr. B. Bayley does not express any opinion to the contrary as to motive and intention being in issue. The case of *Lucas v. Nockells* cannot therefore be adduced as an authority for the general proposition, that motive and intention can be the subject of inquiry on the general traverse. We therefore think, that the rule must be discharged, on the grounds before mentioned—a verdict being entered for the plaintiff upon the general issue, and for the defendant on the special plea; neither party to pay costs.

1837. }
May 22. } EDMUNDS v. GROVES.

Promissory Note—Plea, No Consideration—Evidence.

In an action by the indorsee against the maker of a promissory note, and a plea that the note was given for money lent to game with, and was indorred to the plaintiff, with full knowledge and without consideration, if the replication allege a good consideration and no knowledge,—Held, that the defendant must begin, and give some evidence of want of consideration, although the replication does not deny the alleged illegality of the note.

Assumpsit against the defendant, as the maker of a promissory note, payable to the order of one Cannon, and by him indorred to the plaintiff. The defendant pleaded that he made the note for reimburs-

ing and repaying Cannon the sum of 30*l.*, knowingly lent by him, to the defendant, for the purpose of gaming, and with which money he gamed, against the statute,—and for no other consideration; that Cannon indorred it to the plaintiff without any value or consideration, and with full knowledge.

Replication, that Cannon indorred the note to the plaintiff for a good and valuable consideration, and that the plaintiff had no knowledge.

At the trial, before Lord Abinger, C.B., in Middlesex, at the Sittings after Easter term, the defendant contended, that the plaintiff must begin and shew consideration for the note. The learned Judge thought otherwise, and a verdict was taken for the plaintiff, with liberty to the defendant to move to enter a nonsuit, if the Court should be of opinion, that the *onus probandi* was upon the plaintiff.

W. H. Watson now moved accordingly. —The replication admits the gaming transaction, and though the stat. 9 Anne, c. 11. s. 1. is repealed, which enacted, "that where a note is given for money knowingly lent for gaming, the contract is void, and the note cannot be recovered upon;" still, the stat. 5 & 6 Will. 4. c. 41. s. 1. enacts, "that a note which, by virtue of the former act would have been void, on account of having been given for money lent to game with, shall by that act be considered as having been given for an illegal consideration."

[ALDERSON, B.—The question was, on whom the affirmative lay. The defendant says, there was no consideration for the bill; it was, therefore, for him to shew it.]

The *onus probandi* is the same now as before the new rules. The principle is clearly laid down in *Heath v. Sansom* (1).

[ALDERSON, B.—Is your plea good or bad without the averment, that there was no consideration for the indorsement? Surely he who makes the averment, which is necessary to support his plea, must prove it.]

In *Noel v. Boyd* (2), the effect of such an admission is doubted.

[ALDERSON, B.—The jury have nothing before them but the issue.]

(1) 2 B. & Ad. 291; s. c. 9 Law J. Rep. K.B. 246.

(2) 1 Gale's Rep. 293.

(4) 10 Bing. 185.

The whole pleadings are open to the jury, and the question is, whether the admission of a fact upon the record is to be taken with all its consequences or not.

LORD ABINGER, C.B.—It seems to me, that in conformity with the decisions of this Court, it was incumbent on the defendant to give some evidence, that the note had come to the hands of the plaintiff in the way alleged in the plea. We need not say what evidence he must give before the plaintiff need shew he is a holder for value, until the case arises; but it is enough to say, that the onus is on the defendant, where the whole matter is before the jury. Such suspicions as to the holder's title may arise, that the jury may infer against him, unless he shews how the note came to him; but we need not now decide that. I give no opinion as to the other parts of the plea being admitted. Here, the defendant gave no evidence at all upon that on which issue was joined; and, I think, there must be no rule.

ALDERSON, B.—I am of the same opinion. Here, the defendant pleads, first, that the note was given to a third person for money lent by him to the defendant for gambling, and that this person indorsed it to the plaintiff with knowledge and without consideration. The plaintiff replies he gave consideration for it, and had no knowledge; that is not an admission in the way contended for by the defendant. An admission on record is a waiver of requiring proof of some parts of it not in dispute; but those in dispute must be proved, as if there was nothing else on the record.

Rule refused.

1837. }
May 30. } POPE v. MANN.

Irregularity — Waiver — Affidavit of Merits.

Rule to plead before notice of declaration, is irregular, but it is waived by defendant taking out a summons for time to plead.

Where judgment has been signed for want of a plea, an affidavit of the defendant's attorney, which states, "considering he had a good defence on the merits," is not sufficient to let in the defendant to plead on terms.

In this case, notice of declaration was given and demand of a plea made on the 27th of April. Judgment for want of a plea was signed on the 2nd of May. There was a rule to plead before notice of declaration. A summons for time to plead was taken out on the 1st of May, returnable in the afternoon of the 2nd. An appearance had been entered under the statute, and no notice of taxing costs had been given.

Shew having obtained a rule to set aside the judgment for irregularity,—

Moody shewed cause.—The plaintiff was entitled to sign judgment on the 2nd. The rule to plead was before notice of declaration, which is irregular—*Bennett v. Smith* (1); but here the defendant was not entitled to a demand of plea, as he had allowed an appearance to be entered for him.

[PARKE, B.—The rule to plead is different; it must be given in all cases, whether the defendant has appeared or not—*Tidd's Practice*, 9th ed. p. 478.]

At all events, that irregularity is waived by two summonses taken out for time to plead—*Nugee v. M'Donnell* (2). No notice of taxation of costs is necessary. The rule of Hilary term, 4 Will. 4, does not apply, as the defendant has not appeared. The party will not be let in to plead on terms, as he has made no affidavit of merits; for his attorney merely swears that, "considering he had a good defence on the merits." To be sure, a new attorney who has not had the management of the cause twenty-four hours swears more positively as to merits; but that will not do.

Shew, contra.—The plaintiff was not entitled to sign judgment, as there has been no rule to plead since declaration, and that irregularity is not waived by taking out a summons for time to plead, because there was no attendance by the plaintiff upon either summonses. Notice of taxation of costs was also necessary, because there was no rule to plead; and the rule Hil. term, 4 Will. 4, will not be extended to this case, where the plaintiff has been irregular; that only applies where the defendant has been fairly treated by service of a rule to plead.

[PARKE, B.—The rule is express on this point.]

(1) 3 Bing. N.C. 305; s. c. 6 Law J. Rep. (N.S.) C.P. 39.

(2) 3 Dowl. P.C. 579.

The present attorney swears positively to a defence on the merits. It will not be assumed, that he has not made himself master of the case in twenty-four hours.

LORD ABINGER, C.B.—He has but a short acquaintance with the cause. All the grounds of irregularity are answered. The defendant has made no affidavit at all as to merits, nor is there any satisfactory affidavit on that part of the case.

The other Judges concurred.

Rule discharged, with costs.

1837. } LEE AND OTHERS v. MILNER,
June 5. } BART., AND OTHERS.

*Statute—Construction—Compensation—
Railway—Contingent Damage.*

By an act of parliament (9 Geo. 4. c. 98. s. 2.) the undertakers of the Aire and Calder navigation are empowered to make a navigable cut or canal, communicating between certain points, upon the river Calder, and to construct a railroad from the cut to a certain high-road; and it is provided, "that in case of disputes or differences between the undertakers and persons interested in the lands, &c., taken, used, damaged, or affected by the execution of any of the powers of the act, a jury shall be summoned, and shall ascertain the sum or sums of money to be paid for the purchase of such lands, &c., and also what other separate and distinct sum or sums of money shall be paid by way of recompense, either for the damages which shall or may before that time have been sustained as aforesaid, or for the future temporary or perpetual continuance of any recurring damages which shall have been or occasioned as aforesaid, and the cause or occasion of which shall have been only in part obviated or repaired by the said undertakers, and which can or will be no further obviated, repaired, or remedied by them; and the jury shall award concerning the value of lands, &c. separately from any money assessed for such damages." It is also provided, that the company shall, within five years from the passing of the act, agree for or cause to be valued and paid for the lands, &c., which they are empowered to purchase, and that the powers of the act shall not extend be-

yond fifteen years from the passing of it. A dispute having arisen as to the value of land, where the contemplated railroad crossed an existing line of railroad, a jury assessed the value of the land at 6l.; present damages 0; future damages 2,800l.; and the company having contracted or paid for all the lands required, but not having executed the works between the termini mentioned in the act, and having deviated from the parliamentary line, and made a cut through their own land:—

Held, that that part of the verdict which related to future damages was void; as in order to enable the jury, under the act of parliament, to make a contingent assessment of damages, it is necessary that the cause or injury should exist in some work of the company that has already been done.

Secondly, that the company, unless they had finally abandoned the making of the canal in the line prescribed by the act of parliament, had a right to take possession of the land in question within fifteen years from the passing of the act, on tender or payment of the 6l. assessed as its value.

By statute 9 Geo. 4. c. 98. s. 2. the undertakers of the navigation of the rivers Aire and Calder were empowered to make a navigable cut or canal for the purpose of better communication between several points upon the river Calder, commencing at a place called Broad Reach, which it was to connect with another called Wood Nook, and thence to the extreme terminus of the improvements at a certain bend in the river specified in the act. By the same section, the company were also empowered to construct a railroad from the said cut at a certain point between Broad Reach and Wood Nook, at or near to Stanley Ferry, to communicate with the high road between Leeds and Wakefield. For the purposes of the act they were authorized, in the usual way, to enter into and upon the lands and grounds of any person, &c., in execution of the several powers to them by the act granted, and making satisfaction in manner therein mentioned. By section 20 it was provided, "that in case of disputes or differences between the undertakers and persons interested in the lands, &c. which shall be taken, used, damaged, or affected by the execution of any of the

powers of the act, a jury shall be summoned who shall ascertain the sum or sums of money to be paid for the purchase of such lands, &c., and also what other separate and distinct sum or sums of money shall be paid by way of recompense either for the damages which shall or may before that time have been sustained as aforesaid, or for the future temporary or perpetual continuance of any recurring damages which shall have been so occasioned as aforesaid, and the cause or occasion of which shall have been only in part obviated or repaired by the said undertakers, and which can or will be no further obviated; repaired, or remedied by them;" and judgment was to be given accordingly for such purchase-money or recompense.

By section 27, it was enacted, "That the jury shall award concerning the value of lands, &c., separately from any money assessed for such damages."

At a place numbered 147 on the parliamentary map, the railroad contemplated by this act crossed an existing line, called the Lake Loch Railroad; and a dispute having arisen as to the value of the land at the point of intersection, a jury were summoned, and an inquiry had touching the same, and a verdict was given as follows, viz.:

8 perches of land, value	6 <i>l</i> .
Present damages	0.
Future damage	2,800 <i>l</i> .

An objection was immediately made to that part of the finding which awarded 2,800*l*. for future damage, but the rest of it being acquiesced in, the company tendered the sum of 6*l*., a tender or payment of the money assessed by the jury, being, by section 40, made necessary previously to any operations on the land taken.

By section 110, the company were bound, within five years from the passing of the act, to agree for, or cause to be valued and paid for as in the act mentioned, the lands, &c. which they were empowered to purchase.

By section 111, the powers of the act were not to extend beyond fifteen years from the passing of it.

By section 6, the company were not to deviate more than 100 yards from the course delineated on the parliamentary line.

The company, having contracted for all the lands which were required (including that numbered 147) within the five years specified by section 110, had executed none of the proposed works between the one terminus, Broad Reach, and a place near the river called Foxholes; but, after carrying the cut from Foxholes, for some little distance along the parliamentary line, they had then deviated from it for more than 100 yards, and proceeded through other lands of their own, until they reached the river, at a point somewhat short of the originally proposed terminus at that end.

Under these circumstances, an injunction was obtained by the plaintiffs to restrain the defendants, and the rest of the undertakers of the navigation of the rivers Aire and Calder, from entering upon or taking possession of the piece of land marked 147; and Lord Lyndhurst, upon a motion subsequently made to dissolve it, continued the injunction, in order that the opinion of this Court might be taken on a case to be submitted to them. The questions submitted were these:—First, whether the defendants have now power to enter on the piece of land numbered 147, supposing them not to have any intention to complete the said cut from Broad Reach to Wood Nook. Second, whether they have now such power, supposing them *bona fide* to intend to make and complete the said cut. Third, if the Court should be of opinion that they have not now such power, then whether they will have such power after they shall have completed the said cut, supposing them to complete the same within fifteen years from the passing of the said act. Fourth, whether the defendants can enter the land marked 147 on the plan, without paying the sum of 2,800*l*. assessed by the jury as future damages.

Starkie appeared for the plaintiffs; and Wightman for the defendants. The arguments used by them will be collected from the judgments delivered by the Court.

LORD ABINGER, C. B.—With regard to the first question, if, upon the face of the answer put in by the defendants, on a question, whether or not the injunction should be dissolved, it appeared to be admitted that they had abandoned the intention of

forming the cut in the parliamentary line, I should be induced to think that a good reason for continuing the injunction, because I think they have no right to take the land, except for the purposes described in the act. As it is, however, the question seems to be purely speculative, and there is no occasion that we should make any observation upon it at all. With regard to the second and third questions, which assume a present intention of complying with the act, we must answer in favour of the defendants. It appears to me that they have a right to go on simultaneously with the different works. They have five years within which to take the land, and they need not commence their works till after that period; and perhaps it may be expedient for them to ascertain the price of the whole quantity of land they may require, and to get possession of the whole, before they begin their operations on any part.

The last question is the one of greatest importance; and upon that, I think that the verdict on these contingent and imaginary damages, which may never occur at all, is a mere nullity. I think the true construction of the act is, that the "recurring damages" must be damages *ejusdem generis* as have already arisen, it being open to a party, when a new head of damage accrues, to have a new remedy, either by action, or, if the act justifies it, by a jury, under the act of parliament. In the latter case, if, when the company begin their operations (the land having previously been valued and paid for), their tramroad shall be found to do damage to the adjoining lands of the Lake Loch Company, or, in the making of it, they shall obstruct the passage on the Lake Loch road, or continually obstruct the cross roads, so as to prevent traffic, then the party so damaged might apply for compensation under that particular head, and obtain it. But in this case the jury have found no damage yet sustained; how then can they find a verdict for contingent damages that may never happen at all? as, for example, what would be the case if the company were not to make the tramroad, but, having taken and paid for the land, were to leave it in the present situation for ever? It seems to me, that such a verdict is a nullity, and

an action would not be maintainable upon it. If that be so, then I think that in a court of equity the Judge would be guided by the same considerations, and would not consider the verdict as standing in the way of the company, nor compel them to pay the money awarded before allowing them to proceed with their works.

PARKE, B.—I am of the same opinion in this case with my Lord Chief Baron. With respect to the first question, if it is assumed that the Aire and Calder proprietors have abandoned all intention of completing their cut according to the parliamentary line, then I should answer, that they cannot go upon the piece of land marked 147, because I conceive that they have entered into a bargain with the public, and that they have a right of making the railroad, communicating with the cut, only on the faith of their complying with that parliamentary bargain. That is the rule laid down by Lord Eldon in *Blakemore v. the Glamorganshire Canal Company* (1), and still more strongly in the case of *The King v. Cumberworth* (2). Looking at the construction of this act of parliament, it appears to me I must follow the rule as it is laid down by Lord Eldon; and, therefore, I think that it is a condition precedent to the exercise of the powers under the act, that the proprietors make that line which they have stipulated for, and they have no right to deviate from it as they have done, even although they make a diversion on their own land, such a diversion not being provided for in the act of parliament. The powers granted them of making a railroad communicate with the line, are granted on the faith of their giving the public the benefit of the navigation along that line. That is the opinion I have formed in this case, provided it is clear that the company have abandoned the intention of completing the parliamentary line. If they have not abandoned it, or if they choose to resume it, then they have a right now to enter on all such lands as they have, within the five years, bargained for, for the purpose of communicating with the parliamentary line. They have now a power to abandon their original intention of de-

(1) 1 Myl. & K. 154.

(2) 3 B. & Ad. 108; s. c. 1 Law J. Rep. (n.s.) M.C. 86.

viation, and may enter on the land contracted for, on payment of such sum, for the value of it, as they ought to pay in pursuance of the finding of the jury. That, I think, answers both the second and third questions. And I think they have that power long before they have completed the line of the canal extending from one terminus to the other. They have a power to go on with all their works at the same time.

That answers the first three inquiries that were submitted to the consideration of the Court. With regard to the fourth, which is the most important inquiry, I certainly concur in opinion with my Lord Chief Baron, in the construction he has put on the clause of the act of parliament which relates to this part of the case. The act of parliament is certainly very obscurely worded, with respect to claims of compensation, and that obscurity is increased in no small degree by the section which prohibits the proprietors from entering on the land until they have paid for it. However, looking at the clause in question, it seems to me that the jury have no right to assess prospective damages, except after, if I may so say, an *example* of damage has already occurred; that is, according to the language of the section, and I think it would be impossible for them fairly to perform their duty unless they had such an example to go by. If we look at the words of that clause, the construction appears to be perfectly clear. The undertakers have a right either to treat with the persons interested in the lands, or to go before a jury. Then the provision respecting the jury is this—that the jury shall inquire of, assess and ascertain the sum or sums of money to be paid for the purchase of such lands, grounds, messuages, mills, buildings, tenements, and hereditaments, and also what other separate and distinct sum or sums of money shall be paid by way of recompense either for the damages, which shall or may before that time have been sustained as aforesaid; that is, which shall or may before that time have been sustained by the execution of any of the powers thereby granted, that is, something that is actually done, something that is completed,—not only for that, but also “for the future temporary

or perpetual continuance of any recurring damage which shall have been so occasioned as aforesaid;” that is, which shall have been occasioned, or the cause of which shall exist in execution of the powers of the act. The cause must therefore have existed in something more or less done or completed by the company; and there is a further limitation to cases where the cause or occasion shall have been only in part obviated or repaired by the said undertakers; for that must be the fair reading of the clause, “and which can or will be no further obviated, repaired, or remedied by them.” Therefore the cause or injury must already exist in some work of the company which is already then done; and that work must be in such a state as to be incapable of further alteration, so as to obviate the damage. That being the case, and there being a permanent subsisting cause, and the work being incapable of beneficial alteration, so as to prevent mischief to others, then, and then only, have the jury the power of computing the future damage. That is fair and reasonable: you have a permanent cause; you know how often the injury may accrue, and what it is at present; and from these circumstances you have the power of making a contingent assessment of damages. I would put, as an example, the case of leakage through the banks of the canal, or the interruption of some watercourse; the effect of which you can collect from a bygone time, so as to afford some proper estimate with regard to future time. And it is in that case only, as it seems to me, there is power to assess future damages. In this case, the jury expressly find that there is no injury already committed, and therefore there is nothing for which they can assess future damages, and that part of their finding seems to me to be totally void, though it is good for 6*l.*, the value set on the land itself. Whenever the Lake Loch Company do receive any actual injury from the works of the company, by interrupting their trams from moving along that road, and so often as they receive any injury, they will have a right to call on a jury to make a compensation to them.

BOLLAND, B.—I am of the same opinion.

ALDERSON, B.—I am of the same opinion. I do not give a decided opinion on

the first point in the case, because I am not prepared to say that the company are precluded from taking possession of the land, unless they have *finally* abandoned the making the canal in the line prescribed by the act of parliament, seeing that they have by that act fifteen years, during which they are to make it. The case of *Blakemore v. the Glamorganshire Canal Company* was totally different, as I apprehend, from the present. There the time for making the works had long elapsed when Lord Eldon gave his judgment. The question there was, whether, that being so, and the company preparing to make new works, which were not authorized by the act of parliament, but which were prejudicial to Mr. Blakemore, the Lord Chancellor was authorized to grant an injunction against the company to restrain them from making those works. It was held, and, as it seems to me, on the soundest principles, that these matters are mere parliamentary bargains between the one party and the other, and the power of making the works is to be coupled with the power of making them within a given and specific time; and the moment the time has elapsed, without those powers having been exercised, the parties against whom those powers are to be exercised have a right to prevent their being in future exercised by injunction of the Court of Chancery. But I apprehend that, unless it were found in this case that the parties had finally abandoned the intention of making the canal from one terminus to the other, it would not be competent for us to say, that the court of equity ought to grant an injunction against the party, to prevent his taking possession of land in the intermediate part. With respect to the other points of the case, I apprehend it to be quite clear that the parties are at liberty to make the railway and canal contemporaneously, otherwise this absurdity would follow, that it would be A. waiting for B, and B. waiting for A, inasmuch as the canal is as much a condition precedent to the railway, as the railway to the canal—it would be then impossible to take possession of land for the canal until the railway was made, and impossible to take possession of the land for making the railway, until the canal was made, which is so gross

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an absurdity, that it is clear the works must have been intended to go on contemporaneously, and the parties are not to be precluded from taking the land for the railway until they have completed the canal. With respect to the compensation, which is really the material question in the case, I think, that after the jury had found that no damage existed at the time they were desired to assess the compensation for it, it conclusively follows, that they cannot assess any future damages, because they are precluded from considering the question of future damages, until they have ascertained the existence of present damage. I agree, that that part of the verdict is altogether void, and that the company have a right to enter, on tendering, as they have tendered, the 6*l.* for the land. I also think that, if there shall be damage incurred in future, by separation of the land, and by taking the railway across it, that these parties will have a clear right to come not only for present but for future damages, if they can make them out.

1837. { GOODTITLE on the demise of
BAKER AND ANOTHER v.
MILBURN.

Inclosure Act—Exchanges—Consent of Parties—Evidence—Presumption.

The commissioners under an inclosure act are required to set out, allot, and award any lands, &c. in the parish of A, in lieu of and in exchange for any other lands, &c. within the said parish, "provided that all such exchanges be ascertained, specified, and declared in the award of the said commissioners, and be made with the consent of the owner or owners, proprietor or proprietors of the lands, &c., which shall be so exchanged, whether such owner or owners, proprietor or proprietors shall be a body or bodies politic, corporate or collegiate, or a tenant or tenants in fee-simple, fee-tail, or for life or lives, &c." Lands in mortgage being exchanged under the act, the commissioners set forth in their award, the consent of the mortgagor, who had remained in possession; but it did not appear that the consent of the mortgagee had been obtained:—Held, that as it was not found negatively, that his consent had not

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been obtained, the presumption was, that he had consented, and the Court would not consider whether he need consent or not.

A letter will be presumed to have been written on the day on which it bears date.

Ejectment to recover certain lands at Uphill, in Somersetshire.

At the trial, before Williams, J., at the last Spring Assizes at Taunton, the following facts appeared:—

By indentures of December 1812, and July 1813, one Simon Payne conveyed by way of mortgage two pieces of land, (amongst others) called Warth's and Bennett's, to one Preest. In August 1813, a local act, 52 Geo. 3. c. 102, was passed for inclosing lands at Uphill, in the county of Somerset, and authorizing exchanges to be made under certain circumstances. By the consent of Simon Payne, Warth's and Bennett's were exchanged, under the act, for two other pieces allotted to him, and which he received, called Horsington's and Richardson's. These two pieces Payne contracted to sell to one Gegg, for 800*l.*, and on the receipt of 400*l.*, authorized the commissioners under the Inclosure Act to give Gegg possession of them, in 1814. Gegg continued in possession, and paid interest to Payne upon the remaining 400*l.* until his bankruptcy, in 1826, when his assignees sold these lands by auction to one Edgar. Simon Payne having become insolvent, the defendant became his assignee, under the Lords' Act, 32 Geo. 2. c. 28, in 1831. In August 1834, after Simon Payne's death, the defendant called upon Gegg's assignees and Edgar to pay the remainder of the purchase-money for Horsington's and Richardson's, and recovered them in an action of ejectment against Edgar, in 1835. Preest died in 1820, and the lessors of the plaintiff were his executors, and they brought this action to recover the lands called Horsington's and Richardson's, under the 7th, 22nd, 24th, and 28th sections of the local act above referred to.

Section 7 enacts, "that nothing shall extend to enable the commissioners to determine the title to any messuages, lands, &c., nor to determine any right between any parties, contrary to the possession of any such parties; but in case the commis-

sioners shall be of opinion against the right of the persons so in possession, they shall forbear to make any determination until the possession shall have been given up by such person, or recovered by ejectment."

Section 22 enacts, "that the commissioners shall and may from time to time deliver possession to the persons interested in the divisions and allotments thereby directed to be made and set out, and such possession so delivered shall be kept and maintained by the several persons entitled thereto, against all persons whomsoever, although the award hereinafter directed to be made, shall not at the time of the giving or ordering such possession have been made and executed."

Section 24 enacts, "that it shall be lawful for the commissioners to set out, allot, and award any lands, &c. within the parish of Uphill, in lieu of and in exchange for any other lands, &c. within the said parish, or within any adjoining parish, hamlet, township, or place, provided that all such exchanges be ascertained, specified, and declared in the award of the commissioners, and be made with the consent of the owner or owners, proprietor or proprietors of the lands, &c. which shall be so exchanged, whether such owner or owners, proprietor or proprietors, shall be a body or bodies politic, corporate, or collegiate, or a tenant or tenants in fee-simple, fee-tail, or for life or lives, or for term or terms of years absolute, or for term of years determinable on life or lives, such consent to be testified in writing, under the common seal of the body politic, corporate, or collegiate, or under the hands of the other consenting parties respectively, and all and every such exchange or exchanges so to be made shall be good, valid, and effectual in the law, to all intents and purposes whatsoever."

Section 28 enacts, "that nothing in this act contained shall extend, or be construed or adjudged to extend to prejudice any person having any right or claim of dower, jointure, annuity, rent-charge, incumbrance, or interest whatsoever in, out of, upon, or affecting any of the lands hereby intended to be divided, allotted, and inclosed, or which shall be exchanged or assigned in compensation for any other estate or right, in pursuance of this or the said recited act respectively;

but as well the lands allotted as the tenements and other hereditaments which shall be exchanged or assigned in compensation for any other estate or right, shall, immediately after such allotment, exchange, or assignment shall have been made, be vested, remain, and enure, and the several persons to whom the same shall be allotted, assigned, or given in exchange as aforesaid, shall thenceforth stand, and be seised and possessed thereof respectively, to, for, and upon such and the same uses, estates, interests, trusts, and purposes respectively, and subject and liable to such and the same wills, settlements, limitations, and remainders, conditions, charges, and incumbrances, as the several lands, tenements, and hereditaments, in respect whereof such allotments, assignments, and exchanges shall have been made, should or would have stood severally limited, settled, vested, or subject or liable to, or been held by, in case the same had not been allotted, assigned, or exchanged, and this act had not been made."

The following letter, dated December 20, 1818, from Simon Payne to Preest, was also read in evidence, on behalf of the lessors of the plaintiff:—

"Sir,—The two allotments which you claim in Uphill, I certainly received from Horsington and Richardson, in exchange, under the Inclosure Act, for lands in the mortgage to you; and some time since I agreed to sell them to Mr. Gegg, of Uphill, for 800*l.*; he paid me 400*l.*, and was let into possession, and is still in possession. I have no objection to your receiving the other 400*l.* from him, on his completing his purchase, if you will pay me 100*l.* of it, for my present purposes, and the rest can go towards the payment of the interest now due to you on the mortgage debt lent—you must join in the conveyance to Gegg, as he will not accept a conveyance from me alone.

"S. Payne."

No consent of Preest, the mortgagee, to the exchange under the Inclosure Act was shewn. It was admitted, that no part of the above letter was in the hand-writing of Payne, except the signature. It was objected, that this letter was not admissible in evidence, as, although of prior date, it was not shewn to have been in existence previously to the defendant's becoming

assignee of Payne's effects, under the Lords' Act, in 1831. The learned Judge admitted the evidence, and the jury found a verdict for the plaintiff.

Bompas, Serj. having obtained a rule to set aside the verdict and enter a nonsuit, on the ground, that a consent of the mortgagor alone to the exchange, without the assent of the mortgagee, was not sufficient; and, therefore, that the exchange was not valid; and also on the ground, that the letter was inadmissible, and that the date of it was no evidence of the time when it was written,—

Erle, Crowder, and Barstow, shewed cause.—The mortgagee never having been in possession, his consent is not necessary; but, by the 24th section of the local act, the consent of the mortgagor is sufficient. The word "owner" is frequently applied to a person not having the legal estate at the time. By the 28th section, the incumbrance shifts.

[*ALDERSON, B.*—It is clear from those two sections, that the mortgagor is the owner, and the mortgagee the person having an incumbrance.]

Before the commissioners, Payne expressly claimed to be the owner of Warth's and Bennett's, and consented in writing to the exchanges, and to receive Horsington's and Richardson's instead of them. Secondly, the letter was clearly admissible. It is objected, that it might have been written to prejudice the defendant after the assignment to him, under the compulsory clauses of the Lords' Act, and before Payne's death; but the date being before the assignment, is *prima facie* evidence that it was previously in existence. This letter was evidence of a continuing mortgage, so as to defeat any adverse possession of twenty years—*Gleadow v. Atkin* (1). It clearly contains a statement against the interest of Payne, under whom the defendant claims, and is, therefore, evidence against him. The onus of shewing it was not in existence before the assignment is upon him—*Hunt v. Massey* (2), and *Smith v. Battens* (3). But in this case, the letter, although evidence, was not necessary at all,

(1) 1 Cr. & Mee. 410; s. c. 2 Law J. Rep. (N.S.) Exch. 153.

(2) 3 Nev. & Man. 109.

(3) 1 Moo. & Rob. 341.

as there was no adverse possession—*Hall v. Surtees and another* (4).

Bompas, Serj. and Ball, contra.—It is not necessary to dispute the law as laid down in *Hunt v. Massey*, as the date of the letter is not in the hand-writing of Payne.

[ALDERSON, B.—Is not that for the jury? There is no more reason for supposing the date was written subsequently to the assignment, than that the letter was written subsequently.]

Secondly, the 24th section gives no power to convey under these circumstances. The mortgagor must shew such a conveyance as vests in him a legal title. He does not answer the description of any of the persons mentioned in the section—he is not the owner, nor the tenant in fee-simple, fee-tail, for life, or for years.

[ALDERSON, B.—How can a man be owner who has only a term of years? Does not that shew that no possession is meant?]

The powers of the act must be strictly pursued—*Wingfield v. Tharp* (5).

[ALDERSON, B.—Then there could be no exchange under such circumstances. It seems by no means clear, that the mortgagee has not a claim, both on the original lands and those taken in exchange. I see nothing under the act to discharge the first lands. This is the same as the general Inclosure Act, 41 Geo. 3. c. 109, with an additional clause, imposing a liability upon the new lands received in exchange.]

[LORD ABINGER, C.B.—By the 7th clause, nothing is to be decided against the possession. If a person does not consent at the time, does not the 22nd section give him any allotted lands, if he afterwards adopts them?]

Cur. adv. vult.

LORD ABINGER, C.B. now delivered the judgment of the Court.—We have looked at the case of *Wingfield v. Tharp*, to which my Brother Bompas referred us; but we are of opinion, that it does not support the position for which it was quoted. The point for which it might have been an authority does not appear to have been much pressed upon the Court, or decided

by them. It is not necessary to say, whether under this Inclosure Act, the consent of the mortgagee is or is not required, because we have no right to assume that it was not obtained in this case. We apprehend the commissioners are not bound to set forth the whole of the authority, under which they acted, in their award; and the presumption is, that they have acted rightly until the contrary be shewn. Here they have shewn the consent of the mortgagor; *non constat* that they had not also the consent of the mortgagee; the point would arise, if it had been found negatively, that the mortgagee had not consented. There was *prima facie* evidence of his consent; and it was for the defendant to shew, that no consent was given. The mortgagor acts as if the consent of the mortgagee had been obtained. The letter also from the mortgagor to the mortgagee, which was clearly evidence against the defendant, refers to a transaction between them, implying that all had been rightly done, and speaking of the sale of the lands received in exchange by the mortgagor.

Rule discharged.

1837. }
June 1. } CAPEL v. STAINES.

Attorney—Charge for Letters.

On taxation of costs, the attorney's charge will not be allowed for more than one letter written before action brought.

Before this action was brought the defendant applied for indulgence, and several letters were in consequence written by the plaintiff's attorney, the charges for which, with one exception, had been disallowed by the Master on taxation.

Davison moved to review the taxation, but—

The COURT, without hearing the special circumstances of the case; said, that the practice was to allow for only one letter before action brought, and that this practice ought not to be departed from.

Rule refused.

(4) 5 B. & Ald. 687.

(5) 10 B. & C. 785; s. c. 8 Law J. Rep. K.B. 318.

1837. }
June 6. } FARR V. WARD.

Interpleader Act, Section 1—Vendor and Purchaser.

The defendant was purchaser of goods from the plaintiff, and in part payment remitted a blank acceptance, which ultimately came into the hands of B. for a valuable consideration, bearing the indorsement of the plaintiff. The plaintiff denied that he had received the acceptance or authorized payment by means thereof, or indorsed the bill to B, and commenced an action against the defendant, for the unpaid price of the goods: B. also threatened an action against him upon the bill:—Held, that the defendant was not entitled to relief under section 1 of the Interpleader Act.

Semble—That to give the Court jurisdiction under that act, there must be cross claims on one and the same subject-matter; and that the party applying must shew that he cannot, in any case, be liable to both the claims.

The defendant having bought cattle of the plaintiff, accepted a bill in part payment, leaving a blank for the drawer's name, and sent it in that state by post to the plaintiff. Some time afterwards, the same bill, purporting to bear the plaintiff's name as drawer and indorser, came for a valuable consideration into the hands of Messrs. Bromage & Sneyd, who were bankers. The plaintiff, alleging, that his signature as drawer and indorser was a forgery, and denying that he ever authorized payment by an acceptance, or received the bill from the defendant, had commenced an action for the unpaid price of the cattle. The bankers, on the other hand, threatened an action on the bill. The defendant having offered the bankers an indemnity, which was refused by them, obtained a rule under the 1st section of the Interpleader Act, 1 & 2 Will. 4. c. 58, calling on these two parties to appear before the Court, and abide such order as it should make on their respective claims; against which—

Evans appeared for Messrs. Bromage & Sneyd.—This case is not one contemplated by the statute. The title of the act is, "An act to enable courts of law to give

relief against adverse claims, made upon persons *having no interest in the subject of such claims.*" The defendant is not in this situation; he is liable upon his acceptance to the *bond fide* holders of the bill; and, therefore, the act, which applies only to the case of mere stakeholders, gives the Court no jurisdiction.

E. V. Williams, for the plaintiff, contended, that the Court would not interfere to deprive the plaintiff of his remedy by action, for the debt still due to him.

White, in support of the rule.—The defendant has no interest in the subject-matter claimed.

[PARKE, B.—What issue would you suggest in order to decide the question?]

Whether the bill was indorsed by the plaintiff; for if it was, then he has been paid for the goods.

[PARKE, B.—But should it prove a forgery, you may still be liable to a *bond fide* holder.]

In *Johnson v. Windle* (1) it was decided, that a forged indorsement could not give a title to a *bond fide* holder.

PARKE, B.—That is unquestionable, generally speaking; but, here, you have sent a bill into the world in blank, and the acceptance admits the handwriting of the drawer. I do not say it is so, but there may be strong ground for arguing, that Bromage & Sneyd may sue notwithstanding the forgery, and that you are estopped, by your acceptance, from disputing the genuineness of the drawer's handwriting.

ALDERSON, B.—How can you say, that there are cross claims on one and the same subject-matter? Your answer to the one claimant is, that the bill is a forgery; to the other, your answer arises out of the sale. You cannot shew that Farr is interested in the issue you would have to try with Bromage & Sneyd, or Bromage & Sneyd interested in the issue as to the sale of the cattle. How, too, do you satisfy us, that you cannot in any case be liable to both parties? If you *may* be so liable, that takes away our jurisdiction.

Rule discharged.

(1) 3 Bing. N.C. 225; s.c. 6 Law J. Rep. (N.S.) C.P. 5.

1837. } ATTORNEY GENERAL V.
June 8. } KENIFECK.

Customs—Limitation of Time—Smuggling.

A. being in England in the year 1832, procured a vessel for the purpose of smuggling tobacco into Ireland. The cargo was taken on board before the 19th of July 1833, and unshipped at Cork, on the 28th of July in that year. A. was not proved to have taken any part in the transaction, beyond the hiring of the vessel :—Held, that A. was not liable to be proceeded against in England by information, for penalties, under 6 Geo. 4. c. 108, for assisting or being otherwise concerned in the unshipping of the goods ; and, semble, that such information not being filed till the 19th of July 1836, was beyond the time limited by 6 Geo. 4. c. 108. s. 77.

This was an information against the defendant, for "assisting and being otherwise concerned in the unshipping of tobacco, the duties to which it was liable not having been first paid," contrary to the statute 6 Geo. 4. c. 108. s. 45. It appeared, that in 1832, the defendant came over from Ireland to this country, and made certain arrangements here for employing a vessel, called the *Lavinia*, for the purpose of smuggling tobacco into Ireland. The vessel so employed went on her voyage, and having taken in her contraband cargo, some day before the 19th of July 1833, arrived with it at Cork, where it was unshipped on the 28th of July 1833. The defendant was then in Ireland ; but he was not proved to have been concerned in the transaction beyond the part he took when in England, and before the voyage commenced. The information was filed on the 19th of July 1836, and, a verdict having been obtained for the Crown, two objections were raised and points reserved for the consideration of the Court : first, whether the offence should not have been tried in Ireland ;—secondly, whether the defendant was liable in England, the only act done by him in that part of the United Kingdom having been done in the year 1832, which was more than three years before the filing of the information.

Jervis having obtained a rule to shew

cause why the verdict should not be set aside,—

The Solicitor General, Tancred, and Kaye, shewed cause. — The offence charged against the defendant is, that he assisted or was otherwise concerned in the illegal unshipping of goods. His hiring a vessel to go on a particular smuggling adventure, and with a view to the unshipping of the cargo in Ireland, made him concerned in that unshipping. The presence of a party during the act of unshipping is not necessary to make him "otherwise concerned" in it—*Attorney General v. Woodmass* (1), and *Attorney General v. Lake* (2). And though the cargo was discharged in Ireland, yet his previous procurement is a part of the offence, and renders him liable here. This is either a transitory proceeding, or a statutable misdemeanour. If the first, the courts of this country have cognizance of it—*Attorney General v. Roger Hines* (3); if a statutable misdemeanour, then from the time the offence is complete, the offender is triable wherever he took part in it. In *The King v. Burdett* (4), it was determined, that though the offence of libel consisted in its publication, yet that the libeller might be tried wherever he composed it. The rule is the same with regard to the offences of treason, conspiracy, &c. Moreover, this is not a question of venue, but of jurisdiction ; and the objection to jurisdiction is now too late—*Mostyn v. Fabrigas* (5).

[GURNEY, B.—Does the information state where the unshipping took place? If not, how could the defendant plead in abatement?]

By section 78 of the statute 6 Geo. 4. c. 108, it is enacted, "that any indictment which shall be found or prosecuted for any offence against this or any other act relating to the revenue of Customs, shall and may be inquired of, examined, tried, and determined in any county in England" (6). Then, if for his share in the offence

(1) Bunbury's Rep. 247.

(2) Ibid. 277.

(3) Parker's Rep. 189.

(4) 4 B. & Ald. 93.

(5) Cowp. 166.

(6) By 3 & 4 Will. 4. c. 50. s. 122, the jurisdiction to try in "any county in England," is limited to cases "where the offence is committed in England."

the defendant is rightly tried here, the limitation of time prescribed by 6 Geo. 4. c. 108. s. 77, presents no objection to this information, because that time is only to be reckoned from the period when the offence is complete by the unshipping, which took place within three years.

Jervis was stopped by the Court.

LORD ABINGER, C.B.—This is an information for being concerned in unshipping tobacco. That unshipping took place in Ireland, and no evidence was given, that the defendant unshipped or was actually concerned in that act. It is clear, that the part taken by him was not in itself a participation in the act of unshipping; for the goods which he intended should be taken on board, might never have been unshipped, or he might have given notice of abandoning the adventure, in which case it never could be said, that he was concerned in the unshipping. The acts done by him were not the offence itself, but only evidence of it. With regard to the case of Sir Francis Burdett, the principle was, that the publication is the only offence known to the law; but that the composing elsewhere, with a view to a publication in London, was a publication in London. The unshipping is the offence, not the hiring;—and the act does not give a jurisdiction over offences committed elsewhere, except so far as to make the county immaterial. It takes for granted, that each part of the kingdom has its own jurisdiction.

BOLLAND, B.—I am of the same opinion. The case in *Parker's Reports* arose on a question, whether the right of the king to try an information in one county, the offence arising in another, had been taken away; and it was decided not, because that general right could not be taken away without express negative words. The question here is, whether or not Kenifick was concerned in the unshipping so as to make him liable in England. The words are, "assisted or concerned in unshipping." I do not think that either term is satisfied. He was not present, so as manually to assist, nor even living in Ireland at the time, so as to provide a place for the reception of the goods. The part he took in England was no part of the offence.

ALDERSON, B.—The question is, what is

the offence? If any part of the offence arose here, then the offender would be triable here. In *The King v. Burdett*, though the Court differ on some points, yet they all go on the supposition, that the writing is part of the offence. Here, the offence is the unshipping, and the whole of that was in Ireland. A part suggested to have taken place in England, is the hiring a ship to go on a foreign adventure. Now, though that may be strong evidence to shew that the defendant was concerned in the offence subsequently committed, yet *per se*, it is no part of the offence.

GURNEY, B. concurred.

Rule absolute.

1837. }
June 8. } DOE d. OWEN v. RICHARD OWEN.

Evidence—Inclosure—Commissioner.

To prove that A. B. is a commissioner under a local Inclosure Act (in which he is not named), semble, that the mere production of an award by him is not sufficient, but that evidence should be given, either of his appointment, or of his acting as commissioner on other occasions.

This was an ejectment brought for certain lands alleged to be allotments under an Inclosure Act.

It was tried, before Bosanquet, J., at the last Assizes for Carnarvonshire, and an award made by one T. Roberts, with his seal annexed, was relied upon by the lessors of the plaintiff as sufficient evidence of title, without proof of the commissioner's appointment, or of his acting in such capacity on any other occasions. The local act, which was passed in 1806, nominated one Walter Jones as commissioner, and provided for the appointment, in a specified manner, of a successor in the event of his death or incapacity to act. Walter Jones died before the date of this award. The lessors of the plaintiff having obtained a verdict,—

R. V. Richards moved for a rule to shew cause why it should not be set aside, and a new trial had; and contended, that the mere production of the award by Roberts was not sufficient evidence of his title as commissioner. The General Inclosure Act,

41 Geo. 3. c. 109. s. 1, enacts, "That no person shall be capable of acting as a commissioner until he shall have taken and subscribed the oath therein directed, which oath is ordered to be annexed to and enrolled with the award of any commissioner, and a copy of the enrolment thereof to be admitted as legal evidence." Whatever is not provided for by the act, is to be proved as in any other case. Here a new commissioner was appointed in lieu of Jones, by parties who had no authority, unless they pursued the powers given to them by the local act. The mode, therefore, of appointment by them should have been shewn. In the ordinary case of a submission to arbitration, if an umpire makes an award, it must be shewn that he had authority within the terms of the submission, and it is not enough that he took part with the arbitrators, and acted. These private acts are in the nature of bargains between the parties. Neither is there to be any presumption on the ground of Roberts being a public officer; for the defect lies in the proof of that fact. If his title were once proved, the legality of his acts might be presumed. He cited *The King v. Haslingfield* (1), *The King v. Lord Downshire* (2).

[PARKE, B.—The party not being a commissioner named in the act, there ought perhaps to be general evidence, independently of the mere award, of his acting as a commissioner.]

A rule having been granted on this point—

Jervis shewed cause; and, upon his statement that this objection had not been made at the trial, the rule was discharged,—

ALDERSON, B. observing, that the objection, otherwise, seemed a good one.

1837. } SMITH AND ANOTHER v.
June 12. } BROWN.

Writ of Trial—Irregularity.

The act 3 & 4 Will. 4. c. 42. s. 17. does not enable the under-sheriff to try actions for torts, though by consent of parties.

(1) 2 Mau. & Selw. 558.

(2) 4 Ad. & E. 698; s. c. 5 Law J. Rep. (N.S.) M.C. 74.

This was an action on the case, against a carrier, for negligence, and tried, by consent of the parties, before the under-sheriff of Bristol. The defendant pleaded, first, not guilty; and, secondly, a special plea. The jury found for the plaintiffs upon the first plea with 12*l.* damages, and costs 40*s.*; and for the defendant upon the second plea.

Addison obtained a rule to shew cause why the judgment signed by the plaintiffs should not be set aside for irregularity, with costs, and why the master or the plaintiffs, their attorney or agent, should not deliver up to the defendant the writ of trial and the sheriff's indorsement, on the ground, that the defendant having obtained a verdict upon the second plea, which went to the whole declaration, the plaintiffs were not entitled to have the *postea* delivered up to them, or to sign judgment. He cited *Vivian v. Blake* (1).

Ball shewed cause.—The plaintiffs had damages upon the general issue; and were, therefore, entitled to the *postea*; but justice would best be done by setting aside the writ of trial altogether, as the act 3 & 4 Will. 4. only applies to debts and pecuniary demands, and not to torts—*Watson v. Abbott* (2). It makes no difference that the case went down by consent.

[ALDERSON, B.—The last part of the rule cannot be supported, as the whole matter was *coram non judice*.]

Addison, *contra*.—The writ was taken down by consent of both parties.

LORD ABINGER, C.B.—Upon the record no judgment has yet been obtained; so we shall put neither party in a situation to have it.

ALDERSON, B.—It is quite clear, that the judgment may be set aside; but the latter part of the rule cannot be supported. Both have been parties to an illegal transaction, in taking this case before an incompetent tribunal.

Rule absolute, for setting aside the judgment, and discharged as to the other part.

(1) 11 East, 263.

(2) 2 Dowl. P.C. 215.

1837. }

HAY V. FISHER.

Pleading—Bill of Exchange.

The declaration stated, that the defendant accepted a bill of exchange, which, not being paid when due, certain proceedings were taken in Scotland (setting them out), which on the trial were argued to be equivalent to a judgment against the defendant, so as to dispense with the necessity of producing and proving the bill:—Held, that there being no allegation that these proceedings were a judgment or equivalent thereto, the Court could not take cognizance of their effect; and that, therefore, the declaration could only be considered as one on a bill of exchange.

Assumpsit. The first count was on a bill of exchange, dated in 1829. The second count was as follows:—Whereas the plaintiffs, heretofore, to wit, on the 15th day of January 1829, in that part of the United Kingdom of Great Britain and Ireland called Scotland, made their certain bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the order of the plaintiffs, at a certain place in the said part of the said United Kingdom called Scotland, to wit, at the cellars of the plaintiffs, 103, Hutchison Street, 23*l.* 12*s.*, three months after the date thereof, which period had, before the protesting and registering of the said bill and protest as hereinafter mentioned, elapsed; and the defendant then accepted the said bill, but did not pay the same when due, although the same was duly, according to the law of Scotland aforesaid, presented and protested for non-payment, at the place where the same was so made payable as aforesaid, when the same was due, to wit, on the 7th day of September, A.D. 1829, and thereupon afterwards, and after the said bill had been so made, accepted, presented, and protested for non-payment as last aforesaid, and after the same was due and payable, according to the tenor and effect thereof, to wit, on the 7th day of September, in the year of our Lord 1829, the said protest was duly, according to the law of the said part of the United Kingdom called Scotland, registered on behalf of the plain-

tiffs, in the court of our late Lord King George the Fourth, before the Lords of Council and Session at Edinburgh, in that part of the said United Kingdom called Scotland, and thereupon afterwards and after the said registering was so made as aforesaid, to wit, on the 8th day of September, in the year last aforesaid, his said late Majesty's letters of horning and poinding did issue out of the said court at the suit of the plaintiffs against the defendant, directed to certain officers therein mentioned, conjointly and severally, to wit, amongst other officers to the messenger at arms, whereby our Lord the said late King charged the said messenger at arms, amongst other things, on sight thereof, to pass, and in his said Majesty's name and authority, lawfully command and charge the defendant personally, or at his dwelling-house, to make payment to the plaintiffs of the aforesaid principal sum of 23*l.* 12*s.* sterling, and the legal interest thereof, since the said bill fell due, till payment, after the form and tenor of the said bill and registered protest, in all points within six days next after he should be so charged thereto, under the pain of rebellion, and putting him to the horn, wherein, if he should fail, the space being elapsed, immediately thereafter, to denounce him his said Majesty's rebel, put him to the horn, and use the whole other order against him prescribed by law; which said letters afterwards, to wit, on the day and year last aforesaid, were duly delivered to William Inglis, then and from thence until and at the time of the making of the charge hereinafter mentioned, being the messenger at arms to whom the said letters were so directed as aforesaid, to be executed according to the law of Scotland aforesaid; and thereupon afterwards, and after the delivery of the said letters to the said William Inglis as aforesaid, to wit, on the 9th day of September A.D. 1829, by virtue of the said letters of horning and poinding, raised at the instance of the plaintiffs against the defendant, the said William Inglis, so then being such messenger at arms as aforesaid, in Scotland aforesaid, passed, and in his said Majesty's name and authority, and lawfully commanded and charged the defendant, at his, the defendant's, dwelling-house, being in Scotland aforesaid, to make

payment to plaintiffs of the said principal sum and interest, and that within the space of six days then next following, and under the pain of rebellion and putting to the horn; with certification a just copy of the said charge; in virtue whereof, signed by the said William Inglis, as such messenger, and bearing a certain date, to wit, the day and year last aforesaid, and also the date and signetting of the aforesaid letters, with the names and designations of the subscribing witnesses, and to the aforesaid effect, the said William Inglis so then being such messenger at arms as aforesaid, then at the time of making the said charge, to wit, on the day and year last aforesaid, left for the said defendant, in the hands of a servant, within his said dwelling-house at Port Dundas, at Scotland, as aforesaid, to be given to the defendant; because, after due inquiry was made by the said William Inglis, so being such messenger as aforesaid, for the said defendant, the said William Inglis could not find the defendant personally at the time of making the said charge, or leaving the said copy; all which acts and proceedings were so done, taken, and happened as aforesaid, in Scotland as aforesaid, according to the law of Scotland aforesaid; yet the defendant did not make payment of such principal and interest as aforesaid, within the space of six days, but the same, at the expiration of the said six days, and from thence until the making of the promise hereinafter next mentioned, continued wholly due and unsatisfied to the plaintiffs; whereupon and by virtue of the said several premises, after the said six days had expired, to wit, on the 1st day of October, A.D. 1829, the defendant became and was liable to pay to the plaintiffs the said principal sum in the said bill specified, with interest thereon from the time when the same became due until payment, and being so liable, the defendant thereupon afterwards, to wit, on the day and year last aforesaid, in consideration of his, the defendant's, said liability, promised the plaintiffs to pay the said principal and interest to the plaintiffs on request, yet he hath disregarded his promise, and has not paid the said principal and interest, or any part thereof; and the plaintiffs aver, that before and at the time of the commencement of

this suit, the said interest amounted to a large sum, to wit, 6*l.* 19*s.*

The particulars stated, that the action was brought to recover the sum of 23*l.* 12*s.*, being the amount of the bill of exchange mentioned in the first count of the declaration, and for interest thereon; and that the plaintiffs would rely on the whole or any part of their declaration for the recovery thereof.

Pleas—first, to all the declaration except the first count, non assumpsit; second, to all the declaration, the Statute of Limitations.

At the trial, in London, before Lord Abinger, C. B., the bill itself was not proved, but evidence was given to shew the nature of the proceedings in Scotland upon it, and that they were equivalent to a decree or judgment. The counsel for the defendant objected that such was not the effect of these proceedings; and also, that the particulars limited the claim of the plaintiffs to the bill itself, whereas they were seeking the benefit of a new cause of action, and that, in any case, the bill should be produced. The jury, under the direction of the learned Judge, found a verdict for the plaintiff on the second count; and in Easter term a rule was obtained to have that verdict entered for the defendant, on the grounds advanced at the trial.

Shee and *Addison* shewed cause, and argued, that the proceedings were tantamount to a judgment, to which the Statute of Limitations was no bar, and that the grounds of the judgment need not be shewn, nor the bill proved. They further argued, that the particulars were sufficient, (and to this the Court appeared to assent).

Cresswell (*Wightman* was with him) was stopped by the Court.

LORD ABINGER, C. B.—This is substantially a count on a bill of exchange. All else in it is unintelligible. A declaration on a foreign judgment states that it is so; but there is no part of this declaration which contains any such allegation. How, on this record, are we to see that there has been a judgment? We cannot come to that conclusion without admitting parol evidence of the nature of these proceedings. To this count the defendant could not have

demurred, because the bill, which is alleged in it, is enough to support a promise, and the rest might be treated as surplusage. Then, the only material part not being proved, the defendant is entitled to a verdict.

PARKE, B.—I am of the same opinion. The only part which is clearly stated is the averment that the defendant accepted the bill. If you strike out that, is there enough to give a right of action? There should have been an allegation that the proceedings are equivalent to a decree. This is advanced only as a conclusion in point of law from the premises, not as an allegation of fact. There being then no allegation of a decree, or that the proceedings were equivalent to one, the only part that is good is the part which relates to the bill; and, that not being proved, the defendant must have a verdict.

ALDERSON, B.—If there be a sufficient cause of action, without the averment that the bill was accepted by the defendant, that is enough. But we cannot say, upon this record, that there is any cause of action independently of the bill.

Rule absolute.

1837.
June 7.

SIR JOHN SMITH, KNIGHT, v.
THOMAS STARLING DAY AND
HENRY FRAMLINGHAM DAY,
EXECUTORS OF SIR HAYLETT
FRAMLINGHAM.

Executor and Administrator—Plea of Plene administravit—Distress.

Where certain parts of the residue of the testator's estate remained in the hands of the executors (after payment of all the debts of which they had notice), and they invested the same in the funds in their own names, and received the dividends, and paid them over to the legatees, in satisfaction of their legacies under the will:—Held, that under these circumstances the executors could not support a plea of plene administraverunt to an action against them upon a specialty debt of the testator, of which they had had no notice.

Where A. granted a lease to B, of premises, for sixty-one years, and afterwards granted a lease to C. of the same premises, to commence at the expiration of the sixty-

one years:—Held, that, by the lease to C, A. did not part with his reversion, so as to disentitle him to distrain for rent, under the lease to B.

Debt upon a bond of indemnity, dated the 24th of May 1819, given by the testator to the plaintiff, subject to a certain condition; whereby, after reciting an indenture of lease of the 28th of February 1786, between Sir Thomas Spence Wilson, since deceased, and Dame Jane his wife, of the one part, and Samuel Noble of the other part, of certain premises for forty years, from Christmas, 1785; and further reciting another indenture of lease of the 10th of December 1809, between the said Dame Jane and Sir T. M. Wilson, her son, of the one part, and Mark Noble of the other part, of certain other premises, from September 1808, for sixty-one years; and further reciting a sub-lease of the 20th of May 1816, by the Nobles to Sir H. Framlingham, with the consent of D. J. W., of parts of the premises respectively demised to them by the leases of 1786 and 1809; further reciting another indenture of lease of the 30th of August 1816, and made between the said Dame Jane Wilson and the said Sir T. M. Wilson of the one part, and the said Sir H. Framlingham of the other part, by which indenture, for the considerations therein mentioned, they, the said Dame J. W. and Sir T. M. W., demised and leased unto Sir H. F., his executors, administrators, and assigns, the same portion of the premises as is comprised in the sub-lease of the 20th of May 1816, and which is part of the same land as is comprised in the leases respectively of the 28th of February 1786 and the 10th of December 1809, to hold the pieces of land demised by the lease of the 28th of February 1786, from the 25th day of December 1825, when the term of forty years, thereby created, would determine, for the full term of forty-three years and three quarters, then next following, and to hold the lands comprised in the lease of the 10th of December 1809, from the 29th day of September 1869 (when the said term of sixty-one years, thereby created, would expire), for and during the full term of seventeen years, thence next ensuing, subject, during the said term of

forty-three years and three quarters, to a yearly rent of 34*l.*, payable to the said Dame J. W. and her assigns during her life, and after her decease, to the said Sir T. M. W. during the residue of the said term; and also subject, during the said term of seventeen years, to the yearly rent of 52*l.*, payable to the said Sir T. M. W., his heirs and assigns, and to the performance of the covenant therein for payment of the yearly rent of 6*l.*, as the consideration for the grant of the reversion of terms thereby granted, and all other covenants and agreements therein reserved and contained; and further reciting, that by indenture of assignment, bearing even date with the said bond of indemnity, and made between the said Sir H. Framlingham, of the first part, and the said plaintiff of the second part, the said messuages, tenements, erections, buildings, and other premises, comprised in, and demised by the said indentures of lease of the 20th of May 1816, and the 30th of August 1816, were assigned to and were then vested in the said plaintiff, for all the residue of the said term of years, granted by the said indenture of lease, subject to the costs, covenants, and agreements on the tenant's, lessee's, or assignees' part to be paid, observed, and performed for or in respect of the same premises; and reciting, that upon treating for the sale of the said leasehold premises to the said plaintiff, it was and is among other things agreed that the said Sir H. Framlingham should enter into a certain written obligation, to be conditioned as hereinafter is expressed;—*the condition* of the said written obligation was declared to be such, that if the said Sir H. Framlingham, his executors, administrators, and assigns, should, from time to time, and at all times thereafter, well and sufficiently save, defend, protect, and keep harmless and indemnified the said plaintiff, his executors, administrators, and assigns, and his and their estate and effects whatsoever and wheresoever, and particularly the said hereditaments so assigned as aforesaid, or intended so to be by the said indenture of agreement of even date therewith, with their appurtenances, from and against the payment of the rents respectively reserved in and by the said indentures of lease of the 28th of February 1786 and the 10th

of December 1809, and all actions, suits, costs, charges, damages, losses, and expenses whatsoever, which he or they might sustain or incur, for or by reason or on account of the same rents, or either of them, or any non-payment of the same, or any part or parts thereof respectively, or otherwise, in relation thereto, then the said written obligation should be void, otherwise should be and remain in full force and virtue, as by the said writing obligatory fully appears.

The declaration then stated that the estate and interest of the grantors of and in all the above demised premises, descended and came to one Sir Thomas Maryon Wilson, who was seised thereof in fee, and the obligors of the bond having allowed rent, in respect of the premises demised by the indenture of the 10th of December 1809, to fall in arrear, Sir Thomas Maryon Wilson entered and distrained for the same, and the plaintiff was obliged to pay it, and that thereby an action accrued to him against the defendants, upon the said bond.

Pleas—First, that defendants had fully administered before the commencement of the suit. Second, that after making the said bond, Sir H. Framlingham died in 1820, and that defendants had no notice of the bond till August 1835; that they had fully administered before notice, and had no goods or chattels to administer since notice.

The replication traversed these pleas, and thereupon issues were joined.

The cause was tried, before Lord Abinger, C. B. at the Middlesex Sittings after Michaelmas term, 1836, when a verdict was taken for the plaintiff, with 625*l.* 5*s.* damages, assessed on the breach assigned, subject to the opinion of this Court, upon the following case, with liberty for either party to turn the same into a special verdict.

The declaration was proved in point of fact.

The defendants contend, that it is insufficient in point of law. If the Court should be of that opinion, the judgment is to be arrested, and the subsequent question does not arise; but if the Court should be of opinion that the declaration is sufficient, the defendants rely upon the following

facts as supporting one or other of their pleas:—

Sir Haylett Framlingham, in the pleadings mentioned, died on the 10th of May 1820. He left a will properly executed and attested by two witnesses, dated the 2nd of June 1815, which was proved in the Prerogative Court of Canterbury on the 17th of July 1820, by the defendants, Thomas Starling Day and Henry Framlingham Day, the executors thereof, of which the following is a copy:—

“This is the last will and testament of me, Sir Haylett Framlingham, Knight Commander of the Honourable Order of the Bath, and colonel of the Royal Horse Artillery, made, published, and declared this 2nd day of June, in the year of our Lord, 1815. First, I nominate and appoint my nephews, Thomas Starling Day and Henry F. Day, executors of this my will; and I do hereby authorize and direct my said executors, as soon as conveniently may be after my decease, to convert all the personal estate and effects of which I shall die possessed into ready money, and after the payment thereof of my just debts, and funeral and testamentary charges, to lay out and invest the residue thereof, in their names, in the public stocks or funds of this kingdom, and the dividends or interest thereof I give and bequeath unto my sisters, Frances and Ann Framlingham, to be paid to them in equal moieties during their joint lives; and after the decease of either of my said sisters, I give the whole of such dividends or interest unto the survivor, for and during her life; and after the decease of such survivor, then I give and bequeath the principal money, which shall be so laid out and invested in the said stocks or funds, unto all or any one or more of the children or grandchildren of my sister Margaret Day, in such parts, shares, and proportions, upon such trusts, and to be payable at such times, as she, the said Margaret Day, shall, by her last will and testament, in writing, or any writing purporting to be or being in the nature of her last will and testament, or any codicil or codicils thereto, to be signed and published by her in the presence of two or more credible witnesses, direct, limit, or appoint; but if it shall happen that my said sister Margaret Day shall not make

any such direction, limitation, or appointment, then I give and bequeath the said principal sum of money unto all the children of my said sister Margaret Day, who shall be living at her decease, and the issue of such of her children as shall then happen to be dead, equally to be divided amongst them, share and share alike; but it is my will that the issue of any deceased child or children shall be only entitled to the share or shares which the parent or parents of such issue would have received, if he, she, or they had been living at the time of the decease of my said sister Margaret Day. And, lastly, I give and bequeath unto my nephew, James Day, a lieutenant in the Royal Artillery, all the badges or marks of merit or distinction which I now possess or may hereafter be honoured with. In witness whereof, I have, to this my last will and testament, contained in one sheet of paper, written on three sides, set my hand, and affixed my seal, the day and year first above written.”

The testator died possessed of personal property to the amount of 1,676*l.* 2*s.* 2*d.*, and the said T. S. Day and Henry F. Day received assets to that amount, including the produce of 997*l.* 10*s.* new 4*l.* per cent. annuities, formerly 950*l.* navy 5*l.* per cents. hereafter mentioned. They paid the debts, and funeral and testamentary expenses of the testator, Sir H. Framlingham, to the amount of 525*l.* 4*s.* 5*d.*

On the 30th of November 1820, the said T. S. Day and H. F. Day laid out the sum of 158*l.* 15*s.* in the purchase of 150*l.* navy 5*l.* per cents., in their names, in pursuance of the will of Sir H. Framlingham, for the benefit of Frances and Ann Framlingham, the legatees for life. On the 17th of October 1821, the said T. S. Day and H. F. Day passed the accounts of the estate and effects of the testator, Sir H. Framlingham, at the Legacy Office, Somerset House, and paid the sum of 29*l.* 8*s.* 11*d.* for the legacy duty thereon, at the rate of 3*l.* per cent., payable by the legatees under the will.

In the month of March 1824, the said T. S. Day and H. F. Day, with the privy and consent of the parties interested, sold out the sum of 997*l.* 10*s.* new 4*l.* per cent. annuities, formerly 950*l.* navy 5*l.* per cent. annuities, then standing in the name of the

said Sir Haylett Framlingham, which produced the sum of 1,061*l.* 5*s.* 2*d.*

The said T. S. Day and H. F. Day, in March 1824, lent, on mortgage, in their names, at 5*l.* per cent., to Mr. William Pearson, of Sprole, Norfolk, the sum of 1,000*l.*, part of the produce arising from the sale of the 997*l.* 10*s.* new 4*l.* per cents.

On the 10th of June 1826, the said T. S. Day and H. F. Day received back the sum of 1,000*l.* of the said William Pearson, in discharge of his said mortgage.

On the 22nd of August 1826, the said T. S. Day and H. F. Day laid out the sum of 1,028*l.* 7*s.* 9*d.*, including the said sum of 1,000*l.*, with the consent, in writing, of Frances Framlingham, Ann Framlingham, and Margaret Day, the legatees for life, and themselves, the said T. S. Day, H. F. Day, James Day, George Day, E. Day, William Day, William Foster, Z. Lucas Worship, and S. Day, the legatees entitled to the reversion under the said will of the said Sir H. Framlingham, in the purchase of 53*l.* bank long annuities, in the names of the said T. S. Day and H. F. Day, under the trusts of the will, for the benefit of the said Frances and Ann Framlingham, the legatees for life, who are now respectively living. The value of the said long annuities exceeds the damages assessed as aforesaid.

The said T. S. Day and H. F. Day, from the year 1821 to the commencement of this action, received all the dividends and interest, from time to time, as they became due and payable on the said sum of 950*l.* navy 5*l.* per cents., afterwards 997*l.* 10*s.* new 4*l.* per cents., until the sale thereof as aforesaid; and also on the said sum of 1,000*l.*, lent on mortgage to the said Wm. Pearson as aforesaid, until the same was paid off; and afterwards on the said sum of 53*l.* bank long annuities; and also on the said sum of 150*l.* navy 5*l.* per cent. annuities, afterwards 157*l.* 10*s.*, new 4*l.* per cent. annuities, and now 157*l.* 10*s.* 3*l.* per cent. annuities, and paid the same respectively, from time to time, to Frances and Ann Framlingham, the legatees for life, under the will of the said Sir H. Framlingham, for their use and benefit.

There are now standing in the Bank of England, in the names of the said T. S. Day and H. F. Day, the said sum of 53*l.* per

ann. long annuities, and 157*l.* 10*s.*, 3*l.* per cent. annuities.

The defendants first had notice of the bond, mentioned in the declaration, on the 1st of August 1835.

The question for the opinion of the Court is, whether the preceding facts establish either of the defendants' pleas. If they do, the verdict for the plaintiff is to be set aside, and a verdict entered for the defendants upon both or either of the issues arising out of those pleas, as the Court may direct; if they do not, the verdict is to stand for the said 625*l.* 5*s.* (or so much thereof as the Court shall direct).

The case was argued upon a former day by—

Kelly, for the plaintiff.—The plaintiff is entitled to the judgment of the Court. First, the facts stated in the case do not establish either of the defendants' pleas. The investments made by the defendants, in their own names, in the years 1820, 1824, and 1826, and the interest received by them upon those investments, though made for the benefit of the legatees under the will, are assets in their hands. From the death of the testator to the present time all the interest and dividends have been paid to the defendants. It will be said, that these payments, in satisfaction of legacies, are an answer to an action for a breach for non-payment of rent committed since the testator's death; but, assuming that these legacies have been paid, even without notice of the bond, that payment will constitute no answer to the action. *The Governor and Company of the Chelsea Waterworks v. Cowper* (1) is the only case where it has ever been held that payment of legacies is any answer to an action like this for a debt of the testator. There, twenty-two years had elapsed without any notice to the executor of any outstanding claim. That case, however, has never been recognized, but, on the contrary, much doubted in courts of law and equity. The payment of simple contract debts may be an answer to the non-payment of debts of a higher nature without notice; but the payment of legacies is not so, and the executor can compel the legatees to refund—*Hawkins v. Day* (2). la

(1) 1 Esp. 775.

(2) Amb. 162.

Simmons v. Bolland (3), it was assumed, that for any future breach the executor would be liable at law.

[ALDERSON, B.—In that case the executor had notice of the covenant, though not of the breach.]

Where legatees file a bill for the payment of legacies, and the executors set up some outstanding claim against the estate, of which they have had notice as an answer, they are not bound to pay the legacies without an indemnity; but where the executors have had no notice, and debts arise after payment of legacies, the legatees must refund. In *Davis v. Blackwell* (4), Tindal, C.J. says, "All the text-books lay it down, that *after* the payment of debts it is the duty of an executor to pay legacies." *Norman v. Baldry* (5) is very similar to this case, with the exception that that was a proceeding in equity. There, nine years elapsed without any notice to the executors of the existence of the bond; and the debt was not contingent in its nature, but existed for eleven years, during which time the creditor might have given notice. Here notice was given immediately on the breach. *Pearson v. Archdeacon* (6) is also in point. But it is not necessary to argue to this extent here, as at this moment all the money invested in the funds is in the actual possession of the executors. They have paid the dividends to the legatees, but still hold the principal in their own names. As between the legatees and the executors it may be admitted, that in a bill filed by the former for payment of legacies, the latter would not be able to say they held as trustees; but as against the plaintiff, the executors have never dispossessed themselves of the effects of the testator. Here some legacies have been paid within six months; as to them, at least, these pleas can be no defence, as section 8 of 22 & 23 Car. 2. c. 10, though treating of administrators, would seem equally applicable to executors—*Davis v. Blackwell*. Secondly, as to the other point which is upon the declaration: the first

Sir T. M. Wilson did not lose any right as a landlord, by extending the term of the lease of the 10th of December 1809, by that of the 30th of August 1816. It was merely a deferring of the reversion, and not a granting of it away in such a manner as to disentitle the present Sir T. M. Wilson to distrain. *Thorne v. Woolcombe* (7), which may be cited on the other side, and is the last of a class of cases on that subject, is distinguishable from this.

Sir W. W. Follett, for the defendants.—This is a question of great importance. It is contended, that if an executor or administrator shall pay legacies in their due course, he will afterwards be liable for specialty debts, even though he has had no notice of them; but many of these cases have turned upon the length of time that has elapsed before any claim made. Now, in this case the testator died in 1820; the plaintiff was then holder of the bond, of which he gave no notice for fifteen years, until he brought his action in 1835. In the interval, the executors have administered the assets. Are these payments to be protected? But there is a distinction in the old cases; first, where legacies have been paid prior to the breach; and, secondly, where they have been paid prior to notice. The earliest case is *Nector v. Sharp and Gennett* (8), referred to by Sir W. Grant, in *Simmons v. Bolland*; and the opinion of that learned Judge, if properly considered, is in favour of the defendants. There is no authority for saying, that where an executor has administered the assets without any notice of a specialty debt he is liable for that. If so, no executor would administer.

[PARKE, B.—He must always take an indemnity.]

Hawkins v. Day is no authority that payment of legacies before notice would not protect the executor. Then as to the cases in equity, they all proceed on the assumption that the executor had notice. In *Simmons v. Bolland*, Sir W. Grant treats it as a question of very doubtful law. If a bill had been filed for payment of these legacies by the legatees under the will in 1824, and the Court had thought a suffi-

(3) 3 Mer. 547.

(4) 9 Bing. 8; s. c. 1 Law J. Rep. (N.S.) C.P. 140.

(5) 6 Sim. Rep. 621.

(6) 1 Alc. & Nap. 23, Irish Rep.

(7) 3 B. & Ad. 586.

(8) Cro. Eliz. 466.

cient time for creditors to come in had elapsed, and had decreed payment, according to the argument on the other side, this would have been no protection to the executors if an action had been afterwards brought against them for non-payment of a debt. Suppose a legacy of 5,000*l.* to a pauper, he could not receive it, because he could give no indemnity. In *Egmont v. Vernon* (9), Lord Gifford was of opinion that the executor incurred no liability by paying over the residue without an indemnity; though, under the special circumstances, the House of Lords reversed his decree, and required an indemnity to be given. In that case the executor had notice of the contingent claim. In *Gillespie v. Alexander* (10), the judgment of Lord Eldon, as to payment of legacies, is important. In *Norman v. Baldry*, the opinion of the Vice Chancellor is opposed to that of Lord Kenyon in *The Chelsea Waterworks Company v. Cowper*; but the latter opinion is to be preferred. *Brooking v. Jennings* (11) and *Harman v. Harman* (12) shew that payment of debts in the usual order without notice is protected. In *Davis v. Blackwell* it does not appear that the executor had not full notice of the existence of the covenant, though he had none of the breach when he made over the residue of the assets to the residuary legatee. This case is distinguishable from that quoted from the Irish reports, as there the executor had received notice of the existence of the instrument: these are the only modern authorities, and it is submitted, that there is no valid distinction between simple contract debts, which are protected when paid before specialties without notice, and the payment of legacies without notice, and that an executor, *bond fide* administering according to his knowledge, and within a reasonable time after probate, is not responsible for debts of which he has no notice. Then as to the investments, and the sum of 1,000*l.* lent on mortgage. The interest and dividends have been paid to the legatees for life, and though the same persons are executors and trustees, they are to be treated as distinct, and are

in fact now the trustees. The legatees are now the parties possessed. In *Williams on Executors*, vol. 2, 861, the cases on this subject are collected. And see *Byrchall v. Bradford* (13). If the defendants were now to misapply these funds by paying this demand, a court of equity would compel them to make it good as a breach of trust. Secondly, the judgment must be arrested, as, by the lease of the 30th of August 1816, the lessor is not the reversioner immediately expectant on the determination of the term granted by the lease of 1809, and had therefore no right to distrain. For perfecting such second lease, attornment is requisite—*Bacon's Abr. 'Leases,' n.*

[PARKE, B.—That is the case of a lease to take effect in possession. Here it is intended that the second lease shall not have effect until the expiration of the first. How can that pass the reversion?]

He also cited *Doe d. Wren v. Cole* (14).

Kelly, in reply, as to the first point.—When an executor sets up an outstanding contingent liability as a defence to a bill filed by legatees for payment of legacies, such a defence is an acknowledgment of notice. By the Statute of Distributions, 22 & 23 Car. 2. c. 10. s. 8, after the expiration of one year an administrator may pay legacies, but he should take an indemnity, whether he has notice of debts or not. It is not contended that the executor is liable *de bonis propriis*. Under the statute, the operation of refunding is to take effect through the administrator; the parties to whom distribution has been made, "shall refund and pay back to the administrator." There is no difference between such a case and that of an executor paying under a decree. It may be admitted, that where an executor has paid under a decree, it is hard he should have afterwards to settle a creditor's demand; but a court of equity takes every step to bring all the claims before the Court, by advertising for creditors before a decree is made.

[PARKE, B.—There is another authority not adverted to, in *Comyns's Digest*, 'Administration,' C, 3: "If he pay legacies

(9) 1 Bligh, N.S. 571.

(10) 3 Russ. 136.

(11) 1 Mod. 174.

(12) 3 Mod. 115.

(13) 6 Mad. 13.

(14) 7 B. & C. 243; s. c. 6 Law J. Rep. K.B. 20.

without security, and debts afterwards appear, it would be a devastavit."]

The executor may recover from the legatee, but the creditor could not sue the legatee, even in equity. At law, there is no privity between the creditor and the legatee. A suit in equity must be against the executor, but it will pursue the assets in whatever hands they may be. *The Chelsea Waterworks Company v. Comper* is shaken by *Davis v. Blackwell*, and overruled by *Norman v. Baldry*.

LORD ABINGER, C.B.—This point requires consideration. Upon the point of the reversion we are clear.

Cur. adv. vult.

LORD ABINGER, C.B. now delivered the judgment of the Court.—This was an action against the executors of Sir Haylett Framlingham, deceased, on a bond which had been given by the testator to indemnify the plaintiff against any claim that might be made for the rent of some premises, of which he had taken an assignment. The pleas were, first, *plene administravit* before the commencement of the suit; and secondly, *plene administravit* before any notice of the existence of the bond. Upon the argument, two questions arose. The first (which was upon the face of the declaration) was, whether there was any power of distress so as to justify the distress made for the rent, for the recovery of which this action was brought against the executors. It appeared that during the continuance of a lease from Sir Thomas Wilson to certain parties, he granted another to Sir H. Framlingham, to take effect from the expiration of the first; and it was contended, that he had granted away the reversion immediately expectant on the first lease, and therefore had not the power of making any distress for rent in arrear under it. This point was raised, but not very strongly pressed; and the Court expressed an opinion, in the course of the argument, that there was no assignment of the reversion, so as to prevent the power of distress, and therefore that the distress was lawful.

The next point was upon the plea raised by the executors, that they had fully administered; and the question was, whether certain parts of the residue of the testator's

estate, (which they had invested in their own names in the funds, and on a mortgage, and had changed the security once or twice for the benefit of the residuary legatees,) still remaining in their hands, the executors could be considered as having fully administered the estate; having, without notice of the claim of the plaintiff, paid all the debts and some of the legacies, and apportioned the remainder (as they considered) in satisfaction of the claims of the legatees, on whose behalf they had invested it in the funds. In this state of things two questions arose, first, whether the executors could give in evidence any payment of legacies under the plea of *plene administraverunt*; and secondly, whether, in this particular case the money remaining in their own hands, they could sustain by evidence such a plea. There is no occasion for us to pronounce any opinion upon the first point: there may possibly be some difficulty in certain cases in supporting this plea, but there is no occasion to say anything about that, the Court being unanimously of opinion, that the executors could not sustain the plea under the circumstances of this case. They are placed in the situation of having the complete controul over the estate of the testator, which remained still in their hands, and which we consider not to have been so apportioned by them in satisfaction of any legacies whatever, as to bar the claim of a creditor on a specialty, who was entitled to satisfaction out of the testator's estate. We think, therefore, the plaintiff is entitled to judgment.

Judgment for the plaintiff.

1837. }
June 6. } SMITH v. WEBB.

Bail—Irregularity—Time.

Where the defendant, having notice on the 15th of May, of an assignment of the bail-bond, and notice on the 16th of May of actions upon it being commenced, applied on the 26th of May, (which was the fourth day of term,) to set aside the proceedings for irregularity,—Held, that he was not too late.

Notice of justifying bail at chambers is bad, if the hour of attendance is not specified.

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NEW SERIES, VI.—EXCHEQ. PL.

The plaintiff having taken an assignment of the bail-bond, and commenced actions upon it, on the 15th of May informed the defendant of the assignment, and on the 16th of May informed him of having commenced the actions. On the 26th of May, being the fourth day of term, the defendant moved to set aside those proceedings for irregularity; against which rule

Miller shewed cause, and argued, that the application was too late—citing *Fynn v. Kemp* (1), and *Hinton v. Stevens* (2).

Per Curiam.—We think, that, under the circumstances, the defendant is in time.

Rule absolute.

Notice of justifying bail at chambers had been given, omitting to state at what hour,—upon which a rule was granted for setting aside the allowance of bail.

Butt shewed cause.—The hour need not be stated. No rule or decision requires it. In *Staines v. Stoneham* (3), the facts do not warrant the marginal note. Justifying at chambers is a mere substitution for the same thing in court, and in that case, no notice of the hour is required. There would also be great inconvenience in requiring it, as neither party can tell beforehand at what hour the Judge will attend at chambers. But even if requisite, still the defect is an irregularity, and does not nullify the allowance of bail. At all events, there will be no costs, as the forms given in several books of practice omit this particular.

Per Curiam.—The Master states, that it is the established practice to mention the hour. Upon inquiry, we learn that it is the same in the King's Bench. This rule will, therefore, be absolute; but, for the reasons urged, without costs.

(1) 2 Dowl. P.C. 620; s.c. as *Fyson v. Kemp*, 3 Law J. Rep. (N.S.) Exch. 205.

(2) 4 Dowl. P.C. 283.

(3) 4 Dowl. P.C. 678; and see the marginal note to s.c. 5 Law J. Rep. (N.S.) Exch. 15.

1837. }
June. } NICHOLL v. WILLIAMS.

Particulars—Pleading—Payment.

The declaration stated, that the defendant was indebted in 105*l.* for use and occupation. The particulars were for 52*l.* 10*s.*, being the balance of one year's rent, at 105*l.* (the admitted rent) per annum. The defendant pleaded to all but 52*l.* 10*s.*, non assumpsit, and as to 52*l.* 10*s.*, the residue, payment. The plaintiff joined issue on the plea of non assumpsit, and entered a nolle prosequi as to the plea of payment. At the trial, the defendant did not use the particulars to restrain the plaintiff's proof: and held, that, taking this circumstance, together with the particulars and pleadings, the plea of payment referred to the sum admitted in the particulars, and not to the balance claimed.

Assumpsit. The declaration stated, that the defendant was indebted to the plaintiff in the sum of 105*l.* for use and occupation of a certain messuage of the plaintiff, and in 200*l.* for money due on an account stated.

Pleas—1st, except as to 52*l.* 10*s.*, parcel of the said sum of 105*l.* in the declaration first mentioned, non assumpsit; 2nd, as to the said sum of 52*l.* 10*s.*, parcel, &c. payment before action brought.

Replication taking issue on the first plea; nolle prosequi as to the plea of payment.

The particulars, delivered with the notice of declaration, were as follows:—

"This action is brought to recover payment of the sum of 52*l.* 10*s.*, being the balance of a year's rent, due from the defendant to the plaintiff for the occupation of a farm and premises, situate at Boverton, in the parish, &c., and which the defendant quitted on or about the 2nd of February 1833."

At the trial, before Coleridge, J., the plaintiff proved an occupation by the defendant of a certain house belonging to the plaintiff for three half years, and the defendant put in receipts for rent covering that period. It was objected by the plaintiff's counsel, that, as the plea of payment went to part of the demand only, the evidence of payment could not be given in bar of the residue, though it might be admissible in reduction of damages. A

verdict, however, was found for the defendant, with leave reserved to the plaintiff to move to enter a verdict, with nominal damages.

E. V. Williams having moved accordingly,—

Chilton shewed cause.—Coupling the declaration with the particulars, the plaintiff's demand is but for 52*l.* 10*s.*, and the plea of payment is therefore pleaded to the whole demand; and, as that plea is confessed, the defendant is entitled to the verdict.

[*ALDERSON, B.*—According to that, there are, in effect, two pleas to the same demand. Why did you plead the general issue at all? You should have pleaded payment of everything.]

Had we pleaded payment of 52*l.* 10*s.*, and omitted the general issue, the pleadings would have been demurrable, as not answering the whole declaration.

[*ALDERSON, B.*—As you put it, the general issue is pleaded to a residue, which did not exist; and therefore there was nothing to go to the jury.]

Ernest v. Brown (1) will be relied upon, but that case does not at all impeach *Coates v. Stevens* (2), in which it was laid down, that payment need not be pleaded of a sum admitted in the particulars. Moreover, the plea there was *nunquam indebitatus*, and not *non assumpsit*. *Holland v. Hopkins* (3), and *Brown v. Watts* (4), also shew that the plaintiff cannot recover beyond the amount claimed in the particulars.—[The Court then called upon the other side.]

E. V. Williams and *Nicholl*, in support of the rule.—It must be admitted, that payment was shewn, but it could only go in reduction of damages under *non assumpsit*; and if the plaintiff could go into his case at all, he must have a verdict, with nominal damages. The plea of payment applied to the sum for which the plaintiff gave credit, and then there was *non assumpsit* to the rest of the declaration.

(1) 3 Bing. N.C. 674; s.c. 6 Law J. Rep. (N.S.) C.P. 211.

(2) 2 C. M. & R. 118; s.c. 4 Law J. Rep. (N.S.) Exch. 167.

(3) 2 Bos. & Pul. 13.

(4) 1 Taunt. 353.

[*PARKE, B.*—Your argument is well founded, if, notwithstanding the plaintiff gives credit for 52*l.* 10*s.*, the defendant is bound to plead it.]

This case must be governed by the late one of *Ernest v. Brown*, in the Common Pleas, as, though that was an action of debt, there is nothing different in principle between debt and *assumpsit*. The general issue in both, equally negatives the state of facts from which the liability arises. The Court will not establish a rule, that will make the bill of particulars an exposition of the record, as the particulars may frequently be altered. Besides *Ernest v. Brown* need not be resorted to by the plaintiff, because here the defendant having an opportunity of pleading payment to the whole record, has neglected to do so, and has chosen to plead, disregarding the particulars.

[*PARKE, B.*—Should you not have declared for 52*l.* 10*s.*? You were wrong at first.]

That is so; but, by the defendant's mode of pleading, the plaintiff is driven to enter a *nolle prosequi*. The plea should have been payment to the whole declaration; but now, the only question is, whether the bill of particulars gives creditor not; if it does, the plea of payment applies only to that part.

[*ALDERSON, B.*—You say it is equivalent to saying, "I go for 105*l.*, of which I admit I have received 52*l.* 10*s.*" But, the real question is, whether there was anything to try; if there was, the plaintiff should recover. If you strike the 52*l.* 10*s.* out of the declaration, it is as if the plea was as to *nothing, non assumpsit*, because it is as to all but 52*l.* 10*s. non assumpsit*.]

The bill of particulars is clearly no part of the record—*Meager v. Smith* (5), *Booth v. Howard* (6).

[*ALDERSON, B.*—If it were part of the record, the plaintiff might avail himself of it, as well as the defendant; but it is to be construed as all matters not on the record are, putting a reasonable and sensible construction upon them].

Cur. adv. vult.

(5) 4 B. & Ad. 673; s.c. 2 Law J. Rep. (N.S.) K.B. 108.

(6) 5 Dowl. P.C. 438.

On a subsequent day, the following judgment was pronounced by—

PARKE, B.—The plaintiff in this case declared for use and occupation, stating the defendant to be indebted in the sum of 105*l.* Before declaration, the defendant applied for particulars of the plaintiff's demand, which were accordingly given in this form: "The plaintiff seeks to recover in this action the sum of 52*l.* 10*s.*, being the balance of one year's rent, &c." The year's rent being admitted to be 105*l.*, the particular is equivalent to a statement, that the plaintiff proceeds for 52*l.* 10*s.*, half a year's rent, the other half-year's rent being paid. The defendant pleaded, as to all but 52*l.* 10*s.*, *non assumpsit*, and as to 52*l.* 10*s.* residue, payment. The plaintiff joined issue on the plea of *non assumpsit*, and entered a *nolle prosequi* as to the plea of payment. On the trial, before my Brother Coleridge, the plaintiff went into his case; the defendant produced his evidence on the question, whether the whole year's rent was paid or not, and the learned Judge intimated his opinion that it was, and directed a verdict for the defendant, but reserved liberty to the plaintiff's counsel to move to enter a verdict for nominal damages. In the course of the discussion, the particulars annexed to the record were referred to by the defendant's counsel, but he did not use them in the early part of the case to confine the plaintiff as to proof. A rule having been obtained to enter a verdict pursuant to the leave reserved, the question now is, whether it ought to be made absolute, and we are of opinion that it ought. The whole question turns upon the true construction of the particulars and pleadings in this case. The particulars were given before the declaration, but as they were never amended, they must stand as if they had been delivered with the declaration, or afterwards. These particulars, in substance, admit the payment of 52*l.* 10*s.* half a year's rent; and the question is, whether the plea of payment of 52*l.* 10*s.* refers to the sum so admitted, or the balance which the plaintiff seeks to recover. If the defendant had understood at the time of the trial that it referred to the latter, he would naturally have instructed

his counsel to insist (which he did not) on restricting the plaintiff from going into any proof at all; for, in that view of the case, there would have been no question to try, after the plaintiff had admitted payment. On the other hand, unless he had meant at the time of pleading to apply the plea of payment to the 52*l.* 10*s.* in question, he would have pleaded improperly, with a view to his intended defence. We have a difficulty in saying what the defendant intended, but we must construe the plea, as we think it would have been understood by the plaintiff, or any other person. Now, as it was optional in the defendant to use the particulars or not, on the trial, to restrain the plaintiff, the plaintiff could not tell whether they would be so used; and, finding the plea of payment of 52*l.* 10*s.* to a part of the demand, and knowing that such amount had been paid, he could not safely have taken any other course than to admit the payment; he could not have acted upon the plea as having any other meaning than a plea of part payment of the demand. In that sense, we think the plea must be understood. And, if the recent decision of the Court of Common Pleas in *Ernest v. Brown* be right, that the defendant could not have availed himself of the part payment, admitted in the particulars, by restraining the plaintiff in point of evidence, and must have pleaded part payment, there can be no question as to the meaning of the plea. We do not, however, feel it necessary to decide whether the defendant was bound to plead payment after such a particular as this, or not; for, we think, without relying on that case, we must construe the plea as intended to apply to the payment admitted. To avoid similar questions in future, the obvious course which ought to be pursued in the like cases, is for the plaintiff to adopt the mode of declaring which we have been informed is not unfrequent, to aver the part payment in the declaration, or to insert in the declaration the real amount which the plaintiff seeks to recover. We are of opinion that the rule must be made—

Absolute.

[See *Kenyon v. Wakes*, *ante*, 180.]

1837. } WALKER AND ANOTHER v.
June 1. } RICHARDSON.

Lease, Evidence of Surrender of—Charitable Uses.

A lease of lands already in mortmain is not within the statute 9 Geo. 2. c. 36.

Where A. had a lease for years from B, and before the expiration of the term B. granted another lease of the same premises to C, and no surrender in writing of A's interest was shown, but his lease was found in B's custody, with the seals torn off, where it was shown to be usual to deposit old leases before a re-grant or renewal:—Held, that this was evidence for the jury to consider, whether A. had consented to the grant of the lease to C, so as to determine his (A's) interest by act and operation of law within 29 Car. 2. c. 3. s. 3.

Assumpsit for anchorage and plankage tolls.

Plea—Non assumpsit.

The plaintiffs, by their particulars, claimed "12s. 6d. for five tolls, called anchorage and plankage tolls, in respect of a vessel called the *Majestic*, which came into the river Tees, and took on board and delivered five several cargoes."

At the trial, before Patteson, J., at the last assizes for the county of Durham, the following facts appeared: the plaintiffs were the lessees, under the Bishop of Durham, of the port, haven and creek of Stockton, by a lease granted to them in September 1829, the defendant was the registered owner of the *Majestic* steam-boat; and the question was, whether the landing-place at Middlesborough upon the Yorkshire side of the Tees, where the defendant had landed and taken in cargoes, was within the port of Stockton. The plaintiff's evidence consisted of various leases for twenty-one years to the mayor and corporation of Stockton from the year 1620 downwards, and including the lease of 1829, under which the plaintiffs claimed. In most of them, the demise was "of the port or creeke" of Stockton; and in the 3rd of James II., the demise was of "all that port, haven, and creek of Stockton." The lease under which the plaintiffs claimed the tolls, was dated the 14th of September 1829, for twenty-one years, reserving a

rent of 20s., and granted by the Bishop of Durham to the plaintiffs and two other persons, who were dead, in which, after a demise of the port and creek of Stockton, was the following clause:—"And it is agreed, that the premises are so demised, upon trust, that the said lessees, their executors, administrators, and assigns, shall from time to time apply and dispose of the profits to arise from the above-demised premises, for the making and repairing the public streets and pavements within the said borough of Stockton, or for or towards the payment of the debts contracted on that or any other occasion, or for other public uses within the said borough, and for the public advantage and convenience thereof, in such manner as the mayor, aldermen, and burgesses of Stockton aforesaid, for the time being, from time to time to be assembled at the courts to be held for the said borough, or the major part of them, shall from time to time direct or approve." This lease had affixed to it the episcopal seal of the Bishop of Durham, was attested by one witness, and not enrolled in Chancery. It was objected, on the part of the defendant, that, as the profits were to be applied to charitable purposes, the lease was not properly attested and enrolled within the statute 9 Geo. 2. c. 36. s. 1 (1); but the learned

(1) Which enacts, "That whereas gifts or alienations of lands, tenements, or hereditaments, in mortmain, are prohibited or restrained by Magna Charter, and divers other wholesome laws, as prejudicial to and against the common utility; nevertheless, this public mischief has of late greatly increased by many large and improvident alienations or dispositions made by languishing or dying persons, or by other persons, to uses called charitable uses, to take place after their deaths, to the disherison of their lawful heirs; for remedy whereof, be it enacted, that from and after the 24th day of June, which shall be in the year of our Lord 1736, no manors, lands, tenements, rents, advowsons, or other hereditaments corporeal or incorporeal whatsoever, nor any sum or sums of money, goods, chattels, stocks in the public funds, securities for money, or any other personal estate whatsoever, to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, shall be given, granted, aliened, limited, released, transferred, assigned, or appointed, or any ways conveyed, or settled to or upon any persons, bodies politic or corporate, or otherwise, for any estate or interest whatsoever, or any ways charged or incumbered by any person or persons whatsoever, in trust or for the benefit of any charitable uses whatsoever, unless such gift, conveyance, appointment, or settlement of any such lands, tene-

Judge admitted the lease, giving the defendant leave to move to enter a nonsuit upon this point.

It further appeared that, in the year 1822, the Bishop had granted a lease of the same premises for twenty-one years (renewable at the option of the lessor at the end of seven or fourteen) to different persons from those mentioned in the lease of 1829; and it was contended, that the mere production of that lease from the bishop's custody, with the seals taken off, was not a sufficient evidence of a surrender of the former term; and application was made to the learned Judge to nonsuit the plaintiffs, as they were not entitled to sue. This objection was overruled, and the jury found a verdict for the plaintiffs.

Alexander having obtained a rule to set aside the verdict, and enter a nonsuit, or for a new trial,—

Cresswell and *Temple* shewed cause.—This lease is not within the statute 9 Geo. 2. c. 36, as the trustees have an option as to the disposal of the profits arising under it, and need not necessarily apply the funds to any public uses within the borough; and the question is not affected by considering what application of the funds a court of equity might direct—*Doe v. Copestake and another* (2). In that case a devise not necessarily to charitable uses, was held not to be within the statute. Here the trustees are to apply and dispose of the profits for purposes connected with the town of Stockton, or for or towards the payment of the debts contracted there, "in such manner as the mayor, aldermen, and burgesses of Stockton for the time being, from time to time to be assembled at the courts to be held for the said borough, or the major part of them, shall from time to time direct or approve." The mayor, aldermen, and burgesses may apply the funds at their discretion in acts of benevolence or liberality,

ments, or hereditaments, sum or sums of money (other than stocks in the public funds) be and be made by deed indented, sealed, and delivered in the presence of two or more credible witnesses, twelve calendar months at least before the death of such donor or grantor (including the days of execution and death), and be enrolled in His Majesty's high Court of Chancery within six calendar months next after the execution thereof, and unless," &c.

(2) 6 East, 328.

which they may consider "for the public advantage and convenience of the borough," and such is not a disposition to charitable uses—*Morice v. Bishop of Durham* (3).

Secondly, there was fit evidence from which the jury might presume a surrender of the former lease of 1822. It was contended, that the plaintiff ought to be nonsuited, as there was no evidence at all. The old lease, with the seals torn off, was not offered as conclusive evidence of itself of a surrender of the old term, but as a circumstance from which, with others, a jury might presume it. It might be presumed, that the former tenants had consented to the granting of a new lease to the subsequent parties, and that would be a surrender by operation of law, just as if the first lessees had taken a new term—*Thomas v. Cook* (4). The custom that was proved of returning the old leases to the bishop's office, where this was found, was also evidence. The lessees under the lease of 1829 were also shewn actually in possession, and paying rent; and the *cestuis que trust* were the same under both leases.

Alexander, Addison, and Gray, contra.—The trustees are bound to apply all the profits arising under this demise to such public and charitable purposes within the borough, as the corporation of Stockton, who are the *cestuis que trust*, shall from time to time direct, or, at all events, subject to their approval; and, it may be admitted, that the gift would be good if there were any discretionary power as to the disposal of these monies. Here there is no such option, and the deed is void by the 3rd section of 9 Geo. 2. c. 36. All the cases have been decided upon their own particular circumstances—*Collison's case* (5), *Howes v. Chapman* (6).

[PARKER, B.—Does that act apply to a grant from a bishop, where the land is already in mortmain in his hands?]

[ALDERSON, B.—It would seem not to extend to this case, as it speaks of the "disinheritance of lawful heirs," which words are not applicable to a corporate body.]

The statute 43 Eliz. c. 4. shews, what

(3) 9 Ves. 399.

(4) 2 Stark. 408; a.c. 2 B. & Ald. 119.

(5) Hob. 136.

(6) 4 Ves. 548.

are charitable uses. Great comprehensiveness has been allowed to that statute—*Jones v. Williams* (7). The statute is equally applicable to lands already in mortmain as to others; the object of the act was as much to give publicity to the appointment of trustees for charitable uses as to restrain the facility with which lands got into mortmain.

[LORD ABINGER, C.B.—There seems to be an insuperable difficulty in applying the statute to a case, where, as here, the granting party could not make a will, and the land could not be devised.]

The Attorney General v. Greaves (8) has decided that leaseholds are within the statute. Secondly, the mere fact of finding the former lease cancelled is no sufficient surrender of the term thereby created, to satisfy the Statute of Frauds—*Roe v. the Archbishop of York* (9).

[ALDERSON, B.—I suppose the lease of 1829 recited the former lease of 1822, and a surrender.]

That is not a surrender by deed or note in writing within the statute—*Sheppard's Touchstone*, pp. 301, 302. The case of *Thomas v. Cook* (10) goes scarcely at all beyond the production of the cancelled lease. It was necessary to prove some agreement for the substitution of the present lessees—*Stone v. Whiting* (11), *Whitcher v. Hall* (12), *Mellows v. May* (13). Here the grant is to entirely different parties, and no evidence whatever is shewn of the consent of the former tenants. The mere usage in the bishop's office, to send in old leases before the granting of a new one, is not sufficient to raise a presumption of consent.

LORD ABINGER, C.B.—This case has been thoroughly investigated both here and at the trial; and, I am of opinion, that the rule must be discharged. The first question is, whether this lease is void, as not having been executed with the formalities required by the statute 9 Geo. 2. c. 36. It

appears to me, that this is a case not within that act, as the statute, by the first section, contemplates cases where the property might be the subject of devise, which cannot be the case here. Section 3 does not carry the case any further, as it merely enacts, that conveyances, not made according to the statute, shall be void. Secondly, it is contended, that there was no evidence of a surrender of the lease granted in 1822; and, therefore, that the plaintiffs were not entitled to recover. This objection arises upon an attempt to set up the *jus tertii* in exoneration of the defendant. It has been said also, that the interest of the *cestuis que trust* cannot be looked at in courts of law; but, in many cases, their interests have been considered, and courts of law will prevent a trustee from doing anything to the prejudice of the *cestui que trust*. But, it is said that the custom of depositing old leases in the bishop's office, from which it may be presumed there was a surrender in this case, is not to prevail against the 3rd section of the Statute of Frauds: here it is only necessary, in order to satisfy the statute, to suppose that the new lease was granted with the consent of the old lessees, as that would be a surrender of the former lease by act and operation of law.

PARKE, B.—I am also of opinion, that this rule must be discharged. The learned Judge reserved the question at the trial as to whether this was a lease within the statute 9 Geo. 2. c. 36. It appears to me, to be neither within the words nor the spirit of that act. The preamble recites, that great mischief has arisen from dispositions made *by languishing or dying persons*, to persons who would hold in perpetuity. Now, this is a grant by a body corporate, and not within the letter of the act; neither is it within the spirit, not being a grant from a private individual. If it had been, I should have been inclined to think the lease was void, as most of the purposes to which the trust fund is to be applied are charitable trusts of a public nature, though it may be doubtful whether payment of the debts of the corporation can be so considered. The second objection is, that the legal estate in the anchorage and plankage and tolls, was in somebody else, and, therefore, that the the plaintiffs ought to have been nonsuited:

(7) Ambl. 651.

(8) Ambl. 155.

(9) 6 East, 86.

(10) 2 B. & Ald. 119.

(11) 2 Stark. 235.

(12) 5 B. & C. 269; s. c. 4 Law J. Rep. K.B. 167.

(13) Cro. Eliz. 873.

plaintiffs must prove their case as strictly as if they were bringing an action of ejectment for the soil. The fact of the former lease with the seals torn off, was not used as evidence of a surrender of the former term, but merely as a circumstance fit to be considered by the jury of a surrender by operation of law. Before the case of *Thomas v. Cook*, I should have had some difficulty on this point, but that is a recognized case, where the assent of the former tenant, that another should hold in his place, was held to constitute as valid a surrender of the first interest by act and operation of law, as if the former tenancy had been determined in writing. Here, I think, there was evidence for the jury of the consent of the first lessees, not only from the cancelling of the lease to them, but also from the user at the bishop's office, of taking the old leases there, before a new one was granted.

BOLLAND, B.—I am of the same opinion, and think this case is not within the statute 9 Geo. 2. c. 36. I entertained doubts as to the surrender of the former lease by operation of law, until they were removed by some of the cases that have been cited. I think no great weight is to be attached to the fact of the old lease being found in the Bishop's office, but it receives weight when coupled with the custom of returning them there before a renewal or re-grant.

Rule discharged.

1837. }
June 7. } SMITH v. PINDER.

Arbitration—Award—Interpleader Act.

A sheriff having taken goods in execution upon premises belonging to parties who claimed a portion of the goods, a Judge at chambers, upon the hearing of an interpleader rule, made an order with consent of parties, "that the goods not claimed should be pointed out by the claimants, and should be forthwith removed and sold, and the proceeds from such sale paid to the execution creditor; that security should be given to the sheriff for the amount of the levy, and that the sheriff should withdraw forthwith; and that all matters in difference between the claimants and the execution creditor, and the claimants and the sheriff, should be referred to arbitration."—Held, that an award directing that

the claimants should retain possession of some of the articles claimed by them as their own property, and that the residue should be returned to the sheriff, was sufficiently final and certain with respect to the goods so directed to be returned, as the arbitrator had no power to give directions as to the subsequent disposal of those goods, but the sheriff must proceed with the execution.

The plaintiff in this action having issued a *feri facias* to levy 126*l.* 6*s.* 8*d.*, the sheriff of Surrey took in execution certain furniture and effects upon premises at Ewell, belonging to J. N. Shelley and G. Stilwell, who thereupon gave notice to the sheriff to deliver up possession of the premises, and a portion of the goods seized, which they claimed as their property. The sheriff applied to the Court, under the Interpleader Act, in Michaelmas term last, and on the hearing of the rule at chambers, Alderson, B. made an order, with consent of the parties, in the following terms:—"I do order that the goods not claimed be pointed out by Shelley and Stilwell, and that they be forthwith removed and sold, and the proceeds from such sale paid to Mr. Smith. And I further order, that security be given to the sheriff for the amount of the levy, and that the sheriff do withdraw forthwith, and that all matters in difference between the claimants and Mr. Smith, and the claimants and the sheriff be referred to the arbitration of," &c.

In pursuance of this order, the arbitrator made his award, wherein, amongst other matters, he awarded, "that the said J. N. Shelley and G. Stilwell do retain possession of the following articles of furniture, goods, and wares as their own property (enumerating the articles), and that the said J. N. Shelley and G. Stilwell do return to the said sheriff the following articles of furniture," &c.

Miller had obtained a rule to shew cause, why the award should not be set aside, on the ground, that it was "uncertain and not final in directing the claimants to return certain articles of furniture to the sheriff, without giving any further directions respecting them, and in which respect the arbitrator also exceeded his authority."

Thesiger and *Montagu Chambers* now shewed cause, contending, that there was no necessity for the arbitrator to give directions as to the disposal of the goods, which were to be delivered to the sheriff. The award was clearly final between the parties, and had the arbitrator directed the sheriff as to the course he was to pursue, either by proceeding to sell or otherwise, he would have exceeded his authority, as the interest of persons not parties to the reference might thus be affected. The effect of the order of reference was to suspend the execution of the writ with respect to all the goods claimed by Messrs. Shelley and Stilwell, and the sheriff must now proceed to deal with those returned, and in which the claimants had not proved their property in the same manner as if no claim had been made. It might be, that the defendant was entitled to the goods, or some other person might still claim the property therein, and the arbitrator had no power to adjudicate upon the rights or interests of either.

Miller, contra, submitted, that the award was not final, as it did not dispose of all the goods. The order of reference having been made under the Interpleader Act, the power of the Court and the Judge was delegated to the arbitrator, and it was his duty to dispose entirely and finally of the subject-matter of the claim, without imposing upon any of the parties the necessity of coming to the Court for a further order. An award could not be said to be final, where a further proceeding was necessary, and here the sheriff or the plaintiff must make an application to the Court in respect of the goods in the sheriff's possession, for the sheriff having been ordered by the Judge to give up the goods and to withdraw from the premises, could not now proceed with the execution.

PARKE, B.—The arbitrator had no power to order the sheriff to deliver up these goods to the plaintiff, or to proceed to a sale, and all he could do was to direct that they should be delivered up to the sheriff. It is as clear as possible, that he had no power to order a sale. The argument for the plaintiff proceeds upon the fallacy, that the Judge has given all the

power he had himself to the arbitrator;—but that is not so; and I think that the arbitrator has gone to the extent of his authority in ordering the goods to be delivered back to the sheriff, and that the sheriff is bound to go on with the execution. The order of reference relates to matters as they stood at the time it was made, and was founded on the supposition that there was no further property upon which the execution could operate; but now the sheriff must go on at his peril. It seems to me, that this is a perfectly good award, and as final as the arbitrator could make it.

BOLLAND, B. concurred.

ALDERSON, B.—The arbitration was substituted for an issue, and the sheriff is in the same condition as if the issue had been tried.

Rule discharged with costs.

1837. }
May 30. } *TINLEY v. PORTER.*

Witness—Subpœna ad testificandum—*Attachment.*

An affidavit, for an attachment for disobeying a writ of subpœna, must state that the party was a necessary witness.

Alexander shewed cause against a rule for an attachment against the defendant for disobedience to a writ of *subpœna ad testificandum*, and contended, that the affidavit, on which the rule was obtained, was defective, in not containing an allegation that the party was a necessary witness. He cited *Taylor v. Willans* (1).

Cresswell, contra.—That is a new practice; no case was there cited, and there were several other grounds for discharging the rule. It is not sworn that the subpœna was taken out vexatiously, or that the plaintiff had not a *bond fide* intention of availing himself of the evidence.

[*LORD ABINGER, C.B.*—You have another remedy, as you may have an action against him on the stat. 5 Eliz. c. 9. for the damage you have sustained.]

(1) 4 Moo. & Pay. 59; a. c. 8 Law J. Rep. C.P. 121.

They are not concurrent remedies. Where there is any abuse in those using the process of the Court, an attachment will not be issued. No abuse is shewn here.

LORD ABINGER, C.B.—The case in the Common Pleas is an authority to shew that where the party applying for the attachment has another remedy, he must state that the person whom he seeks to attach for contempt, was an efficient witness, and that he had a *bond fide* intention to call him.

PARKE, B.—The rule must be discharged. We are bound by the decision of the Common Pleas, though it appears a new practice.

Rule discharged, without costs.

1837. }
May 31. } GOUGH v. BRYAN.

Pleading — General Issue — Negligent Driving.

To a declaration in case for negligent driving, the defendant pleaded, that the plaintiff so carelessly drove his carriage that it struck against the coach of the defendant; without this, that, through the carelessness of the defendant, the coach of the defendant struck against the carriage of the plaintiff: —Held, bad on demurrer, as amounting to the general issue.

Case for the negligent driving of a stage coach, and running and striking against a carriage of the plaintiff's, wherein a son and servant of the plaintiff were then riding.

Plea—That the said son of the plaintiff, at the said time when &c., was driving the said carriage, and that had he driven it carefully, skilfully, and properly, no collision would have taken place or damage been occasioned to the carriage, but that just before and at the said time when, &c. the said son of the plaintiff so carelessly drove the same that it struck against the said stage coach and without any negligence or default of the defendant: *without this, that the defendant, at the said time when, &c. so carelessly drove his said*

coach that, by and through the carelessness of the defendant, the coach of the defendant struck against the said carriage of the plaintiff in manner and form, &c.

Special demurrer.

Gurney, in support of the demurrer.

[LORD ABINGER, C.B.—This is a simple negation of the negligence of the defendant.]

Kelly, contra.—The supposed objection is, that this plea amounts to the general issue. But it may be questioned whether, in all cases, a plea alleging that which may be given in evidence under the general issue is therefore bad on demurrer. Before the new rules, many things might be given in evidence under the general issue, which nevertheless might be pleaded without objection, such as payment, release, &c.; and, however the case may have stood before those new rules, there is a great difference in the weight of the objection now and then. Assuming that, formerly, when the plea of the general issue was a collective mode of denying several allegations, it was also the only mode, at present, there is, properly speaking, no general issue. The declaration consists of many matters alleged, any one of which may be answered without regard to any particular form; and though the denial of the wrongful act or breach of duty (which is one of those matters alleged) is called a plea of the general issue, still it does not differ from any other plea. Suppose the declaration had been in this form, that the act was occasioned *merely* by the defendant's negligence; under the general issue evidence might have been given to shew a result *partly* from the negligence of the plaintiff. But the word "*merely*" is here omitted; and, under a general plea to a declaration with this omission, it may be questioned whether such evidence would be receivable. The present plea ought on this account to be allowed.

LORD ABINGER, C.B.—Supposing there be any question in such a case, that is, where the defence is not only a denial of the defendant's negligence, but an assertion of the plaintiff's negligence also, and that the act complained of is the result as well of the one as of the other, yet the plea here does not disclose such a case. The inducement alleges the negligence of the

plaintiff only, but the denial is of the negligence of the defendant. The first part is wholly superfluous; the traverse is all that is material. Now, what was the reason of the law that allowed a demurrer to a plea because it amounted to the general issue? The principal ground was, that the general issue was a short and conclusive way of traversing the allegations which it put in issue; and to avoid prolixity, the Courts upheld the form which usage had established. The same reason applies to the plea of not guilty. Since the new rules, I do not see why it should be said that those rules have abolished the general issue. They have circumscribed the evidence which may be given under the plea, and confined it to a denial of particular parts of the statement contained in the declaration; but the same necessity exists as before for guarding against the introduction of superfluous matter on the record.

ALDERSON, B.—The only use of a special traverse is to raise a question for the Court as to a qualification of the traverse with which the plea concludes; but here there is nothing of that sort. It is not stated that the injury was partly from the plaintiff's negligence and partly from that of the defendant; it is therefore unnecessary and superfluous. Now, in *Com. Dig.* it is laid down, that "where a man has no special matter for his *excuse* or *justification*, he ought to plead the general issue to avoid prolixity in records (E, 13). And therefore, a plea which amounts to the general issue is bad," (E, 14). I take that to be the rule here.

Judgment for plaintiff.

1837. }
May 31. } YOUNG v. GROVE.

Highway—Tothill Fields Act—Repairs.

Section 122 of the *Tothill Fields Act*, 6 Geo. 4. c. 134, does not alter the general liability of inhabitants within the limits of the act, to repair, &c. the roads within those limits; and therefore, where certain premises consisted of a dwelling-house and stable, which adjoined to and communicated with the Vauxhall Bridge Road, and of garden ground in the rear, which was walled

in, and (together with one end of the stable) adjoined to and communicated with a street called Wheeler Street, the street and road forming an angle at the corner of the stable, and the whole of the premises were within the limits of the *Tothill Fields Act*:—Held, that they were liable to be rated by the trustees of that act.

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 127.]

1837. }
June 5. } BRIND v. DALE.

Carrier—Assumpsit—General Issue—What amounts to.

To a declaration in *assumpsit* against a carrier, which stated, that goods were delivered to him, to be carried from A. to B, that he did not deliver them, but that through his negligence and carelessness they were lost, the defendant, besides the plea of non *assumpsit*, and a plea denying the negligence, pleaded, that the plaintiff undertook to accompany the goods from A. to B, and to guard and protect them:—Held bad on special demurrer, as amounting to the general issue under the new rules.

Assumpsit against the defendant as a common carrier. The declaration stated, that the defendant, before and at the time when, &c. was a common carrier, and that the plaintiff, at the request of the defendant, caused to be delivered to him as such carrier, certain goods and chattels, &c., and a certain trunk, to be safely carried by the defendant as such carrier, &c. from a certain place, to wit, Nicholson's Wharf, to a certain other place, to wit, Brook's Wharf, and there to be delivered by the defendant for the plaintiff. And, in consideration thereof, and of certain reward, &c. the defendant, as such carrier, promised to take care of such goods and chattels, &c., and safely deliver the same at Brook's Wharf for the plaintiff. It then stated the receipt of the goods by the defendant, and that, through the carelessness, negligence, and improper conduct of himself and his servant, they became wholly lost to the plaintiff.

To this declaration the defendant by his first plea denied that he was a common carrier of goods, &c. in manner and form, &c.; the second plea denied that the plaintiff caused to be delivered to the defendant as a common carrier, the goods, &c., and the receipt by the defendant of the goods in manner and form, &c.; the third plea was *non assumpsit*; the fourth plea denied that the goods, &c. were lost by the negligence or carelessness of the defendant or his servant in manner and form, &c.; the fifth plea was as follows:—

“And for a further plea in this behalf, the said defendant says, that, at the said time when he, the said defendant, received the said goods and chattels, and the said supposed promise of the said defendant in the said declaration mentioned was made, a certain express condition and agreement was then made and entered into between the said plaintiff and the said defendant, that is to say, that whilst the said defendant carried and conveyed the said trunk with the goods and chattels in and by the said defendant's cart from the said place called Nicholson's Wharf in the said declaration mentioned to the said place called Brook's Wharf, in the said declaration mentioned, he, the said plaintiff, would accompany and follow the said cart of the said defendant, from the place called Nicholson's Wharf, in the said declaration mentioned, to the place called Brook's Wharf, in the said declaration mentioned, and watch and protect the said goods and chattels from being stolen or lost out of the said cart. And the said defendant further saith, that whilst the said defendant so carried and conveyed the said goods and chattels from the said place called Nicholson's Wharf, to the said place called Brook's Wharf, he, the said plaintiff, contrary to the said condition and agreement in that behalf, wholly neglected to accompany and follow the said cart, or to watch and protect the said goods and chattels from being lost or stolen from the said cart; by reason whereof, and not by any negligence, carelessness, or improper conduct in the said defendant, or his servant, the said goods and chattels became and were lost.” Verification.

To this plea there was a special demurrer and joinder.

Barston, for the plaintiff.—This plea is bad, as it shews a contract entirely different from that stated in the declaration, and, by the rules of Hilary term, 4 Will. 4, tit. ‘Assumpsit,’ merely amounts to the general issue. The rule is, “In actions against carriers and other bailees, for not delivering, or not keeping goods safe, or not returning them on request, and in actions against agents for not accounting, the plea will operate as a denial of any express contract, to the effect alleged in the declaration, and of such bailment or employment as would raise a promise in law to the effect alleged, but not of the breach.”—[He was then stopped by the Court.]

W. H. Watson, contra.—The goods might have been delivered, subject to an agreement qualifying the delivery. The plaintiff undertakes to keep a kind of guard over them.

[*ALDERSON*, B.—You say, they were delivered on a special agreement. Is not that merely denying you received them in the way stated in the declaration?]

Suppose it is a substantive agreement, and not a condition of another agreement.

[*PARKE*, B.—So far as watching and protecting the goods upon the way, that the plaintiff takes upon himself. Is not that a qualifying contract?]

[*ALDERSON*, B.—You have a plea of *non assumpsit*, and a plea denying the negligence, which are all the pleas you can possibly want without this.]

Per Curiam—

Judgment for the plaintiff.

1837. { *DOE d. THOMAS WYTTE AND*
June 7. { *MARY HIS WIFE v. MARGA-*
RET *RUTLAND.*

Power—Lease—Rent—Re-entry.

Testator, by his will, empowered the devisee for life to make a lease for twenty-one years, “so as upon such lease there be reserved and be made payable during the continuance thereof, the best improved yearly rent that can be reasonably had for the same, without taking any sum or sums of money by way of fine or income for or in respect of such lease, and that in such lease there be contained a clause of re-entry for non-pay-

ment of rent." A lease was made under this power for twenty-one years, commencing on the 11th of October 1833, at the "yearly rent of 903*l.*, payable by equal half-yearly payments, that is to say, on the 6th of April and the 11th of October, in every year, by equal portions, except the last half year's rent, which is hereby reserved and agreed to be paid on the 1st of August next before the determination of the term." The lease also contained a clause of re-entry for non-payment of rent, if forty-two days in arrear, and a covenant that the lessee might "use the barns and the stack-yards, belonging to the demised premises, for the purpose of threshing and dressing the corn, grain, and pulse, which should be produced from the premises, in the last year of the said term, until the 1st of August next after the determination thereof."

Held, that the lease was a good execution of the power.

This was an action of ejectment, tried before Tindal, C.J. at the Norfolk Summer Assizes in 1836, when the jury found a verdict for the lessors of the plaintiff, subject to the opinion of the Court, on the following

CASE.

Benoni Mallett, being seised in fee of land, called the Testerton Estate, devised the same to the use of Philip Mallett Case for life, with an ultimate remainder to his daughters, in tail general, under which limitation Mary, the wife of Thomas Wythe, (the lessor of the plaintiff,) became, on the death of the said Philip Mallett Case, on the 4th of July 1834, tenant in tail in possession of the Testerton Estate, but as to the premises sought to be recovered in this action, subject, as the defendant contended, to the lease hereinafter mentioned.

The will contained the following power of leasing, viz.:—

"Provided always, and my will is, that it shall and may be lawful to and for my said grandsons, Thomas Mallett Case and Philip Mallett Case, and all their sons, and all other person or persons respectively, as and when they shall respectively come into, and be in the actual possession of my said hereinbefore devised manors, estates, and premises, including the said Middleton Estate and Testerton Estate, or

any part thereof, or be actually entitled to the rents and profits thereof, or of any part thereof, by indenture, under their respective hands and seals, to demise and lease the same, or any part thereof, unto any person or persons for any term or number of years not exceeding twenty-one years in possession, and not in reversion, remainder, or expectancy, so as upon any such lease there be reserved, and be made payable during the continuance thereof respectively, the best improved yearly rent that can be reasonably had for the same, without taking any sum or sums of money by way of fine or income for or in respect of such lease or leases, and so as none of the said lessee or lessees be made dispunishable of waste by any express words therein, and that in every such lease there be contained a clause of re-entry for non-payment of the rent or rents to be thereby respectively reserved, and so as such lessee or lessees, to whom such lease or leases shall be made, seal and deliver counterparts of such lease or leases."

On the 14th of December 1833, the said Philip Mallett Case, being then in the actual possession, or actually entitled to the rents and profits of the Testerton Estate, under the limitations of the will, signed and sealed, in the presence of two credible witnesses, an indenture of lease of that date, between the said Philip Mallett Case of the one part, and Margaret Rutland (the defendant in this action), who then and there sealed and delivered a counterpart thereof, of the other part, whereby it was witnessed, that by virtue of the power of leasing, in the said will contained, and in consideration of the rent, covenants, and agreements in the said lease, reserved and contained on the part of the said Margaret Rutland, the said Philip Mallett Case demised unto the said Margaret Rutland the premises therein mentioned, being the premises mentioned in the declaration in this action sought to be recovered, the said indenture containing therein, amongst other things, as follows:—"To have and to hold the said premises unto the said Margaret Rutland, and her executors and assigns, from the 11th day of October last, for and during the term of twenty-one years, thence next ensuing, yielding and paying therefor unto the said Philip Mallett Case and his assigns, during such part of the term

of this demise as he shall live, and after his decease, unto such person or persons as for the time being shall be entitled to the reversion of the said premises, the yearly rent of 903*l.* of lawful money current in Great Britain, by equal half-yearly payments, (that is to say) on the 6th day of April and the 11th day of October in every year, by equal portions, except the last half year's rent, which is hereby reserved and agreed to be paid on the 1st of August next before the determination of the said term, which said rent hath been adjudged by two indifferent and skilful persons, viz. Messrs. William Wright and Edward Sepplings, to be the full annual value of the said premises. *Provided always, that if the said rent, or any part thereof, shall be unpaid for forty-two days next after any of the days whereon the same is reserved to be paid as aforesaid, then it shall and may be lawful for the said Philip Mallett Case, or his assigns, during his life, and after his decease for such person or persons as aforesaid, into the said demised premises, or any part thereof in the name of the whole, to re-enter, and the said Margaret Rutland, and her executors, administrators, and assigns, and all other occupiers thereof, to expel, put out, and remove therefrom.*"

The said lease contains the following covenants on the part of the lessor: viz., "that it shall be lawful for the said Margaret Rutland and her executors, administrators, and assigns, paying the rent, and performing the covenants herein contained, which, on her or their part ought to be performed, to hold and enjoy the premises hereby demised during the said term of twenty-one years, and to use the barns and the stack-yards thereto belonging, for the purpose of threshing and dressing the corn, grain, and pulse which shall be produced from the said premises in the last year of the said term, until the 1st of August next after the determination thereof, without interruption." And there were also all usual and necessary covenants on the part of the lessee, supposing the Court to be satisfied that the covenants herein stated are of that description. It is also agreed, that no question shall be raised or considered as to the amount of the rent.

The defendant was in possession of the

premises in the lease and declaration mentioned at the commencement of this action, and claimed to hold the same under the lease. She had been served with a regular notice to quit, which had expired before the day of the several demises laid in the declaration.

On the part of the defendant, evidence was tendered, to shew the usage of the country as to agricultural leases in general, with respect to covenants of a like description with those which came in question in the present lease. The evidence was objected to, but received by the Chief Justice, subject to the opinion of this Court, as to its admissibility in whole or part.

The question upon the special case was, whether the lease of the 14th of December 1833, was a valid execution of the power of leasing contained in the will of Brown Mallett.

Sir W. W. Follett, for the lessors of the plaintiff. — Under this power, the rent should be reserved equally throughout the term, and during the term. The tenant for life cannot reserve rent by anticipation. If he should die in the interval between the 1st of August and the 11th of October, in the last year of the term, he would receive all the benefit, and the remainderman would be kept out of possession, without having any rent. The object of the power is, that the tenant for life should receive rent for that part of the term which runs through his life, and the remainderman for the part which runs through his—*Doe d. Wilmot v. Giffard*, cited in *Doe v. Wilson* (1), is not distinguishable.

[*PARKE, B.*—In that case, one half year's rent was lost. There were only forty-one half years' rent reserved.]

The rent was not reserved equally throughout the term. Could the tenant for life make the whole rent payable on one day? That might be a beneficial reservation, and yet it would not be allowed, nor is there any authority for considering that reservation good which is not equal throughout the term—*Doe d. Harries v. Morse* (2). Next, as to the power of dis-

(1) 5 B. & Ald. 371.

(2) 2 Cr. & M. 247; s. c. 3 Law J. Rep. (N.S.) Exch. 70.

treas. The law upon this subject was much discussed in *Doe d. Lord Jersey v. Smith* (3), and is fully considered in 2 *Sugden on Powers*, 455, where it is laid down that a reasonable time is allowed, and the law will take notice of what is reasonable. But no case hitherto has decided that so long a period as forty-two days is a reasonable time. The third objection arises out of the power given to the tenant to continue in possession of the barns and stack-yards, until the 1st of August next after the expiration of the term; and it cannot be supposed that the lessor was justified in conferring on the lessee, so long an enjoyment of the premises, without any payment of rent for that period.

Maule, in support of the lease.—The power is, in some respects, general; in some, limited and confined. The sound rule deducible from all the cases is, that wherever the party creating the power has expressed a condition or number of conditions, then those conditions must be complied with: but he leaves the exercise of the power at large, on those points where he has expressed none. It is conditioned that the rent should be reserved and made payable during the continuance of the term, that it should be a yearly rent, and the best that could be reasonably had. Those conditions are complied with. It is conceded on the other side, that the express conditions are fulfilled; but it is alleged, that the lease does not satisfy some condition that is to be implied. But is there anything unreasonable in the reservation of the last half year's rent on the 1st of August? It must not be assumed that the lease is bad, if the remainder-man can in any case be injured; and only one case of injury was suggested or supposed. But the criterion is, whether the tenant for life would have been prudent in making this reservation, if he had, in addition to his life estate, been also remainder-man. Undoubtedly this would have been a wise and prudent precaution to secure to him his remedy by distress, which he would otherwise lose if the rent were payable on the last day of the term. If the tenant for life were to die before the last half-

year, the remainder-man would be benefited by this stipulation, and the probabilities are more in favour of his being benefited in this way, than injured by the only possible contingency which might be injurious to him. The lease is to contain a power of re-entry; that is an express condition. Now, if the last half year's rent were not payable until the last day of the term, the power of re-entry for that rent could not be exercised at all; and in such a case it might be argued, that an express condition of the power had not been complied with. *Doe v. Giffard* has been cited, but that case is not in point, because there, one half year's rent was entirely lost. *Doe v. Wilson* is in favour of the lease. In no case have leases under a power been held bad, unless there has been a literal violation of a condition. Thus, in *Doe v. Morse*, the rent was to be made payable half-yearly; but, instead of that, it was reserved at periods of five and seven months. So also in *Doe v. Lock* (4), the new lease excepted from the demise more than the old lease, and the subject-matter of the demise being thus varied, the rent was not the "ancient" rent, and a condition that it should be so, was expressly violated. As to the time of re-entry, that is a power which ought to be exercised with a proper discretion. It is an open question, what is a reasonable time.—[He then argued upon the admissibility of the evidence as to the covenants being usual in leases in that part of the country, and contended that the power being silent in that respect, it was to be exercised in a reasonable manner, and that the usage might be proved, in order to shew what was reasonable; but, as the Court in their judgment gave no opinion on this point, the argument relating to it is omitted.]

Follett, in reply.—The argument on the other side, if pushed to its full extent, would allow a rent to be reserved on the first day of each year; but hitherto no such doctrine has been established. Nor is the test a true one, whether this is a lease which a tenant in fee simple would fairly make. The cases hitherto have been to the effect, that the remainder-man is not

(3) 2 Brod. & Bing. 473.

(4) 2 Ad. & El. 705; s. c. 4 Law J. Rep. (N.S.) K.B. 113.

to be prejudiced, and the better opinion certainly is, that a reservation of rent beforehand is not good—*Sugden on Powers*, p. 433, 440. The principle is, that rent is the compensation for the occupation of the land, and should be paid to the person who is the owner, when the occupation is complete, and a rent payable previously is an exception which cannot be within the power, unless by specific terms. The judgment of Bayley, B., in *Doe v. Morse*, is direct upon this point.

[PARKE, B.—It could not have been present to his mind how great is the inconvenience of rent becoming due when there is no power of taking it by distress.]

This particular lease cannot be supported without maintaining the general doctrine, that rent may be reserved beforehand.

Cur. adv. vult.

On a subsequent day, judgment was delivered by—

LORD ABINGER, C.B.—The question in this ejectment turned on the construction of a power, and that power is in these words—[His Lordship here read that part of the will which created the power of leasing.]—Now, the defence rested on two objections to the execution of the power in the lease produced; the first was, that although there was a clause in it for re-entry for non-payment of rent, yet that the power of re-entry was limited to forty-two days after the rent should have accrued due; the second objection was, that the last half year's rent was made payable on some day in August, whereas the term itself did not expire until Michaelmas. In answer to the first objection, cases were cited to shew, that a reasonable time might be allowed after the rent became due, without any contravention of the power; but I am at a loss to see how the question could arise, unless there were an appearance of evasion. One can conceive a case, where, under the pretence of complying with a power in terms, the clause may be of such a nature as to make the power of re-entry wholly nugatory. If such a case should arise, it would be a violation of the power; but, here, there is

no appearance of evasion in the mode of framing the clause; the period of forty-two days is not an unusual one; and we, therefore, think, that the lease is unobjectionable in respect to the clause of re-entry. The second objection is, that the reservation of rent for the last half year is in contravention of the power; but upon consideration, we think, that there is no foundation for the argument urged. On this point, the testator's reason for limiting the power by this proviso, appears on the face of the will itself to have been, that no premium or fine should be taken from the lessee; and, therefore, whatever was reserved was to be received annually, and made payable at the usual times, and was not to be taken as a premium or fine, leaving nothing to the person in remainder, who might succeed during the continuance of the term. There is no pretence for saying, that there was any object to defeat the remainder-man's claim. On the contrary, the reservation of the last half year's rent, before the full and complete expiration of the term, is a matter of prudence and caution, and is generally to the benefit of the lessor. Nor can it be detrimental to the remainder-man, except in the single supposable case of the tenant for life dying after the reservation of the last half year's rent, and before the end of the term. But in construing this power, we are to look at the intention of the testator, as well as to the words of the power; and that intention manifestly was, that the rent should be apportioned in twenty-one yearly payments—there is no direction further; but it might be quarterly, half yearly, or yearly, there being no direction on the subject. It would be quite sufficient to make it payable yearly within the twenty-one years. The spirit and intention, then, of the testator are complied with, as well as the words of the power; and therefore there is no valid objection to the lease on the second ground. On both the grounds, the conclusion to which we come is, that the judgment should be for the defendant.

Judgment for the defendant.

1837. { JAMES AND OTHERS, ASSIGNEES
OF EMERSON, A BANKRUPT,
V. GRIFFIN AND HILLHOUSE.

Stoppage in Transitu—Delivery incomplete.

Goods were consigned to a purchaser in London, deliverable in the river. He, being insolvent when they arrived in the river, directed them to be landed on a wharf where he had been accustomed previously to have goods of that description landed, he having, however, a warehouse in the city. At that wharf they were stopped by the vendor:—Held, in an action of trover by the purchaser's assignees, that it ought to have been left to the jury to say, whether the wharfingers received the goods as the purchaser's agents, to take possession of them for him as owner, or to forward for him, or to keep them for the vendor.

Held also, that directions given by the purchaser to his agent, whom he sent to order them to be landed, expressing his intention not to receive the goods for himself, were admissible in evidence, though not communicated to the wharfingers or the seller, and were material, for the purpose of shewing that possession was not taken for the benefit of the purchaser, but of the vendor, and that the transitus was not at an end.—(Dissentiente Lord Abinger, C.B.)

Trover for lead converted since the bankruptcy.

Plea—That one Stagg, a trader at Stockton-upon-Tees, had bargained and agreed to sell the lead to Emerson, who carried on business in London, and that it was sent by a common carrier from Stockton-upon-Tees, to be delivered to Emerson in London, and that the lead was in the possession of the defendants, as wharfingers, in the course of carriage and conveyance. That before the lead arrived in London, Emerson became wholly insolvent, and Stagg stopped the lead while in the possession of the defendants, and requested them to hold the possession thereof for him; and the defendants justified their refusal to deliver to the plaintiffs under these orders.

Replication—That the lead came into the possession of, and was received by the defendants as agents and wharfingers of

and for Emerson, and the defendants held the same as such agents and wharfingers of and for Emerson, and for his use and benefit, and the delivery to him was complete; and further, that Stagg did not stop the lead before the defendants had received it for the bankrupt, and before the delivery was complete. On this, issue was joined.

At the trial, before the Lord Chief Baron, at the London Sittings after Trinity term, 1835, it appeared, that Mr. Stagg, a lead-merchant, at Stockton, shipped in November 1834, on board two vessels, the *Fanny* and the *Cumberland*, a quantity of sheet lead, consigned to Emerson, the bankrupt, who carried on business as a lead and tin merchant, at Lawrence Pountney Lane, London. It was deliverable to him at London, in the river. The vessels arrived in the port of London on the 7th of December. The captains called at Emerson's counting-house, which, with his warehouse, was in Lawrence Pountney Lane, on the 8th, and required him to have the lead landed. They saw his son, who communicated the message to his father, and, by his direction, went on the 10th on board the two vessels, and directed the captains to land the lead on the defendants' wharf. Emerson had been in the habit of having goods consigned to him landed at their wharf under written orders, and of having them forwarded thence to his warehouse. The son then told one of the defendants, that the lead was coming from the vessels, and that they were to land it. Being asked whether it was to be carried away, he said he did not know, but assented to its being piled away. The bankrupt stated, that at the time when the lead arrived, he was in embarrassed circumstances; that his directions for landing it were given for the accommodation of the captains. His son also stated, that his father had told him at that time, that he did not intend to take the goods; but this was not communicated to the defendants. On the same day, namely, the 10th of December, the lead was lightered from the two vessels to the defendants' wharf, and piled up there. The captain of one of the vessels paid the light-erage of his lead, Emerson paid that of the other. On the 18th of December, Stagg desired the defendants to stop the lead, and on the 22nd, a fiat issued against Emer-

son. The freight and wharfage still remained unpaid. The Lord Chief Baron desired the jury to say, whether the defendants received the lead as the agents of Emerson or not, as, if they did, it followed in law that it was in Emerson's possession, and the plaintiffs were entitled to recover; if they did not receive it as his agents, or received it in a doubtful or ambiguous character, the ownership did not pass to the plaintiffs. His Lordship also said, that the *intention* of Emerson, uncommunicated to the defendants, was immaterial. The jury found a verdict for the plaintiffs.

In Michaelmas term, 1835—

Sir W. W. Follett obtained a rule for a new trial, on the ground of misdirection, contending, first, that the *transitus* was not determined by the delivery to the defendants; and secondly, that the contract of sale was rescinded by the bankrupt before the bankruptcy, when he declared that he did not intend to take the goods as a purchaser.

Sir F. Pollock, Kelly, and Hoggins, now shewed cause.—If the defendants received the lead as the agents of the bankrupt, the *transitus* was at an end.

[PARKE, B.—The question is, whether the goods were received by the defendants as agents, to forward them, or whether they had arrived at their ultimate destination.]

Perhaps, if the bankrupt had repudiated the contract when the goods arrived, the property might not have passed, but he gave directions to land, without any intimation that they were not to be received on his account. The property was completely vested in him, and he could have disposed of the lead; the *transitus*, therefore, was at an end. The goods were deliverable in the river; and the captains on their arrival, went to the bankrupt, because their business as carriers was at an end. It was no part of their engagement with the vendor to land them. The defendants, on the receipt of the lead, did not propose to forward it, but inquired how it was to be disposed of on their wharf. The bankrupt, it is true, had a warehouse of his own, but he might use a public wharf as his warehouse—*Ellis v. Hunt* (1), *Rowe*

v. Pickford (2), and *Dixon v. Baldwin* (3). Then, secondly, the bankrupt's intention not to keep the goods, not being communicated to the other parties, cannot alter the character of his acts.

[LORD ABINGER, C.B.—In two cases, *Atkin v. Barnick* (4), and *Mills v. Ball* (5), the intentions of an insolvent vendee have been inquired into, but in both of them they were expressed by letter. Any expression by Emerson to the wharfinger, verbally or by letter, would have been conclusive.]

[PARKE, B.—Suppose the intention to be manifested by facts not communicated to the wharfinger?]

If an agent, by the order of his principal, gives a new direction to goods, that makes his possession the possession of the principal, so as to bring them within his order and disposition—*Hawkes v. Dunn* (6). The intention ought to be expressed in an open and notorious manner; and great danger will result from allowing a bankrupt to affect the rights of third parties, by giving evidence of his uncommunicated intentions. But no question of intention arises on the record. The first issue is simply whether the lead was in the course of transit or not. Then, on the second plea, it must be admitted, that there had been a vesting of the property in the bankrupt, before it can be argued, that the intention of the latter re-vested the property in the vendor. But the pleadings do not allow that argument to be raised.

Sir W. W. Follett, Alexander, and Martin, in support of the rule.—The *transitus* was not determined by the delivery to the defendants. The goods were necessarily landed at a public wharf, to be subsequently conveyed to his warehouse; and it is quite immaterial that he pointed out the wharf at which they were to be landed. If he had sent his own lighter, and taken possession of the goods in the river, the *transitus* would have been determined; but the case is different, when they are to be landed through the medium of third

(2) 1 B. Mo. 526.

(3) 5 East, 175.

(4) 1 Stra. 165; s. c. 10 Mod. 432; Fort. 353.

(5) 2 Bos. & Pul. 457.

(6) 1 Cr. & Jer. 519.

(1) 3 Term Rep. 465.

parties, who are to convey them to the place of their ultimate destination. No doubt the *property* was in the bankrupt; but had the goods been received into his possession? The question as to the purpose for which the defendants received the lead, whether to keep for him or to forward, is the real one in this case, and ought to have been left to the jury. The delivery in the river was no part of the consignor's contract, but was an arrangement between the vendee and the ship-owner. The bankrupt's declarations, being made coterminously with the directions to land, remove all doubt, and shew the purpose for which the goods were put into the defendant's possession—namely, not to complete the delivery, but to enable the vendor to stop them. There can be no need to communicate this intention to the wharfinger: he is usually an agent to forward—it could not be necessary to tell him that in this case he was so no more.

LORD ABINGER, C.B.—I think there must be a new trial. The question is, whether there was a taking possession of the goods by the bankrupt or his agent. The rest of the Court incline to think, that the directions given by him were admissible to shew the nature of his acts: they were, however, received, and no ground for a new trial exists in that respect. But the question remains whether the receiving of the goods, with the intention expressed by the bankrupt at the time, was a taking possession of them as his own. I can conceive a case in which the receiving into a bankrupt's own warehouse would not be receiving them into his own possession, as if he put them apart from his other goods to be restored to the vendor. Here, the bankrupt received the goods with great reluctance, and only under the pressure of the inconvenience complained of by the captains. By his directions, they were then received by the wharfingers, he telling his son, at the same time, that he would not have them himself. He took possession only for the benefit of the vendor. The question, therefore, which ought to have been left to the jury is, whether the possession taken by the defendants was for the benefit of the bankrupt as owner, whereas I only left the question, whether they took

possession as his agents. I ought to have qualified it, whether, supposing them to have been his agents, they received the goods to take possession for his own benefit, or to keep them for the seller.

PARKER, B.—The real question for the jury was, whether the son's act was a taking possession by the bankrupt as owner. If it was, the *transitus* was at an end; if not, and the latter merely meant to take possession for a limited purpose, for the seller's benefit, the *transitus* was not determined. The latter was most probably the case.

ALDERSON, B.—To defeat the right of stoppage in *transitu*, one of two things must be shewn: either that the goods have arrived at the natural end of their journey, when I should rather think the intention of the vendee had nothing to do with the question; or, if the *transitus* is to be determined by some intermediate act, the intention with which that was done must be shewn. The latter case is the present. The intermediate act of the son is to be inquired into: therefore, it seems to me, that the instructions given by the bankrupt to his son were material evidence, as shewing with what intention the authority to take possession of the goods was given—whether to take as owner or not.

Rule absolute.

Upon the new trial, which took place before the Lord Chief Baron, at the London sittings after Hilary term, 1836, the bankrupt's son stated, that lead had previously been landed on the defendant's wharf for his father; that he was accustomed to land his sheet lead there, and to have it piled up and kept there till he carted it away to his customers, in his own carts; and that he never brought sheet lead to his own premises, but sold it from the wharf. It was also his father's practice to send written orders for landing the lead at the wharf, and also written orders when it was to be carted away. He likewise proved, that, at the time his father spoke to him about landing the lead on the 10th of December, he told him, that under the circumstances he would not meddle with it—that he did not intend to take it—and that Mr. Stagg ought to have it; but the son did not communicate this to the whar-

fingers. The bankrupt also directed his son not to give a written order; but the wharfingers did not ask for one, nor inquire the reason why one was not given.

The Lord Chief Baron, in summing up, told the jury, that he had received the evidence as to the intention of the bankrupt not to meddle with the goods, not communicated to the defendant, nor to any agent of the consignor, with considerable doubt; but that, as it had been admitted, he should leave it to them for their opinion, whether it made any difference in the conclusion to be drawn from the other evidence; and desired them to state what that conclusion was; and then, whether it would be at all varied by the fact of the intention declared to the son. The jury found for the plaintiffs; and stated, that the intention of the bankrupt, declared only to the son, and not followed up by any act, did not, and, in their opinion, ought not to influence their verdict. The learned Judge gave the defendant leave to move to enter a nonsuit, if the intention so expressed was evidence, and if, as matter of law, it was of sufficient weight to entitle the defendant to a verdict.

Alexander, in Easter term, 1836, obtained a rule accordingly; against which—

Sir F. Pollock, Kelly, and Hoggins, shewed cause.

Sir W. W. Follett, Alexander, and Martin, appearing in support of the rule.

After argument, the Court took time to consider, and, the Judges differing, their judgments were now pronounced *seriatim*.

ALDERSON, B.—In this case, which has stood over for some time, in the expectation that the parties would have come to some arrangement between themselves, it has now become necessary that the Court should deliver their opinion; and, as we are not agreed in that opinion, it falls to me to begin.

This was an action of trover by the assignees of a bankrupt, for some lead which had been shipped by a person of the name of Stagg, from Stockton, in Yorkshire, and consigned to Emerson, the bankrupt. The defendants were wharfingers in London; and the only question for the Court is, whether Stagg's right to stop the goods *in transitu* was at an end or not.

The facts in evidence were these :—The lead in question was shipped on board two vessels, the *Fanny* and the *Cumberland*; and those ships arrived in the river on or before the 8th of December 1835. On the 8th, 9th, and 10th of that month, the captains called at the warehouse of the bankrupt for orders, being urgent to get rid of the lead, in order to avoid demurrage. They could never obtain directions from him, and threatened to land the lead unless he gave some directions about it. On the 10th of December, the bankrupt, who was then in insolvent circumstances, and indebted to Stagg to a large amount, told his son, who usually transacted business for him, to tell the captains to take the lead out of their vessels, and land it at Beal's (the defendants') wharf, where his lead had been before deposited on various occasions; but the bankrupt told his son, at the same time, that, under the circumstances in which he was, he would not meddle with it—that he did not intend to take the lead—that Stagg ought to have it. He was also forbidden by the bankrupt to give any written order for the lead to the captains, as had been the usual custom of the bankrupt before. With these instructions, the son proceeded to act, and verbally directed the goods to be landed; and when they were landed, he saw Hillhouse, one of the defendants, and told him, that they were to land the lead; and being asked whether it was to be carted away, replied, that he did not know. Hillhouse then said, it had better be piled away: the son replied, yes, and that was accordingly done. No communication of what had passed between the bankrupt and his son, as to the bankrupt's intention not to meddle with the lead, was made to the defendants.

These being the facts proved, and there being no doubt as to them, the Lord Chief Baron reserved the question, whether, under these circumstances, the *transitus* was at an end, the Court giving leave to the defendants to enter a nonsuit, if the Court thought it was not at an end: and after considering the case, I think a nonsuit ought to be entered. I cannot see why this case is not to be governed by the decision of the Court on the former occasion. In that case, I conceived that the

Court were unanimous in thinking that the question for the jury was, whether the acts done amounted to a taking possession of the lead by the bankrupt as owner. I find that so stated in the very first sentence of my Lord Chief Baron's judgment, and in the observations which afterwards fell from my Brother Parke and myself.

I am still of opinion, that that is the true question; and, if it be so, then the intention of the bankrupt is, as it seems to me, most material; and it is not material whether it was or was not communicated to the defendants, except as a test for the jury to judge whether such intention was real or not. Here the intention is to be taken as real; and, indeed, the facts are abundantly clear on that point.

Now, the taking possession here is by the bankrupt's agent; and the declared intention of the bankrupt to him, when he directs him to do the act, appears to me to be precisely the same as if the bankrupt had himself done the act, making the same declaration of his intention at the time. The agent has only a qualified authority; and I cannot see how, under such circumstances, his ordering the goods to be landed can be held to be a taking possession of them by the bankrupt, as owner, when the bankrupt at the time declares that the agent is not to do so; that he does not mean thereby to take to the goods, but to relieve the captains from the inconvenience of the delay, leaving, however, the goods for Stagg, who afterwards stopped them *in transitu*. I place no reliance on the circumstance, that, contrary to the usual course, the goods were landed without a written order: the broad ground on which I conceive the Court should decide the question is, that here, the bankrupt did not take possession of the goods as owner, at the wharf of the defendants; and that therefore, the goods still remained at the defendants' wharf *in transitu*, not having arrived at the ultimate place of destination, and not having been taken possession of by the bankrupt, as owner, at any intermediate place. For these reasons, I think a nonsuit should be entered.

BOLLAND, B.—This rule calls upon the plaintiffs, the assignees of Arthur Emerson, to shew cause why the verdict obtained by them should not be set aside, and a

nonsuit entered; or, why there should not be a new trial. The only question in the cause was, whether the lead had arrived at its ultimate destination, and the *transitus* was determined. This cause was before the Court, upon a former rule, in Hilary term, in last year, and a new trial was granted, upon the ground, that the only question that the learned Lord Chief Baron had left to the jury was, whether the defendants took possession of the goods as the agents of the bankrupt; whereas he ought to have qualified it further, by calling upon them to say, whether, supposing the defendants to be the agents of the bankrupt, they received the lead to take possession of it for his benefit, or only to keep it for the seller. Upon the discussion of that rule, a question was made, whether the directions given by the bankrupt to his son, whom he sent to order the landing of the lead, in which he expressed his intention not to receive it as owner, were admissible in evidence, although such directions were not communicated to the defendants, the wharfingers, or the seller. It appears, from the judgments of the majority of the Court, that they were of opinion, the directions were admissible. The learned Lord Chief Baron gave no decided opinion upon the point, although it may be collected, from what he said respecting it, that he had doubts respecting its admissibility. Upon the second trial, that evidence was again given; and it appears clear, from the report of the testimony of the bankrupt and his son, that it was not the intention of the bankrupt, when the goods were landed at the wharf, to receive them as his own. In his summing up to the jury upon this point, of the intention of the bankrupt declared to his son, that he would not meddle with the goods, the learned Lord Chief Baron said, that this intention, not declared to the defendants, nor to any person who was agent or could act for Stagg, was received in evidence by him with considerable doubt, in his own mind, whether it was admissible; but that, as it was admitted, he should submit it to them for their opinion, whether it made any difference, in the conclusion to be drawn from the other evidence in the case; that if, in point of law, the evidence was not admissible, and the

conclusion they drew from it was against the plaintiffs, the plaintiffs would have an opportunity of setting it right, on a motion for a new trial; if, on the contrary, they thought it made no difference in the conclusion they drew from the other facts, it would be of no prejudice, even if it was not admissible; and he therefore desired them to consider what conclusion they would draw from the other evidence, and then to say, whether that conclusion would be at all varied by the fact of the intention declared to the son; and he desired the jury to say, if they thought themselves bound by the other proofs of the case, that the *transitus* was at an end, and that the defendants held the goods as agents of Stagg, the seller, whether the intention declared to the son, not communicated to the defendants, made any difference in their conclusion;—that he would not give any opinion upon it as a point of law, as the evidence, being admitted, was for their consideration; he wished only, in case they thought, as mercantile men, that such an intention communicated to the son alone ought to qualify the rights, or alter the relations of the parties, they would say so, and the Court would afterwards give effect to it. The jury found for the plaintiffs, and stated that the intention of the bankrupt, expressed only to the son, and not followed up by any act, did not, and, in their opinion, ought not, to influence their verdict. Mr. Alexander had leave given him to move to enter a nonsuit, if, in the opinion of the Court, the intention so declared was evidence, and if, as a matter of law, it was of sufficient weight to entitle the defendants to a verdict; and it is with this verdict, found upon the above summing up, that the Court has now to deal. As I do not entertain any doubt that the intention of the bankrupt, in ordering the lead to be landed at the wharf of the defendants, was to place it under such circumstances as would enable the vendor to stop it, and that such intention, though not communicated to the wharfingers, was admissible in evidence; and as I consider that it was, as a matter of law, of sufficient weight to entitle the defendants to a verdict, notwithstanding the other evidence in the cause, I am of opinion that the rule must be made absolute for entering a nonsuit.

PARKER B.—I am of opinion, that the rule in this case should be made absolute to enter a nonsuit on the point reserved by my Lord Chief Baron, which point I understand to be this—whether, assuming that the bankrupt's intention in ordering the goods to be landed was *not* to take possession of them on his own account, as owner, the non-disclosure of that intention to the wharfinger makes any difference. I think it does not.

When this case was before the Court in Hilary term, 1836, on the first application for a new trial, this point was discussed (?); and I considered it to have been the opinion of the Court, that the non-disclosure of that intention made no difference when they decided that the proper question to be left to the jury was, *quo animo* the act of landing by the bankrupt's order was done; was it done with intent to take possession by the bankrupt as owner for his own benefit, or not? But, as my Lord Chief Baron appears to have thought the question still open, and to have acted under that impression on the trial, I will state the reasons for the opinion I then formed, and still retain, a little more at length than I then did.

The question raised upon these pleadings, is, whether the stoppage by Stagg, the unpaid vendor, took place before the transit was at an end, and the delivery to the bankrupt complete. The defendant had the burthen of that issue cast upon him, and I think upon the evidence he did prove it.

Of the law on this subject, to a certain extent, and sufficient for the decision of this case, there is no doubt. The delivery by the vendor of goods sold, to a carrier of any description, either expressly or by implication, named by the vendee, and who is to carry on his own account, is a constructive delivery to the vendee; but the vendor has a right, if unpaid, and if the vendee be insolvent, to retake the goods before they are actually delivered to the vendee, or some one whom he means to be his agent to take possession of and keep the goods for him, and thereby to replace the vendor in the same situation as if he

(?) 1 Tyr. & Granger, 457, 458; a. c. 1 Moo. & W. 28, ante, 243.

had not parted with the actual possession. Up to this point the law is clear. Whether this act of retaking rescinds the contract, or merely restores the right of possession, can hardly as yet be considered as finally determined; for, even in the case of *Clay v. Harrison* (8), where it was thought it would necessarily be decided, it became ultimately immaterial to settle it, as appears by the note of the reporter, which I know to be correct, and to contain the true ground of the judgment. It is equally unimportant in this case to give any decision upon it, though I must own I feel very little doubt upon the question.

The actual delivery to the vendee, or his agent, which puts an end to the *transitus*, or state of passage, may be at the vendee's own warehouse, or at a place which he uses as his own, though belonging to another, for the deposit of goods—(*Scott v. Petit* (9), *Rowe v. Pickford*,) or at a place where he means the goods to remain until a fresh destination is communicated to them—(*Dixon v. Baldwin and another*,) by orders from himself; or it may be by the vendee's taking possession, by himself or agent, at some point short of the original intended place of destination. It is not necessary in this case to decide whether a vendee may take such possession before arrival at the port or place of delivery. In *Wright v. Lames* (10), Lord Kenyon held he could; in *Holt v. Ponnall* (11), that where there was a bill of lading he could not. It is somewhat difficult to understand how a bill of lading, which is only a contract between the vendor and shipper, for the carriage, can make any difference. Here, if there was a taking possession by the vendee, it was at the place of destination, in the sense in which that term is used in the latter case. In applying the law to the facts as proved, it is clear that the goods, which were put on board under a bill of lading, making them deliverable in the River Thames, were not actually delivered to the vendee or his agent, whilst they remained on board the ship, though it had arrived at the end of the voyage, and at the spot where the ship-owner was by his contract to deliver them.

The putting on board the lighters, which were hired, was not an actual delivery to the vendee, for it was only another mode of forwarding the goods a stage further. Was the landing and warehousing of the goods at the wharf by the vendee's order, a delivery at a warehouse or a place of deposit for the vendee, or a taking possession of the goods as owner? The answer to both these questions depends upon that to a prior question, *quo animo* was that act done?

If the order was given to land at the wharf, with the intent to make it the place of deposit for the goods as the bankrupt's own property, at which place he meant to deal with them as his own, to sell to his customers, or to give them from thence a fresh destination, doubtless, the *transitus* was at an end. The wharf became the warehouse of the vendee, and the landing there was a taking possession.

Independently of the true nature and character of that order to land, the wharf was not the warehouse of the vendee, for, though he was in the habit of using that wharf as his own warehouse, it was only when he gave written orders to land there; that is, he was in the habit, by an act subsequent to the shipping and arrival in the river, to select that wharf as the place of final deposit. If he did not do so on this occasion, it was not the place of final deposit, the journey's end of the goods; on the other hand, if his intention in landing the goods had been to make the wharfing an instrument of further conveyance to his own warehouse, then the *transitus* still continued, or, if the goods were placed there with the intention of preventing any liability, on his part, to the captains for demurrage, and that they might remain *in medio*, or that they might remain for the benefit of the owner, the *transitus* had not ended—they had not arrived at the end of their journey—they were not actually delivered to the vendee, or one who was an agent of his, for the purpose of keeping possession on his account.

The whole question then is, with what intent was the order to land given? Of that there is on the evidence no doubt. The bankrupt did not mean to take possession as owner. The son, who landed the goods, was not authorized to take such possession.

(8) 10 B. & C. 99; a. c. 8 Law J. Rep. K.B. 90.

(9) 3 Brod. & Bing. 468.

(10) 4 Esp. 82.

(11) 1 Esp. 242.

The inquiry with what intent an act is done is a very common circumstance in the administration of the criminal law, and by no means rare in that of our civil law: whether a man left his house, or kept it, or assigned his goods with intent to delay his creditors, or intended to commit a fraud, are matters of ordinary occurrence; and in such inquiries, if you can be satisfied by the concomitant facts, that such an intention existed, the want of a disclosure of that intention to any other person is wholly immaterial. So, in this case, if the intention existed, I think the non-disclosure is wholly immaterial. The intention not to take the goods as owner was proved clearly by the bankrupt's son, and, I cannot help thinking, might have been proved by the bankrupt himself, whose evidence, I think, was admissible; and the only effect, as I think, of the want of disclosure of that intention to the wharfingers, was to give them rights as between themselves and the vendee, for whom they may have supposed they were acting as warehouse-keepers, which, but for the want of that disclosure, they might not have possessed. It does not vary the right of the unpaid vendor, which continues or not, according to the real nature of the character which the person bears, who has the actual custody of the goods.

The case resembles another which might occur under the same head. For example, suppose the vendee to order goods, which he had purchased, to be left at an inn, which was also the receiving house of a carrier, for the purpose of being forwarded to his own residence, their intended place of destination; but from the non-disclosure by the vendor of that purpose, the innkeeper supposed that he was to keep the goods till the vendee came himself for them, or ordered them to be sent elsewhere; there is no doubt, I apprehend, that notwithstanding such ignorance of the innkeeper of his real character, the *transitus* would not be at an end, while the goods were in the innkeeper's possession.

I am of opinion, for these reasons, that the rule must be made absolute for a non-suit.

LORD ABINGER, C.B.—I am very sorry to be obliged to differ from the rest of the Court in opinion upon this case. The question is of very great importance; and

as this may form a leading case on the subject of commercial law, the Court have given it serious attention. When the case was tried the first time, I received the declarations of the bankrupt, made to his son, with considerable doubt; I thought they were not evidence, and I omitted, in summing up to the jury, to leave any question of intention to them. When the case was moved for a new trial, that omission of mine to leave the effect of intention to the jury, was considered objectionable; and doubtless it was so, if such intention was admissible evidence. I concurred in opinion with the rest of the Court, supposing the intention to be admissible evidence, under the circumstances of the case, as they were then presented, that it was fit that a new inquiry should take place. It did not then appear in evidence in the cause, that the wharf on which the goods were landed was the usual and ultimate place in which the bankrupt received goods of that description; it was left in doubt whether that wharf, or any other wharf, might not have been selected for the purpose of landing these goods, merely to discharge the vessels of them, and with a view to remove them to the bankrupt's warehouse; and I admitted the argument, that, so long as the goods had not come into the actual possession of the bankrupt, or to the possession of some immediate agent, who was finally to receive them on his account, the *transitus* still continued, and therefore it was competent to the vendor to stop *in transitu*; and the question of, whether a party who had intercepted the goods in their progress, thereby accepted them, and put an end to the *transitus*, necessarily involved the intention with which he took that step: and it might, therefore, be important to ascertain the reason of his interference before they came into his final possession. In other words, as there is a class of cases where the *transitus* has been held to be determined by the reception of the goods at another person's warehouse on behalf of the consignee, this case might be distinguished from that class, if it appeared upon the evidence, that the so receiving them was only a step in their progress to their destination, and that they were still to come to him at another place. The intention, therefore, with which he

caused the goods to be landed, was important: and in that view I concurred with the rest of the Court, and a new trial was directed.

Now, the reason of my opinion in the present case, is founded upon a fact proved at the last, which did not appear on the first trial; and that fact is, as appears by the evidence of his son—that the bankrupt, whenever he had any sheet lead consigned to him which he did not sell in the river, caused it to be landed at Beal's Wharf, which was the last and only place where he ever received sheet lead, and where it was piled up for his use, though he had a warehouse of his own for other commodities. On the first trial, a doubt existed in my mind whether the landing of the sheet lead at Beal's Wharf was not merely a step in its being carried to his own warehouse; but, upon the last trial, it being proved that, whenever sheet lead was consigned to him, Beal's Wharf was the place where it was deposited, in his own name, and for his own use, there to remain until it was disposed of or sold to his customers, I consider that fact to make a very important difference, and I now proceed to mention my reasons for thinking so. I consider the law to be well settled, that in all cases of the sale or transmission of goods, the *transitus* is at an end when the property comes either into the actual possession of the vendee, or to that place where, by his authority, it is destined to come for his use and to await his orders; where there is nothing further to be done with the goods but to sell them to a customer, or to apply them to his own use: where, in effect, there is to be no further change of possession till a change of property takes place, the transit is at an end. Now, supposing the actual *transitus* in this case, according to the received authorities, to be at an end, independent of the question of intention, an important question arises, which is this—whether the intention which existed in the mind of the bankrupt, at the time when the *transitus* was so at an end, shall alter or qualify the right of the assignees to possess these goods, or can give the right to the vendor still to obtain the possession of them. It should be observed, that in this case the books of the wharfingers, the defendants, were not produced.

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Notice was given to produce them; and on the argument addressed to the jury, in which, I own, I entirely concurred, the non-production of these books, which, it was clear, had been kept by the wharfingers, afforded a strong presumption that the goods, if entered in the wharfingers' books, were entered in the name of the bankrupt as his property. Now, then, I assume, for the purposes of this question, that the goods had arrived at the only place where the bankrupt ever intended them to arrive, and that they could not be removed from that place without some change of property, by a sale to a customer, or by his order, in whose name they were entered in the books of the wharfingers, and that he alone was the person to whom the defendants were accountable by their contract, not for the further carriage, but for the safe custody of the goods.

Now the question is, whether the mere intention, existing in his mind at the time of the deposit, is competent to alter the relation of the parties. At the last trial, I left that question to the jury distinctly, giving no opinion upon it myself, as I did not wish to prejudice any opinion of theirs by any direction of mine on the subject, and they delivered their opinion strongly. They thought the intention, not declared to the wharfingers, so as to qualify the contract by which they became the agents of the vendee, made no difference at all in the rights of the parties; and, I own, I concurred with them in that opinion.

The question is original. The only case that I know of, on which the defendants can rest as an authority, is *Atkin v. Barwick*, which is of this description:—A person residing in the West of England, had purchased goods of a person living in London; before the goods arrived at his warehouse, he found himself in failing circumstances, and, being an honest person, when they arrived he declined to receive them into his warehouse, and despatched them to another man's warehouse, accompanied by a letter to that person, stating, that he did not choose to receive these goods, and desiring him to hold them for the benefit of the vendor. This was before his bankruptcy. The day after the act of bankruptcy, he addressed a letter to the vendors, telling them what he had done. Upon

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this, a question arose between the assignees and the vendors. Though the report is short, it is correct as far as it goes ; but I have reason to know from some private sources, that it was argued more than once, and at great length. The only argument adduced for the assignees was this—the goods were the property of the vendee ; by the act of sale, they had been sent to him, and the contract which vested the property in him could not be rescinded, except by the consent of both parties ; and as he had become a bankrupt before he gave notice to the vendor, and before the vendor consented to receive the goods back, it became impossible for him then to rescind the contract himself, or to give the vendors a right to receive the goods, without the assent of the assignees. It was argued on the other side, that a man was to be presumed to do everything which it is his interest to do, till the contrary appears ; and, therefore, as the person to whom the goods were sent by the vendors, had received them as the assets and for the benefit of the vendors, their consent to that matter must be presumed ; and upon that latter ground, the Court decided in favour of the defendant, and held, that the goods were the property of the vendors. Afterwards, in the case of *Harman v. Fisher* (12), Lord Mansfield first introduced that principle into the law of bankruptcy, that a person on the eve of and contemplating bankruptcy, should not give a preference to a particular creditor, by sending him back goods or paying his debt. It was obvious, that the case of *Atkin v. Barwick* stood in the way of that decision ; and Lord Mansfield, in order to reconcile the cases, stated, that in *Atkin v. Barwick* the judgment was right, though the reasons were wrong, and stated what he conceived to be the true ground of the decision, which was this, that the bankrupt, being an honest man, when the goods arrived, refused to take them into his warehouse, or to accept them at all, or to make them a part of his effects, but sent them to another person, signifying his intention, that they were to be deposited with him as the goods of the vendors, and as his agent, he, the vendee, having refused to receive them. That au-

thority does not apply to the present case. The important fact is wanting of some declaration of the vendee to the person who received the goods, of an intention to rescind the contract, and still more of some notice to the person in whose hands he placed the goods, that he placed them there at the disposition of the vendor. In the case of *Atkin v. Barwick*, it is plain, that if the person who received the goods for the use of the vendors, had refused to deliver them to the vendors, he would have been liable to an action at the suit of the vendors, because, by contract, he had received them as their agent, independently of all question of stopping *in transitu*. In this case, there is nothing which passed between the wharfinger and the bankrupt, to qualify the obligation of the wharfinger to hold the goods for the bankrupt. If he had communicated to the wharfinger that he did not wish to take the goods, but desired him to receive them till the suspense he was under was removed, and hold them in the meantime for the benefit of the vendor, the case would be very different, and would range under the authority of *Atkin v. Barwick* ; but this is a case where he makes an unqualified contract with the wharfinger to receive the goods as his, and to account to him alone for them, as upon former occasions ; and, therefore, the question is, whether his secret intention at the time he made that contract with the wharfinger is to make any difference. I consider it is of no importance his declaring that intention to the son, as it was not declared to the wharfinger. The son stating that the father did not tell him to communicate it to the wharfinger, the fact is the same as if the intention had merely existed in his own mind, undeclared to anybody ; otherwise, the consequence would be, that in all cases where the goods of a bankrupt are not received actually into his own warehouse, and into his own manual possession, but when the *transitus* is at an end, in the usual mode in which his business is conducted, by being received at the warehouse of another person, who, by his own authority, and in his name, and for his use, received the goods, and described them as belonging to the vendee, and deposited for his use, he might afterwards come and declare, that he had formed an intention at

(12) Cowp. 117 ; s. c. Loft, 472.

the time not to take them, and thereby divest the right of his assignees. Now, it appears to me, that, whatever anxiety we may feel to do justice in particular cases, we ought to be especially cautious of laying down any principle in commercial law that may lead to uncertainty and litigation. One of the main advantages of jurisprudence is, that the rules of property should be certain, and litigation made as little likely to arise as possible. In this case it is obvious, that a new element of uncertainty is introduced; and that, in every possible case where a bankruptcy intervenes, and goods are not received into the actual custody of the bankrupt, it would be in his power to make a subsequent declaration of his intention to favour a particular creditor. I have no doubt this will give rise to considerable litigation. The rule of law is now pretty well settled as to what should be deemed the possession of goods by a bankrupt; it will, I apprehend, henceforward be open to doubt in many cases; and on that account, and not because I am insensible to the justice of the particular case, or that I am not most desirous, if possible, of concurring with my Brothers in opinion, it is, that I find myself obliged to differ. I fear the result of this case will be, to protect an underhand intention of the bankrupt, to qualify the acts done by him in making a contract with any person who may receive the goods in his name, and to account to him only.

On these grounds, although with much concern, I differ from my learned Brothers; but as the majority of the Court are of opinion, that a nonsuit ought to be entered, of course that consequence must follow.

Rule absolute, for entering a nonsuit.

1837. }
May 6. } COHEN v. HUSKISSON.

Constable—Breach of the Peace, What amounts to.

To a declaration in trespass for an assault and false imprisonment, the defendant pleaded a noise, disturbance, riot, and breach of the peace by the plaintiff, and that, to preserve the peace, he, the defendant, gave the plaintiff into the custody of a policeman.

No riot was proved, but a large concourse of persons was shewn to have assembled, and much abusive language to have been used by the plaintiff, in the presence of the policeman:—Held, a sufficient breach of the peace to justify the policeman in taking the plaintiff into custody, and taking him before a Magistrate.

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 133.]

1837. } WILSON AND OTHERS v. EDWIN
BARTHROP.

Bill of Exchange—Liability of Agent—Evidence.

To make a party liable upon a bill of exchange, which he has drawn in the name of another, some evidence must be given that he drew it without authority.

Quære—whether, even in that case, he can be sued as drawer, unless his name appears on the bill.

Assumpsit on a bill of exchange. The declaration stated, that the defendant, using the name and style of Jonathan Barthrop & Son, made his bill of exchange, and directed it to John Hanson, payable to the order of the defendant; and that the defendant, using the said name and style, indorsed the same to the plaintiffs. The defendant pleaded, first, that he did not draw the supposed bill of exchange; secondly, that he did not indorse it *modo et forma*.

At the trial, before Lord Abinger, C.B., in Middlesex, it appeared that the defendant was clerk of one Halliday, who was surviving partner of a firm trading under the name of Jonathan Barthrop & Son. Jonathan B. died about the end of the year 1835; the son (who was the second partner,) was also dead, and the defendant was employed by their executors and Halliday, as a confidential clerk, to wind up the business. A conversation with him was given in evidence, by which it appeared that he had, on former occasions, drawn bills in the name of the firm, but had guarded himself against personal liability, by not putting his own name to them.

The plaintiffs contended, that, unless this bill was drawn and indorsed by authority of Halliday, the defendant was liable; and that it was a question for the jury, whether he was so authorized; but the learned Judge, considering that some proof should be given by the plaintiffs of want of authority, directed a nonsuit; to set aside which, *Hoggins* moved for, and obtained, a rule.

Knowles shewed cause.—This is not the case of a party affixing his name to an instrument, either with or without words of procuration, and seeking to shelter himself under his character of agent, whether expressed on the instrument, or known to the party with whom he deals. In such cases, his signature may pledge his own credit, or let in evidence that he acted without authority—*Leadbitter v. Farrow* (1). But there is no instance of a person being held liable, as drawer of a bill, unless his name is upon it. He might perhaps be sued in another form of action—as, for a deceit in the false representation of authority—*Polhill v. Walter* (2). But here, no evidence was given that he did not act within the scope of his agency. It was incident to his duty as confidential clerk employed to superintend the winding up of the affairs of the firm; and it appeared that he had previously drawn bills in the partnership name. Upon the evidence, if any person is liable, it is Halliday, the surviving partner.

Hoggins, contrâ.—The bill does not profess to be drawn by procuration, but by Barthrop & Son; so that no notice is given to the world that it was drawn by authority, and not in the defendant's own right. In which capacity he drew it, should have been the question for the jury. It might also have been a question for them, whether there was any existing firm at the time the bill was drawn, except for the purpose of winding up the affairs of the old firm; and if so, the defendant would not have been authorized to bind them. No authority was shewn, and it was for the defendant to shew it.

[PARKE, B.—Is there any distinction between a bill of exchange and a contract

to purchase goods, made in the name of a firm without authority? Have you looked at the class of cases, to which *Tatlock v. Harris* (3) and *Vere v. Lewis* (4) belong?]

[LORD ABINGER, C.B.—In those cases, bills were drawn on fictitious payers; and it was held, that they might be declared upon as bills payable to bearer. I continue to think that the plaintiffs should have given some evidence of want of authority: but, as all cases on bills of exchange are of importance, we will take time to consider the point.]

On a subsequent day—

LORD ABINGER, C.B. delivered the judgment of the Court.—[After stating the facts, his Lordship proceeded:—] A motion was made to set aside the nonsuit, and enter a verdict for the plaintiffs, on the ground that the defendant was liable, inasmuch as he drew the bill, having no authority from the firm of Barthrop & Co. Without considering whether a party can, under any circumstances, be liable, who is not the drawer or acceptor of a bill, we are of opinion, that, before any man can be charged with a transaction of this sort, some *prima facie* evidence should be given that he used the name of a firm without authority. It is no uncommon thing, among commercial men, to allow a clerk to draw bills; and it can never be contended, that the clerk is to be liable as the drawer of the bills. There should be some evidence, at least, that the clerk had used the name of his principal without authority. In the present case, the evidence of that fact not only failed, but was rather the other way, as the defendant was the confidential clerk of the firm, and employed solely to carry on the business of the house, either by drawing bills, as he had been in the habit of doing, or by such other means as were necessary.

Rule discharged.

[*Thomas v. Hewes*, 2 C. & M. 530, n.; s. c. 3 Law J. Rep. (N.S.) Exch. 158, and *Alston v. Skinner*, Lord Holt, 309, were cited in argument.]

(1) 5 Mas. & Selw. 345.

(2) 3 B. & Ad. 114; s. c. 1 Law J. Rep. (N.S.) K.B. 92.

(3) 3 Term Rep. 174.

(4) Ibid. 182.

1837. } FILBY v. COMBE, DELAFIELD,
May 29. } AND DELAFIELD.

Scavenger, Right of—Paving Act.

The right of scavengers, under the statute 57 Geo. 3. c. 29, to the soil, ashes, and other things specified in the act, does not attach, unless the original owner or householder has abandoned his property in them.

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 132.]

1837. }
June 3. } *Ex parte* PERING.

Petition of Right—Indorsement.

A petition of right was presented, addressed to the King "in his Court of Exchequer." It was indorsed by the King, "Soit droit fait :"—Held, that as there was no indorsement to the Court of Exchequer, that Court had no authority to adjudicate upon the petition.

This was a petition of right, presented by Mr. Pering, addressed to the King, in his Court of Exchequer, claiming a compensation for the use of a patent which had been granted to the petitioner for the improvement of anchors. It appeared that Mr. Pering had served in the Royal Dock Yards, under the orders of the Lords of the Admiralty, from 1782 to 1822, when he retired upon a pension. In 1813 he had obtained a patent for an improvement in the making of anchors; and, in 1830, in consequence of an additional improvement in the formation of anchors, Mr. Pering obtained another patent, which contained a proviso for making void the same, if the patentee, his executors, administrators, and assigns should not supply, or cause to be supplied for his Majesty's service, all such articles of the said invention, as he or they should be required to supply, in such manner, and at such times, and at and upon such reasonable prices and terms as should be settled for that purpose by the Commissioners for executing the office of Lord High Admiral of the United Kingdom, for the time being. It further appeared, that under the directions of the Commissioners of the Navy, Mr. Pering

had, in 1831, drawn up instructions, to enable the smiths at the several dock-yards, to make anchors upon the improved plan; on which occasion, he was employed for some months, and was put to much expense in superintending the making of anchors, for which he claimed remuneration from the Lords of the Admiralty. Applications had been twice made to the Admiralty on this subject, but the claim was not admitted. Mr. Pering then, in the year 1836, applied to the Court of King's Bench, for a mandamus to the Lords of the Admiralty, commanding them to settle the prices and terms according to the proviso in the patent; but that Court refused to grant the rule—*Ex parte Pering* (1). This petition was then presented to his Majesty, which, after a statement of the facts, prayed that the King would be pleased to order that right be done. The petition was indorsed by the King, "*Soit droit fait*," and there was a further indorsement by the Secretary of State for the Home Department, referring it to his Majesty's Attorney General.

The Attorney General objected to the reception of the petition by this Court.—This is an attempt to bring before the courts of law, disputes that may arise in public offices, in consequence of demands made on his Majesty's government. The petition is referred to the Attorney General, who is to confess or deny the facts stated in it; and if he should deny them, an inquisition is to issue, to ascertain whether they are true or not. No foundation can be shewn for an application to this Court, which has no jurisdiction. In Lord Somers's celebrated argument in the *Banker's case* (2), this matter is treated of. It is there said, "The manner of answering petitions to the person of the King, was very various, which variety did sometimes arise from the conclusion of the party's petition; sometimes from the nature of the thing, and sometimes from favour to the person; and according as the indorsement was, the party was sent into Chancery or the other courts. If the indorsement was general, *Soit droit fait al partie*, it must be delivered to the Chancellor of England, and then a commission is to go to find the

(1) 4 Ad. & El. 949.

(2) Ed. 1733, p. 40-1, and in Skinner's Reports.

right of the party, and that being found, so that there was a record for him, thus warranted, he is let in to interplead with the King; but, if the indorsement was special, then the proceeding was to be according to the indorsement in any other court." This is fully explained also in *Stamford's Prerogative* (3). Here there is no special reference by his Majesty to this court.

Watson, contrà.—A petition may be referred to any of the courts.

[ALDERSON, B.—But here is no indorsement to the Court of Exchequer.]

This is a petition presented to his Majesty in his Court of Exchequer, at Westminster, praying that the King would be graciously pleased to order right to be done in his Court of Exchequer. The petition here is special; if it were general, it may be admitted, that it should be delivered to the Chancellor (4).

[ALDERSON, B.—The King does not say, let right be done in his Court of Exchequer; he merely says, "let right be done."]

[LORD ABINGER, C. B.—Suppose the Attorney General should advise the King to refer this matter to the Court of Chancery: how can we interfere, unless he advises that the petition should be referred here?]

In *Sir Henry Neville's case* (5), this Court entertained the petition respecting the grant of the office of the keeper of a park, and the prayer was, that the deed might be recorded.

[ALDERSON, B.—How does it appear from that case, that there had not been a reference of the petition to the Exchequer?]

The mode of proceeding for restitution from the Crown, of real or personal property, is either by petition of right, or *monstrans de droit*; but, the latter is only the proper remedy, where the right of the party, as well as the right of the Crown, appears upon record. The former is in use, where the King is in full possession of any hereditaments or chattels; and the petitioner suggests such a right as controverts the title of the Crown, grounded on facts disclosed in the petition itself—3

(3) Cap. 22, 7S, a.

(4) *Stamford's Prerogative*, 7S, a.

(5) 1 Plowd. 377.

Blackstone's Commentaries, 255. In a note at the end of *Sir Henry Neville's case*, it is stated, "From this record, may be seen the order and form, how one, who has a rent out of land in the King's hands, shall make his petition to the Court of Exchequer, to come at it without making petition to the King's person; and also how he shall have the judgment executed, for it is not the course to command by parol, that payment be made; but a writ, in the form aforesaid, shall be awarded by the Barons." This petition is directed to the Court of Exchequer; where all is done by his Majesty in his Court of Exchequer; he is supposed to be present in all his courts.

[LORD ABINGER, C. B.—In the King's Bench always, but not in the Exchequer.]

In *Sir Thomas Wroth's case* (6), this Court, upon a petition by Sir Thomas Wroth, awarded to him the arrears of an annuity, granted to him for his life, by King Henry VIII., by patent, for the exercise of an office. In *Manning's Revenue Branch of the Exchequer Practice*, 84, it is stated, "When the property of the subject is invaded or withheld, the prerogative does not prevent the injured party from obtaining restitution or payment. The course, therefore, prescribed by the common law, is to address a petition to the King in one of his courts of record, praying that the conflicting claims of the Crown and the petitioner may be duly examined."

[BOLLAND, B.—The question in *Sir Thomas Wroth's case* was, whether the Court of Augmentation was so annexed to the Court of Exchequer, as to give the latter a joint or independent right.]

[LORD ABINGER, C. B.—Suppose the King had indorsed, "Let right be done in the Court of King's Bench."]

That would have been no answer to the prayer of this petition, which asks for a specific remedy. In *Coke's Entries*, 402, the petition is general in the precedent given there. Also in *Viner's Abridgment*, title 'Prerogative of the King,' 552, it is stated, "That the Justices of B. R. may proceed to the examination of the matter by themselves, (if the petition contains that the King commands them to examine it,) and this without the original out of Chancery."

(6) 1 Plowd. 432.

[ALDERSON, B.—That must be an indorsement: how can the petition contain a command?]

The cases cited were general petitions, with general indorsements; but here there is a special prayer to the King in his Court of Exchequer; and the King, by his indorsement, assents to that prayer.

LORD ABINGER, C.B.—If one precedent had been cited, to shew, that upon such a general indorsement as this by the King, of "Let right be done," the matter had been referred to the Court of Exchequer, which had adjudicated upon the petition, I should have yielded to that authority; but no authority has been cited, to warrant our interference in this case at all. Unless the King indorses the petition to this Court, it has no jurisdiction to entertain it. The prayer is, that his Majesty be graciously pleased to order that right be done; on which, there is a reference of the petition to the Attorney General, for his advice; the result of which, we do not know. The ground of my opinion is, that it does not appear at present that this Court has any jurisdiction.

BOLLAND, B. concurred.

ALDERSON, B.—It is stated in *Comyns's Digest*, title 'Prerogative,' (D.) 80, "A petition may have a special conclusion that the King command his Justices of B. R. or C. B.; and if it be indorsed accordingly, it shall be pursued there." Now, what is the meaning of the word "accordingly"? This is not so indorsed, and, therefore, this Court has no jurisdiction.

Discharged.

1837. }
June 7. } THURNELL v. BALBIENIE.

Contract—Pleading—Valuation.

The declaration stated, that the defendant agreed to purchase of the plaintiff certain goods, at a valuation to be made by N. and M., or their umpire, and that M. refused to attend to value, whereupon N. valued the goods to the defendant. Breach, that the defendant refused to take the goods so valued, and to pay the price:—Held bad, upon special demurrer; there being no agreement that the defendant would take the goods at the valuation of N. only.

Assumpsit.—The declaration stated, that the defendant occupied certain rooms of the plaintiff's, as his tenant, in which were certain goods, fixtures, chattels, and effects (enumerating them) of the plaintiff's, of great value, to wit, of the value of 500*l.*; and thereupon, heretofore, to wit, &c., it was agreed by and between the plaintiff and defendant in manner following, that is to say, the said plaintiff then agreed to sell and deliver to the said defendant, who then agreed to purchase and take of the said plaintiff the said goods, fixtures, chattels, and effects, at a valuation to be made by certain persons, to wit, Mr. Newton and Mr. Matthews, or their umpire. Mr. Newton to value for the plaintiff, and Mr. Matthews for defendant. It then alleged mutual promises between the parties; and that Mr. Newton was ready to value on behalf of the plaintiff, and requested Mr. Matthews to meet, to value on behalf of the defendant; which he refused to do. It then stated a notice by plaintiff to defendant, that Mr. Newton was ready to meet Mr. Matthews or any other person whom defendant would appoint, at any time within ten days; but that the defendant wholly refused to appoint any day for Mr. Matthews to value, and wholly neglected to nominate any other valuer, and, during all that time, wholly refused and neglected to take any steps to value as aforesaid, or cause or procure the same to be valued according to the said agreement and promise of the defendant, and during all the time aforesaid, wholly refused to value the said goods, fixtures, chattels, and effects, or let the same be valued according to the said agreement and promise of the defendant as aforesaid; and thereupon the said Mr. Newton, afterwards, and after the lapse of a reasonable period of time, to wit, of one month from the day and year last aforesaid, proceeded to value, and did then value, the said goods, chattels, effects, and fixtures; and the price thereof upon such valuation, reasonably amounted to a certain sum of money, to wit, 500*l.*, whereof the defendant had notice, and was requested to pay the same. Averment, that since the valuation the plaintiff hath always been ready and willing to sell and deliver to the defendant the goods, chattels, fixtures, and effects, and to receive the value there-

of. Breach, that the defendant did not nor would take the said goods, &c., so agreed by him to be taken as aforesaid, and pay to the plaintiff the value thereof, but hath hitherto wholly neglected and refused so to do, whereby the plaintiff hath been put to great inconvenience and loss, and hindered and deprived of the benefit of disposing of the same to advantage, and of the use of them, &c.

Special demurrer, assigning, among other causes, that the declaration contains no agreement or promise to take the said goods at their value generally, or at the value made by the said Mr. Newton, but at the valuation only of the said Mr. Newton and Mr. Matthews, or their umpire.

Joinder in demurrer.

Kelly, in support of the demurrer.—This declaration cannot be supported, as the defendant is not liable for the refusal of Matthews to value. Here no valuation has been made by Newton and Matthews, or their umpire, according to the agreement. It is not alleged that Matthews was prevented from valuing by the defendant.

[LORD ABINGER, C.B.—There was no understanding that if Matthews refused, Newton should at all events value.]

He was then stopped by the Court.

Hoggins, contra.—It is specifically averred, that the plaintiff's valuer was ready to meet the defendant's valuer; and the breach is, that the defendant has wholly neglected and refused to take the goods, chattels, fixtures, and effects, agreed to be taken by him, and to pay the plaintiff the value thereof. In *Hotham v. the East India Company* (1), a mere refusal was held sufficient. *Raymay v. Alexander* (2) is also in the plaintiff's favour. In the case before the Court, the defendant was to purchase goods and chattels of the plaintiff then in the defendant's possession, to be valued by two parties named. The plaintiff's valuer was ready to proceed, and upon the refusal of the defendant's valuer, ten days' notice and time for him to value was given. It is charged that the defendant has wholly refused to let the goods be valued, according to his agreement and promise.

(1) 1 Term Rep. 638.

(2) 1 Yelv. Rep. 79.

LORD ABINGER, C.B.—The declaration is bad. The agreement is, that defendant should purchase goods of the plaintiff, to be valued by two persons, one on behalf of each; and the declaration states, that the valuer for the defendant refused to value; but it nowhere appears, from the agreement, that, upon such a refusal, the defendant was to be bound to take the goods at the valuation of the plaintiff's valuer alone. It is another thing, whether there may be any remedy for goods sold and delivered upon a *quantum valebant*; that does not arise upon this demurrer.

ALDERSON, B. and BOLLAND, B. concurred.

Judgment for the defendant.

Hoggins then applied for leave to amend, which was granted on payment of costs.

1837. { DOE d. REES v. WILLIAMS
AND WIFE.

Devise—Trust Estate—Presumption—Reconveyance.

C. S. devised all her real and personal estate to trustees, in manner following, viz.—“I give my houses, &c. into the hands of the said trustees, to pay 2l. a year to M. D. for life.” (Then followed some pecuniary legacies.) “And I also give the sum of 5l. in the year to my grand-niece, Elizabeth Jones, and I hereby constitute the said trustees executors of my will; and that, after all my just debts are paid, the residue of my personal and real property to be equally divided between my two grand-nieces, Catherine Jones and Elizabeth Jones, the legacies only excepted.”—Held, that the trustees took a legal estate in fee in the property so devised.

The survivor of the two grand-nieces having been in exclusive possession of the property since 1815, when Elizabeth died, up to which time each had enjoyed a moiety:—Held, that against such possession, no presumption of reconveyance by the trustees, could arise in favour of the husband of Elizabeth claiming as tenant by the curtesy, though all the trusts of the will were executed previously to 1815.

Ejectment for a moiety of a freehold house, &c., and a moiety of leasehold premises in Kidwelly.

At the trial, before Williams, J. at the Carmarthen Spring Assizes, 1836, a verdict was taken for the plaintiff, subject to the opinion of the Court on the following

CASE.

John Stephens, being seised in fee of the entirety of the freehold hereditaments, whereof a moiety is in question, and being absolutely entitled to the entirety of the leasehold estate, whereof a moiety is in question, under a lease granted to him by a Mr. Pemberton, by his will duly executed and attested, dated the 31st of March 1795, devised as follows:—

"I give and bequeath unto my well-beloved wife, Catherine Stephens, all that house, gardens, messuages, lands, and tenements, situate in Lady Street, in the borough of Kidwelly, and county of Carmarthen, in as ample a manner as they are by me now enjoyed; which house, gardens, messuages, lands, and tenements, were part and parcels of lands bought by me of W. O. Brigstocke, Esq.; and it is my further will, that the said Catherine shall possess, own, and enjoy the same, she, and her heirs, executors, and assigns for ever, to be disposed of as she or they may think fit. And I do likewise bequeath the lease of Mr. Pemberton's lands, houses, and barn, to my beloved wife, Catherine Stephens, during the lives of John and David Stephens, if they should survive her, and afterwards to her heirs, whom she shall think fit during the lease. And, as to whatever I shall die possessed of, the marriage settlement made between me and the said Catherine, dated the 19th day of July 1773, shall continue in full force, without any infringement, alteration, or change whatever. In witness," &c.

The testator died soon after the date and execution of his will, leaving his wife Catherine surviving him; who thereupon took possession of the freehold and leasehold estates of her husband, and continued in such possession till her death.

On the 25th of September 1799, Catherine Stephens, by her will, duly executed and attested, devised as follows:—

"All my property, real and personal, whatsoever and wheresoever, either in

possession, reversion, remainder, or expectancy, I give and bequeath to Mr. Thomas Taylor, of the county of the borough of Carmarthen, and Mrs. Eleanor David of the Yarmouth Arms, in the said borough, in trust, in and for the uses and purposes following, viz.: I give and bequeath the house, land, and appurtenances I hold and am possessed of, by the last will and testament of the late John Stephens, my husband, deceased, into the hands of the said Thomas Taylor and Eleanor David, to pay the sum of 2*l.* sterling English money, viz., 10*s.* on the first quarter-day which is next after my decease, and so continue every three months, to Margaret Davis, during the natural life of the said Margaret Davis, and no longer. And I also give and bequeath to William Jenkins, of Hendgrass, in the parish of Llanstury, in the county of Carmarthen, the sum of 10*l.* of lawful money of Great Britain, to be paid in six months after my decease. And whereas my grand-niece, Catherine Jones, is now apprenticed to Catherine Edwards, in consideration thereof, I leave 10*l.* per year to be paid to the said Catherine Edwards, milliner and mantua-maker, of the borough of Kidwelly aforesaid, in regular quarterly payments. And I also give and bequeath unto my grand-niece, Elizabeth Jones, the sum of 4*l.* of lawful money of Great Britain, to be paid her at four regular quarterly payments every year, until she shall attain a suitable age to go to a proper apprenticeship; and, that the sum of 4*l.* 4*s.* be paid for such apprenticeship, and the sum of 10*l.* for the first year, and the sum of 10*l.* also for the second year of such apprenticeship; and also the sum of 5*l.* in the year, to her, the said Elizabeth Jones, in regular quarterly payments, the same as enjoyed by her sister, Catherine Jones, to her and her heirs for ever. And I hereby constitute and appoint the above-mentioned Thomas Taylor and Eleanor David executors of this my will, as well as guardians of my two grand-nieces, Catherine and Elizabeth Jones; and that, after all my just and lawful debts are paid, the residue of my personal and real property in possession, or to come into possession of my said executors, to be equally divided between my two said grand-nieces, the legacies otherwise mentioned excepted."

In the month of September 1799, Catherine Stephens died without having revoked her will, leaving her grand-nieces, Catherine Jones and Elizabeth Jones, surviving her; in a short time after her death her grand-nieces entered into possession of the property so devised by the will of Catherine Stephens, to the trustees Thomas Taylor and Eleanor David, and received the rents and profits thereof to their own use and for their benefit.

On the 6th of October 1814, Elizabeth Jones married John Lewis Rees, the lessor of the plaintiffs, she at the time being in possession, and in receipt of a moiety of the rents and profits of the freehold and leasehold property, late of John Stephens, and her sister, the said Catherine Jones, being in possession and in the receipt of the other moiety. After the marriage, the lessor of the plaintiff entered into possession of his wife's moiety of the said freehold and leasehold property, and received the rents thereof during her lifetime.

In the month of September 1815, Elizabeth, the wife of the lessor of the plaintiff, was delivered of a living child, which soon afterwards died, and the wife also died about two months afterwards, leaving her husband surviving; and upon her death the defendants took possession of the whole property, and received both moieties of the rents to their own use, and up to the commencement of the action continued in possession.

The annuity bequeathed to Margaret Davis, by the will of Catherine Stephens, was paid to her during her lifetime, and she died in 1804; and the legacy bequeathed to Jenkins was paid to him about the year 1812.

John Stephens and David Stephens, named in the will of John Stephens the testator, are still living.

It was agreed at the trial, that if this Court should be of opinion that, under the circumstances, the jury ought to have been directed to presume a conveyance from the devisees in trust, under the will of Catherine Stephens, the parties should be in the same situation as if the jury had found that that conveyance had been made at the time at which the Court should consider such presumption to have arisen.

The question for the opinion of the Court was, whether the lessor of the plaintiff was entitled to recover one moiety of the freehold or of the leasehold estate, late of the testator John Stephens. If the Court should be of opinion, that the plaintiff was entitled to recover a moiety of the freehold estate, and a moiety of the leasehold estate, then the verdict to stand; if they should be of opinion, that the plaintiff was entitled to recover a moiety of the freehold, but not a moiety of the leasehold, then the verdict to be confined to the moiety of the freehold. But if the Court should be of opinion that the plaintiff was not entitled to recover any part, either of the freehold or of the leasehold estate, then a verdict to be entered for the defendant.

G. Wilson, for the plaintiff.—There is nothing discoverable on the face of the will which makes it necessary that the trustees should take the legal estate; but even if they did, the Court would, under the circumstances, presume a reconveyance in favour of the present lessor of the plaintiff, who claims as tenant by the curtesy. The rule on this subject is to be found in *2 Saund. 11*, and is recognized in terms in *Kenrick v. Lord Beaucherk* (1). So in *Doe v. Barthrop* (2) it is laid down by Heath, J. that the legal estate of the trustees is to be carried only so far as is necessary to effectuate the several intentions of the will. Now, the cases shew, that a mere direction to pay annuities or legacies is not enough to confer a legal estate; but, at all events, the trustees could only take such an estate for the lives of the annuitants—*Jones v. Lord Say and Sele* (3), *Doe v. Simpson* (4), *Doe v. Nicholls* (5). The trusts of the will were satisfied in 1812, when the last legacy was paid; and a reconveyance at that time should be presumed. With regard to the leasehold property, it is objected, that the husband should have taken out administration; but he claims here in his marital right as survivor of his wife, and not as administrator. (See *Williams on Executors*, 489.) The lease must be taken to

(1) 3 Bos. & Pul. 175.

(2) 5 Taunt. 685.

(3) 8 Vin. Abr. 262, pl. 19.

(4) 5 East, 162.

(5) 1 B. & C. 336; s. c. 1 Law J. Rep. K.B. 124.

have been one for years, as the statement is, that John Stephens was absolutely entitled, under a lease granted "to him," which is to be understood as being to him, his executors and administrators.

Chilton, contra.—According to the rule cited on the other side, the trustees here took the legal estate. This was necessary to them, for the purpose of paying the annuities and dividing the estate between the grand-nieces—*Doe v. Field* (6), *Doe v. Woodhouse* (7), and *Anthony v. Rees* (8). Moreover, there is no bequest of the residue to the nieces, till after the debts are paid. In the meanwhile, and for the purpose of paying those debts, the legal estate must have been in the trustees. The words, "to be equally divided," further imply a power of conveyance given to them, which is inconsistent with their having any less estate. Then how has that estate been taken out of them? A reconveyance cannot be presumed against the fact of possession by the present defendant since the death of Elizabeth Rees in 1815; nor, from the circumstances set forth, is it possible to suppose that any division of the property was made. Then, as to the leaseholds, it is clear that they cannot be recovered; for if the lease was for lives, the plaintiff fails, not being heir-at-law; if for years, he should have taken out administration.

Wilson, in reply.—The general provisions of the will create a *charge* of legacies and debts upon the real estate, which is not, of itself, enough to vest the legal estate. The only duty directly imposed on the trustees, is that of paying the annuity to Margaret Davies, and that duty ceased in 1804, when the estate, which was necessary for the satisfaction of the annuity,

also ceased—*Doe v. Needs* (9). The phrase, "after all my just and lawful debts are paid," has not the effect of postponing the estate, but to make it subject to such payment. Then, as to the division of the estate, nothing more is meant by the words, than that the grand-nieces should take as tenants in common.

LORD ABINGER, C.B.—It is quite clear, that the lessor of the plaintiff must fail as to the leasehold property. The case might have been different, if it had been stated to have been a lease for years; but, as it is, in all probability the lease was one for lives, in the usual form. The lessor of the plaintiff can recover only on the strength of his own title, and must fail if there is any case in which that title may be defective. It is incumbent on him to shew that it was a lease for years. We will consider the point as to the freehold property.

Cur. adv. vult.

Afterwards,

LORD ABINGER, C.B. said, the only undetermined point in this case was, whether the plaintiff was entitled to recover the freehold estate devised by the will of Catherine Stephens. The first question is, whether the trustees took the legal estate in fee; and though there is some obscurity in the will, the Court, on the whole, is of opinion that they did so. The ejectment, therefore, cannot be sustained, unless a reconveyance from the trustees can be presumed. We are of opinion, that, under the circumstances of the case, such a presumption cannot be made. The lessor of the plaintiff has exercised no act of ownership since his wife's death; and the presumption of a reconveyance would therefore be not in favour of possession, as it ought to be, but against it. The defendant is consequently entitled to judgment, as to the whole property in dispute.

Judgment for the defendant.

(6) 2 B. & Ad. 564; s. c. 9 Law J. Rep. K.B. 274.

(7) 4 Term Rep. 89.

(8) 2 Cro. & Jer. 75; s. c. 1 Law J. Rep. (N.S.) Exch. 44.

(9) 2 Moo. & W. 129; s. c. ante, 59.

IN THE EXCHEQUER CHAMBER.

Cases in Error.

1836. } JAMES AND ANOTHER v.
Feb. 24.* } PLANT.

Way—Extinguishment—Construction of Deed of Partition.

By deed of partition, two estates, formerly distinct, but which had become vested in coparceners, were conveyed to a trustee, together with all ways, paths, passages, easements, &c., to the said messuages, &c. belonging, appertaining, or therewith usually held and occupied or enjoyed, to have and to hold the said messuages, &c., with the appurtenances as to one estate, to the use of A. in fee, and as to the other, to the use of himself in recovery:—Held, that, on this deed, there was sufficient evidence of an intention, that a way, which had been usually enjoyed by the occupier of the one estate over the other, and which was used up to the time of the deed of partition, should pass to the uses limited as to the former estate, under the word appurtenances: and that, as the re-lessee to uses as to the one property took no estate, he had not such a seisin of the soil of the two as should extinguish the right of way.

This was a writ of error, upon the judgment of the Court of King's Bench, in this case, which is reported as *Plant v. James*, in 3 *Law J. Rep.* (n.s.) *K.B.* 64 (1). It was argued, in the vacation after Trinity term, 1835, by Sir *W. W. Follett*, for the plaintiffs in error; and *R. V. Richards*, in support of the judgment of the Court below. *Com. Dig.* 'Chemin,' (D) 3; *Bro. Abr.* 'Extinguishment and Suspension,' p. 15; and *Barlow v. Rhodes* (2), were the only new authorities cited, and the Court

took time to consider; their judgment was delivered in Hilary term vacation, 1836, by—

TINDAL, C.J.—This case comes before us upon a writ of error, brought on a judgment of the Court of King's Bench, given for the plaintiff below, upon a demurrer to the defendant's plea, that Court having, in effect, determined by their judgment that the right of way, under which the defendants below have justified the trespasses complained of, did not pass, under the indenture of release, the fine and the recovery set out in the defendant's plea. There will be no necessity for us to enter into a discussion of the principles of the law upon which the judgment of the Court below has proceeded, with respect to which principles there is no difference in opinion between this Court and the Court of King's Bench. We all agree that, where there is a unity of seisin of the land, and of the way over the land, in one and the same person, the right of way is either extinguished or suspended, according to the duration of the respective estates in the land and the way; and that, after such extinguishment, or during such suspension of the right, the way cannot pass as an *appurtenant*, under the ordinary legal sense of that word. We agree also in the principle laid down by the Court of King's Bench, that, in the case of an unity of seisin, in order to pass a way existing in point of use, but extinguished or suspended in point of law, the grantor must either employ words of express grant, or must describe the way in question as one "used and enjoyed" with the land which forms the subject-matter of the conveyance. But, agreeing thus far with the Court below, we feel ourselves compelled to differ from it in the application of these principles to the present case; for, we think the intention of the grantors to pass the way in question

* Present—Tindal, C.J., Lord Abinger, C.B., Park, J., Bosanquet, J., Vaughan, J., and Alderson, B.

(1) And also in 5 *Barn. & Ad.* 791.

(2) 1 *Cr. & Moo.* 503; s. c. 2 *Law J. Rep.* (n.s.) *Exch.* 91.

to the owner of the Park Hall estate, appears from the deed itself, and that there are words contained in that deed sufficient to carry such intention of the parties into effect.

It appears from the recitals in the deed, that, at the time of its execution, that is, on the 10th of November 1812, the Park Hall estate, in respect of which the right of way is claimed, was vested in the two sisters, Maria, the wife of Thomas Smallwood, and Elizabeth Hector, as coparceners in fee, claiming by descent from their father; and that, at the same time, the Wood's Eaves House estate, which comprises the land over which the way extends, and which came from their mother, was vested in them as tenants in common, in tail general, under a settlement made upon their father and mother's marriage.

There can be no doubt, therefore, but that any right of way, which before unity of seisin of these two properties, might have belonged to the Park Hall estate over the lands of the Wood's Eaves House farm, became suspended in law from the moment when such unity of seisin commenced, and that such suspension of the right would continue until the unity of seisin should cease by the determination of the estate tail. It appears, however, from the plea, the averments in which are admitted by the demurrer to be true, that, long before and at the time of the making of the said indenture, &c., the occupiers for the time being of the Park Hall estate, had always been used to have and enjoy a certain way therein described over the closes, in which, &c. and back again, for the convenience, use, and occupation of Park Hall aforesaid; and that such way had, before and at the time of making of the indenture &c., been always held, occupied, and enjoyed therewith; and that this was the very same way in dispute between the parties, is evident, as well from the defendants' justifying under it, as from the plaintiffs' not new assigning trespasses committed out of and beyond this way so described in the plea. It appears, therefore, judicially to the Court, that the way in question always existed as a way for the convenient use and enjoyment of Park Hall, and has always been held and occupied and enjoyed therewith, that is, not only

before the unity of seisin of the lands and way over it, but since and during that unity, and notwithstanding the legal effects of such unity of seisin, and indeed up to the very time of the execution of the deed. This being so, the reasonable inference must be, that, in a deed making a partition between the two sisters, it was the intention of the contracting parties, that each should take the whole of the estate allotted to her in the same plight and condition, as to all its conveniences and means of enjoyment, as it was held and occupied at the time such partition was made, and no reason can be suggested, *à priori*, for supposing that a way, which had always been found useful and convenient for the enjoyment of the Park Hall estate, and which, for that purpose had been always held and enjoyed by the tenants of Park Hall, and which continued so to be up to the time of the very partition made, should, after the partition, cease to be held and enjoyed for the same purpose, by that sister to whom Park Hall was allotted. Indeed, so strong is that inference, that authorities are not wanting to shew that, where a way has been extinguished by the unity of seisin of two estates, by the partition of those estates the way is revived. Thus, it is laid down as law (3), that "a way is extinguished by unity of possession, and is revivable afterwards upon a descent to two daughters, where the land through which &c. is allotted to one, and the other land to which the way belonged, is allotted to the other sister; and this allotment, without specialty to have the way anciently used, is sufficient to revive it." And to the same point is the authority of *Bro. Abr.* 'Extinguishment,' 15, with this difference only, that Lord Brooks adds, "*tamen videtur, que est novel chimin.*" But, independently of this general inference of intention, resulting from the object of the parties being that of effecting a partition, we think the intention of the parties, that the way should pass, is to be inferred more particularly from the frame and texture of the deed itself: for the grantors convey to Haxley, the grantee, the lands comprised in Park Hall, and the lands comprised in Wood's Eaves House farm, and all ways,

(3) *Jenk. Cent. Ca.* 37.

paths, passages, &c. to the said several messuages, lands, and hereditaments belonging, or in anywise appertaining, or therewith usually held, used, occupied or enjoyed. Haxley, therefore, takes under the latter words the way in question, which, according to the allegation in the pleadings, was held and enjoyed with Park Hall. And we can assign no object for which this way could have been granted to him, unless it were intended to pass it, through him with the land itself, upon the several uses which are subsequently declared as to Park Hall. Upon the first point, therefore, we think the intention of the grantors to pass this way sufficiently appears; and then the only question is, whether there are words in the indenture of release sufficient, upon their legal construction, to pass such right of way. Now, the deed of release, after describing the premises intended to be conveyed in the terms before adverted to, proceeds in the *habendum* thus: "To hold the said messuages or tenements, called Park Hall and Park House, with the buildings, lands, and hereditaments thereunto belonging, thereby before granted and released, and every part and parcel thereof, with their and every of their appurtenances, unto Haxley and his heirs, to such uses as are therein declared." The deed then contains a covenant, on the part of Smallwood, that he and his wife will levy a fine of the Park Hall and Park House estate, and that the fine shall be levied of the several messuages or tenements, lands, hereditaments and premises thereby before granted and released; and that Haxley and his heirs shall stand seised of all the same messuages or tenements, lands, hereditaments, and premises, and every of them, and of every part thereof, with the appurtenances, to the several uses thereafter declared of and concerning the same respectively, that is to say, as to, for, and concerning the whole of the messuages and tenements called Park Hall, with the buildings, lands, hereditaments, and appurtenances thereunto respectively belonging, to the use of such person," &c. And we think that the word *appurtenances*, where it occurs in that part of the *habendum* which relates to the Park Hall estate, and again, where it occurs in the declara-

tion of uses of the fine, is not confined to that which is, in legal strictness, an *appurtenance*, such as an easement, the enjoyment whereof has never been interrupted by unity of possession, or extinguished by unity of seisin; but that it will let in and comprehend the right of way, "which has been usually held, used, occupied, and enjoyed with the Park Hall and Park House estate," as above expressed in the operative part of the deed itself, that is, the very way which is now in dispute. The deed itself forms a glossary for the word, by which glossary it is to be interpreted.—[See the cases, to this point, well collected in the argument of counsel, in the case of *Cholmondeley v. Clinton* (4).]—It has been urged in argument, that, even if the word *appurtenances* is capable of receiving a more enlarged meaning from the context, yet that the way in and over the lands of the Wood's Eaves estate did not and could not pass by those general words, for the soil itself of both the estates passed to the same trustees. But to this, it appears to us to be a sufficient answer, that, whilst the Wood's Eaves lands are conveyed to Haxley, to the use of him and his heirs, to the intent that he may suffer a common recovery, no estate whatever is conveyed to him in the Park Hall estate, but he is a mere re-lessee to uses only; and, with respect to such re-lessee, it is a known doctrine, that, since the statute, he takes no interest whatever in the land; that, on his account, it can neither escheat nor be forfeited, nor is it subject either to dower or curtesy, on account of his momentary seisin. And we know of no authority, and without it there is no reason for holding that such momentary seisin of the land shall operate to extinguish a right of way by unity of seisin.

We, therefore, think, that we can construe the deed so as to carry into effect the manifest intention of the parties, when we hold the words of it to be sufficient, when explained by the context, to carry the right of way in dispute to the grantee of the Park Hall and Park House estate; and we think ourselves justified in such construction, according to the well-known principle, "*Benigne faciendæ sunt inter-*

(4) 2 B. & Ald. 637.

pretationes chartarum ut res magis valeat quam pereat." On these grounds we give judgment of reversal.

Judgment reversed.

1837. } NEALE V. MACKENZIE.

Lessor and Lessee — Eviction — Apportionment of Rent — Distress.

A lessor demised by parol certain premises for a year. The lessee accepted the lease, and entered upon a part. He found another person in possession of the residue, under a previous lease from his lessor. That person continued to occupy that part, in exclusion of the lessee, until the expiration of the first half year, but the lessee occupied the remainder: — Held, that the lease was void as to the former part, and therefore the rent not apportionable, consequently, that the lessor could not distrain for the rent reserved, nor any portion of it.

Error on a judgment of the Court of Exchequer, reported in 4 *Law J. Rep.* (N.S.) *Exch.* 135(1). The case was argued in Hilary vacation, 1836, by—

Bompas, Serj., for the plaintiff, and—
Cleasby, for the defendant.

The arguments were the same as were urged in the court below, but the cases of *Hayne v. Maltby* (2), *Smith v. Raleigh* (3), and *Stokes v. Cooper* (4), were cited for the plaintiff. The Court took time to consider, and the judgment of the Court was now delivered by—

LORD DENMAN, C.J., who stated the pleadings, and continued:—The question to be determined, is, whether the replication be an answer to the plea. It has been argued, that the impediment to the plaintiff's obtaining possession of the eight acres demised to Adam Charlton, by the defendant, previously to the demise made to the plaintiff, is in the nature of an eviction. On one side, it is contended, that it is analogous to an eviction by title para-

mount, the right of Adam Charlton being prior to the demise made by the lessor, and to the title acquired under that demise by the lessee; and, on the other side, that it is analogous to an eviction by the tortious act of the lessor, since the impediment arises from the wrongful act of the lessor himself, in demising land which he had already parted with; and is not to be distinguished in principle from the case of an entry upon the lessee, under a demise made by the lessor to a stranger, immediately after possession taken by the lessee. If the former of these views be adopted, the rent will be apportionable, and the distress justified by the plea, for it is clear that a person may distrain for apportionable rent; and if the defendant was entitled to distrain at all, the action of trespass cannot be maintained. If the latter view be correct, the defendant was not entitled to distrain at all, so long as the plaintiff was kept out of possession of any part by his wrongful act. But we are of opinion, that the impediment to the plaintiff's taking possession in this case, is not analogous to an eviction; for it appears to us, that no interest in the eight acres previously demised to Adam Charlton passed to the plaintiff by the demise subsequently made to him. The demise to Adam Charlton, covered the whole time during which the rent distrained for accrued. But it has been supposed, that notwithstanding the demise to Adam Charlton, by which the defendant had parted with his right of possession in the eight acres, the plaintiff by his subsequent lease took an *interesse termini* in these eight acres, for the period of his own lease, viz. one year, so as to give him a right to a term for all that period, and to the possession on the determination of the prior lease by efflux of time, or by any other lawful mode, whenever and in whatever way it should be determined, and that the existence of the prior demise being the impediment, by which alone the plaintiff was prevented from obtaining possession, under the demise to him, the case must be governed by the same principle as that of an eviction by title paramount; and, if any interest in the eight acres did pass to the plaintiff under the demise to him, we might possibly be disposed to accede to this view of the case; con-

(1) And also 2 Cr. M. & R. 84.

(2) 3 Term Rep. 438.

(3) 3 Campb. 513.

(4) Ibid. note.

sidering that eviction by title paramount means, eviction by a title superior to the titles both of lessor and lessee, against which neither is enabled to make a defence. It appears to us, however, upon authority which we do not feel ourselves at liberty to dispute, that the demise to the plaintiff of the eight acres in question was wholly void. It has been already observed, that the demise to Charlton, made previously to the demise to the plaintiff, covers the whole of the plaintiff's term, or at least the whole period for which the distress was made. Now, it is expressly laid down in *Bac. Abr.* 'Leases,' (N), which is to be considered as the language of Lord Chief Baron Gilbert, as follows: "If one make a lease to A. for ten years, and the same day make a parol lease to B. for ten years, of the same lands, this second lease is absolutely void, and can never take effect either as a future *interesse termini*, or as a reversionary interest, though the first lessee should forfeit, or otherwise determine his estate, or though the first lease were on condition, and the condition broken within ten years; neither shall the lessor have the rent reserved upon such second lease, but such second lease is absolutely void, as if none such had been made; the reason whereof is, because the first lease being made for ten years, lessor, during that time, had nothing to do with the possession, or to contract with any other for it, and the second lease being made the same day, and for no longer a term than the first ten years, would not pass any interest as a future *interesse termini* certainly, for the first lessee had the whole interest during that time, and his forfeiture or determination of it sooner, which was perfectly contingent and accidental, shall never make good the second lease, as a future *interesse termini*, when at the time of making thereof it was absolutely void, for want of a power in the lessor to contract for it; and, as a reversionary interest, it cannot be good for want of a deed." And a little further on, "But now, if such second lease had been made for twenty years, then it had been good as a future *interesse termini* for the last ten years, and void for the first ten years, for the reasons before given; but, for the last ten years it had been good, because, when the first ten years were

elapsed, the second lessee might then execute and reduce into possession by entry, as well as if it had been at first made in possession; for it had been good for the whole twenty years, if the first lease had not stood in the way, and that can stand in the way no longer than it continues, and therefore, by its termination, lets in the second lease; but, as a grant of the reversion, such second lease could not be good for want of a deed, for the reasons before given; neither could any attornment help it, or let in the second lease, till the first ten years ran out by effluxion of time." And afterwards, it is said, "That if after a lease for ten years, a second lease by deed-poll were made for twenty years, it might take effect with attornment, as a grant of the reversion, or if no attornment could be had, yet it would enure as a future *interesse termini* for the last ten years, and would be absolutely void for the first ten years, as much as if it had been made by parol." It has been remarked, that the doctrine here laid down is derived from the argument of counsel in the case of *Bracebridge v. Clowse* (5); but it may be answered, that although the matter introduced into *Bacon's Abridgment* is first distinctly found in the argument set forth at length in *Plowden*, it now stands upon the authority of Lord Chief Baron Gilbert. Moreover, the point immediately under consideration in this case, is confirmed by the opinion of Gawdy, J., in *Dove v. Williot* (6), who says, "If a lease be made for two years, and after the lessor let the land for four years, this is but a lease for two years, although the first lessee surrender, for he had no power to contract for the first two years at the beginning, but otherwise when the estate is determinable upon an uncertainty;" and *Smith v. Stapleton* (7), where the argument is fully stated, is referred to. It may be remarked also, that in *Comyns's Digest*, title 'Estates' (G) 13, it is said, "That a lease which cannot take effect in interest except by possibility, if it be not an estoppel, shall be void; as if tenant in fee leases by parol to A. for nine years, and the same day to B. for nine years, the lease to B. shall be void." For

(5) *Plowd.* 421.(6) *Cro. Eliz.* 160.(7) *Plowd.* 426.

this is cited *Plowden*, 432, and though this statement be only part of the language of the apprentice, who argued the case of *Smith v. Stapleton*, Chief Baron Comyns, by introducing it in this general way, must be considered as adopting it, in some degree, at least, as authority; to what is said by Gawdy, J., as referred to in *Cro. Eliz.* 160, there is afterwards added, *Smith v. Stapleton*, though it is not clear whether this was his language or that of the reporter. This same doctrine, as far as regards a second parol lease for years, after a former lease for years, appears to have been treated as clear law in various books; though the effect of such a lease made after a prior lease for life, has been the subject of discussion—See *Bro. Abr.* 'Lease,' pl. 35, 48; *Plowden*, 521, n., *Welchden v. Elkington* (8), *Sir Hugh Cholmondeley's case* (9), in the argument of *Cook v. the Attorney General*. So in *Watt v. Maydenwell* (10), "If a man make a lease for twenty-one years, and after makes a lease for twenty-one years by parol, that is merely void; but if the second lease had been by deed, and he had procured the former lessee to attorn, he should have the reversion—*Edward v. Staler* (11)." So *Sheppard's Touchstone*, 275, b, "If the second lease be for the same or a less time, as if the first lease be for twenty years, and the second lease be for twenty or for ten years, to begin at the same time, these second leases are for the most part void; but if the second lease be by fine, deed indented, or poll, it may pass the reversion with attornment, when attornment is necessary, and without, if not necessary. But, if the second lease be by word of mouth, it is otherwise."—"And if the second lease be by fine or deed indented, then it may work, by way of estoppel, both against the lessor and the lessee, so that if the first lease happen by any means, as by surrender or otherwise, to determine before it be run out, then the second lessee shall have it." Upon these authorities, therefore, we feel ourselves obliged to hold that the lease to the plaintiff was utterly void, so far as regarded the eight acres demised to Charlton.

If that be so, we are unable to distinguish the case in principle from that of *Gardiner v. Williamson* (12), where the tithes of a parish, together with a messuage used as a homestead for collecting the tithes, having been demised by parol at a rent of 200*l.* per annum, and a distress made for arrears, the Court of King's Bench held, that an action of trespass would lie, because the demise of the tithes being by parol was void. There was no valid demise, it was said, of the whole subject-matter, nor any distinct rent reserved for that part of it upon which there might have been a legal distress. That case was the stronger, because it was contended that the whole rent must be taken to be issuable out of the corporeal hereditament, upon which a distress could be made. And, accordingly, in a case of a lease by indenture, Dyer is reported to have held (13), that if lands at common law and copyhold lands are leased by indenture, rendering rent, all the rent is issuing out of the lands at common law; for the lessor had no power to make such a lease of copyhold; wherefore, as to this, the lease is utterly void," but it is added, that if a man lets lands, parcel of which he is seised of by disseisin, then the rent is issuing out of all the land; and by the entry of the disseisee the rent shall be apportioned, because the lease of this was not void, but voidable. In this last case, the tenant took an interest, and enjoyed all the lands demised till the time of his being evicted from a parcel thereof by the disseisee, and was, therefore, liable in respect of such interest and enjoyment to a portion of the rent. In the case before the Court, which is not the case of a demise by indenture, the rent is reserved in respect of all the land professed to be demised, and to be issuing out of the whole and every part thereof; and as the plaintiff, as to a portion of the land comprised in the demise (which might be great or small, as far as the principle is concerned), has taken no interest, and had no enjoyment, and is not bound by any estoppel, we are of opinion, that the distress made by the defendant is not justifiable either in

(8) *Plowd.* 521; *Plowd. Queries*, 122, 161.

(9) *Moore*, 344.

(10) *Hutt.* 105.

(11) *Hard.* 345, arg.

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(12) 3 *Barn. & Ad.* 336; s.c. 9 *Law J. Rep.* K.B. 233.

(13) *Moore*, 50.

respect to the whole rent reserved, or any portion of it.

It may further be observed, that even supposing the plaintiff to have taken an *interesse termini* in the eight acres, capable of being executed by entry, in case the demise to Charlton should happen to be forfeited or surrendered, yet, as that demise to Charlton was in force at the commencement of the plaintiff's tenancy, and continued during the whole period, in respect of which the distress has been made, no demise of those eight acres to the plaintiff ever took effect, and, consequently, no right to any rent in respect of those eight acres has ever come into existence. And we are not aware of any case where an entire rent reserved has been held to be apportionable, in which the tenant has not been at some period subject to the entire rent by virtue of the demise. Here, the right of apportionment is not founded upon any eviction, or other matter occurring subsequently to the demise ; but, upon an original defect in the demise itself, by which the entire rent was reserved. In this respect, it is strictly analogous to *Gardiner v. Williamson*.

In the case of *Tomlinson v. Day* (14), which has been referred to, the landlord did not claim an apportioned part of an entire rent, either by avowry for a distress, or by action for the rent. It was an action for use and occupation, in which he was allowed to make use of an agreement for a lease (according to the express provision of the statute 11 Geo. 2. c. 19. s. 14) "as evidence of the quantum of damages to be recovered;" and as the defendant had been interrupted in the full enjoyment of what had been agreed for, the plaintiff was held entitled to recover a reasonable compensation for the property enjoyed by the defendant as an equivalent for rent. The interruption to the defendant's right of exclusive sporting was indeed compared by Lord Chief Justice Dallas and Mr. Justice Richardson to an eviction : but, if it was eviction, it was clearly an eviction by title paramount. The agreement for exclusive sporting was not void on account of the landlord having made a prior agreement to let it to some other person, but

it was defeated, because other persons interfered, who had a right superior to that of the landlord. Supposing the circumstances, therefore, to amount to an eviction, it would be a case of apportionment, according to the acknowledged rule, and would not assist the argument in favour of the defendant.

Upon the whole, therefore, we are of opinion, that the judgment of the Court of Exchequer ought to be reversed.

Judgment reversed.

1837.* { HITCHCOCK v. COKER.

Contract—Restraint of Trade.

Where a party undertakes to refrain partially from the exercise of a trade for a consideration, the Courts will not examine whether it be a legal consideration, and will not enter into the question whether it be adequate or not.

A person entered into the service of a chemist and druggist as an assistant, and agreed, that if he should at any time use or exercise the trade of a chemist and druggist within the town of Taunton or three miles thereof, he, his executors or administrators, would pay to the plaintiff the sum of 500L., as liquidated damages :—Held, that this was not an illegal contract, either on the ground that the restriction, being indefinite, would last beyond the master's life, or that the consideration was inadequate for the restraint.

Error from the judgment of the Court of King's Bench.

The declaration was in assumpsit, which alleged, that the plaintiff was a chemist and druggist, and the defendant was taken into his service as assistant, upon his entering into an agreement, by which, reciting, that the plaintiff had taken him into his service as an assistant, at an annual salary, upon condition of his entering into this agreement, he promised and agreed, that if he should, at any time thereafter, directly or indirectly, either in his own name or in the name or names of any other

* Present—Tindal, C.J., Lord Abinger, C.B., Park, J., Bosanquet, J., Parke, B., Alderson, B., and Gurney, B.

person or persons, use, exercise, carry on or follow the trades or business of a chemist or druggist, or either of them, within the town of Taunton, in the county of Somerset, or within three miles thereof, then that the defendant, his executors or administrators, would pay to the plaintiff 500*l.*, as liquidated damages. A breach of the agreement was alleged; and it was averred, that the defendant, in his own name, exercised the trades of a chemist and druggist in the town of Taunton.

Plea—Non-assumpsit.

At the Spring Assizes in 1835, for the county of Somerset, the plaintiff recovered a verdict. In the ensuing term, a rule *nisi* for arresting the judgment was granted by the Court of King's Bench, which was argued in Easter term, last year, by—

Bompas, Serj. and Crowder, for the plaintiff, and—

Erle and Kinglake for the defendant.

The Court took time to consider, and, in the ensuing Trinity term, made the rule absolute for arresting the judgment. The writ of error was argued on the 26th of November, by—

Sir W. W. Follett, for the plaintiff in error.—The Court below ought not to have arrested the judgment. They proceeded upon the decision in *Horner v. Graves* (1); but the principle there established is inapplicable. It appears, in the present case, that the plaintiff received the defendant into his employment upon a certain condition—namely, that if he set up as a chemist and druggist in the town of Taunton, he should pay 500*l.* First, assuming this to be an agreement in restraint of trade, it was not illegal. The plaintiff was not bound to take the defendant into his service, and therefore if he did, he was surely at liberty to make such stipulations as he thought fit; and it was not improper or unreasonable that he should prevent the defendant from doing anything which might injure his own business. Then what illegality is there in the agreement? There is no doubt that a party may bind himself not to carry on his business in a particular place during his own life, if there be a sufficient consideration. The party is at liberty to make such

a restriction as will secure him in the enjoyment of what he seeks to preserve; and the question is, whether his restraint be greater than what is requisite. The exact measure of the adequacy of consideration cannot be ascertained by any Court, for that will depend upon a variety of circumstances—it is enough, if it be shewn that there is a real consideration.

[*ALDERSON, B.*—A partial restraint may be made so stringent, as to be in fact a general restraint—the consideration would then be only colourable. In *Horner v. Graves* the party was restrained from practising for 100 miles round York.]

And therefore it was treated by the Court as a general restraint. It has been objected, and the Court below adopted the argument, that the restraint is too extensive, because it is not confined to the duration of the plaintiff's life. But that is not a valid objection. The plaintiff is entitled to protect his business: why may he not protect it for the benefit of his representatives or family, or for his partner, if he should happen to have one? His business would be assets in the distribution of his effects, or in payment of his debts. There is nothing, therefore, in principle that makes such a stipulation for a restraint beyond the plaintiff's life illegal; and certainly there is no authority, except the judgment of the Court below, which decides that it is so. If the stipulation had been for a term of years, it might have lasted beyond the plaintiff's life; yet it would hardly be held that that was void—*Mitchel v. Reynolds* (2), *Davis v. Marsh* (3), *Hayward v. Young* (4), *Homer v. Ashford* (5), *Bryson v. Whitehead* (6), *Williams v. Williams* (7), *Capes v. Hutton* (8). Secondly, it may be contended, that this is an agreement not in restraint of trade, and therefore operating by way of a penalty; but rather as an express agreement to pay the sum of 500*l.* when the defendant sets up in business.

Erle, contrà.—This agreement was invalid. A general restraint of trade is

(2) 1 P. Wms. 181.

(3) 5 Term Rep. 118.

(4) 2 Chit. Rep. 407.

(5) 3 Bing. 322; s. c. 4 Law J. Rep. C.P. 62.

(6) 1 S. & S. 74; s. c. 1 Law J. Rep. Chanc. 42.

(7) 2 Swanst. 253.

(8) 2 Russ. 357.

illegal, but a partial restraint is good, if it be no more than is requisite for the protection of the party requiring it; and secondly, if it be founded on a good and adequate consideration. The agreement fails in both respects. First, it is a restraint during the whole life of the defendant, whether the plaintiff be alive or be dead, and whether there be any other chemist or druggist in Taunton or not. As to the supposed value of the good-will of the plaintiff's business, that is too uncertain and problematical an interest to be noticed by the Court, and the parties themselves have not thought proper to insert it in their own contract. Then, secondly, no sufficient consideration is shewn on this, which is a parol contract only, to compensate for the restraint. The defendant is to render his services to the plaintiff, and to receive a salary for so doing—the plaintiff gives nothing for obtaining this restraint.

[ALDERSON, B.—How can the Court determine the adequacy of the consideration?—it is sufficient, if there appear to have been a valuable consideration.]

But if it be shewn clearly that there is no adequate consideration for the restraint, it is the same thing as though there were none. Here, the defendant appears to have entered into the agreement after he was in the service of the plaintiff, and there was nothing which bound the latter to retain him in his service after the end of the first year; so that the only apparent consideration is the salary for one year, which is a compensation for the year's service. The relation of master and servant existed between the plaintiff and defendant, but nothing further. He cited *Mitchel v. Reynolds*, *Anonymous* (9), *Leggate v. Bachelour* (10), *Jelliet v. Brond* (11), *Brugnell v. Goss* (12), *Young v. Timmins* (13), *Gale v. Reed* (14), *Horner v. Graves*, *Chesman v. Nainby* (15), and *Wickens v. Evans* (16).

Follett, in reply.—The argument for the defendant, so far as it depends upon the

adequacy of the consideration, rests entirely upon the erroneous use of the terms. It is true, the words "adequate consideration" are met with in the cases, but no more is really meant than a reasonable and sufficient consideration with reference to a return of benefit to the one party, or an injury or loss to the other—the actual amount has never been examined.

Cur. ado. vult.

On this day, the judgment of the Court was delivered by—

TINDAL, C. J.—The ground on which the Court of King's Bench held, after a verdict obtained by the plaintiff in this case, that the judgment of that Court ought to be arrested, was, that the agreement set out upon the record, and upon which the action was brought, was void in law, being an agreement in unreasonable restraint of trade: for, although the inadequacy of the consideration upon which the agreement was entered into was urged in argument as one reason for holding the agreement to be void,—and, in the delivering of the opinion of the Court, some reference was made to that objection,—yet it is manifest that it formed no part of the ground upon which the Court refused to give their judgment in favour of the plaintiff. The consideration for the agreement in question, appears to have been the receiving of the defendant into the service of the plaintiff, as an assistant in his trade or business of a chemist and druggist, at a certain annual salary; and the agreement on the part of the defendant, founded upon such consideration, is, that if he should at any time thereafter, directly or indirectly, in his own name or that of any other person, exercise the trade or business of a chemist and druggist within the town of Taunton, in the county of Somerset, or within three miles thereof, then that the defendant should, on demand, pay to the plaintiff, his executors, administrators, or assigns, the full sum of 500*l.*, as and for liquidated damages.

The ground upon which the Court below has held the restraint of the defendant to be unreasonable is, that it operates more largely than the benefit or protection of the plaintiff can possibly require—that it is indefinite in point of time, being neither

(9) *Moore*, 242; s. c. 2 *Leon*. 210.

(10) *Noy*, 98; s. c. *Owen*, 143.

(11) *Noy*, 98.

(12) *Aleyn*, 67.

(13) 1 C. & J. 331; s. c. 9 *Law J. Rep. Exch.* 4.

(14) 8 *East*, 80.

(15) 2 *Stra.* 739; s. c. 3 *Bro. P.C.* 349.

(16) 3 *You. & Jer.* 318.

limited to the plaintiff's continuing to carry on his business at Taunton, nor even to the term of his life. We agree in the general principle adopted by the Court, that where the restraint of a party from carrying on a trade is larger and wider than the protection of the party with whom the contract is made can possibly require, such restraint must be considered as unreasonable in law, and the contract which would enforce it must be therefore void; but the difficulty we feel is in the application of that principle to the case before us. Where the question turns upon the reasonableness or unreasonableness of the restriction of the party from carrying on trade or business within a certain space or district, the answer may depend on various circumstances that may be brought to bear upon it, such as the nature of the trade or profession, the populousness of the neighbourhood, the mode in which the trade or profession is usually carried on, with the knowledge of which, and other circumstances, a judgment may be formed, whether the restriction is wider than the protection of the party can reasonably require; but, with respect to the duration of the restriction, the case is different. The good-will of a trade is a subject of value and price; it may be sold, bequeathed, or become assets in the hands of the personal representatives of a trader; and if the restriction as to time is to be held to be illegal, if extended beyond the period of the party by himself carrying on the trade, the value of such good-will considered in these various points of view, is altogether destroyed. If, therefore, it is not unreasonable, as undoubtedly it is not, to prevent a servant from entering into the same trade in the same town in which his master lives, so long as the master carries on the trade there, we cannot think it unreasonable that the restraint should be carried further, and should be allowed to continue, if the master sells the trade or bequeaths it, or it becomes the property of his personal representative—that is, if it is reasonable that the master should, by any agreement, secure himself from a diminution of the annual profits of his trade, it does not appear to us unreasonable that the restriction should go so far as to secure to the master the enjoy-

ment of the price or value for which the trade would sell, or secure the enjoyment of the same trade to his purchaser, or legatee, or executor; and the only effectual mode of doing this appears to be, by making the restriction of the servant's setting up, or entering into the trade or business within the given limit, co-extensive with the servant's life: and accordingly in many of the cases which have been cited the restriction has been held good, although it continued for the life of the party restrained; and on the other hand, no case has been referred to where the contrary doctrine has been laid down. In *Bunn v. Guy* (17), a covenant of an attorney who had sold his business to two others, that he would not, after a certain day, practise within certain limits as an attorney, was held good in law, though the restriction was indefinite as to time. In *Chesman v. Nainby* (18) (in error), the condition of the bond was, that Elizabeth Vickers should not, after she left the service of the obligee, set up business in any shop within half a mile of the dwelling-house of the obligee, or of any other house that she, her executors or administrators, should think proper to move to, in order to carry on the trade; and in that case the contract was held to be valid, though the restriction was obviously indefinite in point of time, and although one of the grounds on which the validity of the contract was sought to be impeached was, that the restriction was for the life of the obligor. Again, in *Wickens v. Evans*, the agreement in restraint of trade was made to continue during the lives of the contracting parties, and no objection was taken on that ground. We cannot, therefore, hold the agreement in this case to be void merely on the ground of the restriction being indefinite as to duration, the same being, in other respects, a reasonable restriction. But it was urged in the course of the argument, that there is an inadequacy of consideration in this case with respect to the defendant, and that upon that ground the judgment must be arrested. Undoubtedly, in most, if not all the decided cases, the Judges, in delivering their opinion that the agreement in the particular instance before them was

(17) 4 Term Rep. 190.

(18) 1 Bro. P.C. 234.

a valid agreement, and the restriction reasonable, have used the expression, that such agreement appeared to have been made on an adequate consideration, and seemed to have thought that adequacy of consideration was essential to support a contract in restraint of trade. If, by that expression, it is intended only that there must be a good and valuable consideration—such consideration as is essential to support any contract not under seal—we concur in that opinion: if there is no consideration, or a consideration of no real value, the contract in restraint of trade which in itself is never favoured in law, must either be a fraud upon the rights of the party restrained, or a mere voluntary contract—a *nudum pactum*, and therefore void. But if by adequacy of consideration more is intended, and that the Court must weigh whether the consideration is equal in value to that which the party gives up or loses by the restraint under which he has placed himself, we feel ourselves bound to differ from that doctrine. A duty would thereby be imposed upon the Court in every particular case, which it has no means whatever to execute. It is impossible for the Court, looking at the record, to say whether, in any particular case, the party restrained has made an improvident bargain or not (19). The receiving of instructions in a particular trade might be of much greater value to a man in one condition of life than another; and the same may be observed as to other considerations. It is enough, as it appears to us, that there is actually a consideration for the bargain, and that such consideration is a legal consideration, and of some value. Such appears to be the case in the present instance, where the defendant is retained and employed at an annual salary. We therefore think, notwithstanding the objections which have been heard on the part of the defendant, that the plaintiff has shewn, upon the record, a legal ground of action, and, having obtained a verdict in his favour, that he is entitled to judgment.

Judgment for the plaintiff.

(19) See, as to the refusal of a court of equity to interfere by injunction in cases of hard bargains in restraint of trade, *Kimberley v. Jennings*, 5 Law J. Rep. (N.S.) Chanc. 115; *Croft v. Haw*, *ibid.* 305.

1835.

Dec. 1, 2.

1836.

Jan. 22;

May 10.*

THE EARL OF SCARBOROUGH,
v. DOE d. SAVILE.

*Will, Construction of—Shifting Use—
Clauses of Cesser—Recovery a Bar.*

Lands were devised to R. for life; remainder to trustees to preserve, &c., remainder to R's first and other sons successively in tail male; remainder to J., R's younger brother, for life; remainders to J's first and other sons successively in tail male; remainder to F., another younger brother of J.; remainder to his first and other sons successively in tail male; remainder to other younger brothers of R., and remainders to their sons successively in tail male; remainders over; subject to two provisos. The first proviso was, that all and every person or persons, who, by virtue of the will, should become entitled to a certain part of the lands devised, should, within two years after he or they should become entitled to the possession, take upon himself and themselves the surname of S., with his or their own name or names, and quarter the arms of S. with his or their own family arms; and, in case he or they should refuse or neglect to do so, the limitation to him or them, (such neglect &c., being made during certain lives of R. then in being, or within twenty-one years afterwards), should cease and determine, and become utterly void, and the lands should immediately go to the person next in remainder, in the same manner as if such person so neglecting, &c. was dead, or being tenant in tail had died without issue male. The second was, that if the title to a certain earldom should descend to any of the said R., J. &c., or to any of their sons, within the period of the existence of any of the above lives, then, and in such case, and as and when the title should come to him or them, the estate which he or they should then be entitled to in the lands, under the will, should cease and determine and become void, and the lands should thereupon go to the person and persons, who, under the limitations aforesaid, should then be next in remainder expectant on the decease and failure of issue male of the person to whom the said title should so come, in the same manner as such person or

* Present—Tindal, C.J., Park, J., Parks, B., Bolland, B., Alderson, B., and Gurney, B.

persons so in remainder as aforesaid, would take the same by virtue of the will, in case he or they, to whom the said title should come, was, or were actually dead without issue, such person or persons so in remainder performing and complying with the former proviso. The title descended to R., whereupon J. took possession, and assumed the name of S., and being in possession a recovery was suffered. The lands being conveyed by lease and release, executed by J. and his eldest son, to a tenant to the præcipe, J.'s eldest son was vouched, but not J. F. and his eldest son, while J. was in possession, by a deed reciting the above facts, released their interest to trustees, strangers in interest, to the use of the trustees in fee, and upon the trusts created on the recovery, F. and his eldest son covenanting against incumbrances, and for further assurance. The title having descended upon J., and the eldest son of F. having brought an ejectment:—Held, that it was barred by the recovery, as no new estate was created by the second proviso on the descent of the title, but the lessor of the plaintiff could only claim by virtue of the limitation, expectant upon the estate tail of J's eldest son, which was defeated by the recovery.

Semble, that the second proviso was capable of operating more than once, and that the plaintiff was not barred or estopped by the release to the trustees, or by the above covenants.

Error from the Court of King's Bench. The defendant in error brought three ejectments; one for lands in the county of Durham, another for lands in Yorkshire, and a third for lands in Nottinghamshire. There were special verdicts in all. The verdict in the first was argued in the Court of King's Bench, and judgment was given in Easter term, 1835, for the lessor of the plaintiff. The case is reported in 4 *Law J. Rep.* (N.S.) K.B. 172, n.; and in 3 *Ad. & E.* p. 2. Judgment was also signed in the third ejectment without argument, and the writ of error was brought in this court by the heir of the defendant in that action. The special verdict was the same as that set out in the case already reported, to which the reader is referred, with the addition of covenants, with two trustees in the deeds of lease and release of the 1st and 2nd of

July 1837, by Frederick Lumley the elder and Frederick Lumley the younger, for good title and for further assurance.

Sir W. W. Follett, for the plaintiff in error, contended, first, that the proviso for shifting the estates, in the event of the descent of the title, could only operate once; and having operated when the title descended upon Earl Richard, was then at an end. This is a proviso to divest a vested estate, and the Court will construe it strictly—*Doe d. Luscombe v. Yeates* (2). It cannot be shewn, that the testator intended that the estates and the title should never be united. Indeed, in some cases such a union must have taken place, and the proviso could not have applied: at least, it cannot be necessarily implied that the shifting of the estate should take place more than once—*Wilkinson v. Adam* (3). Secondly, that the descent of the title upon the tenant for life must have simply had the effect of transferring the estate to the son of the defendant below. Thirdly, that the proviso did not create new interests, but accelerated the remainders; consequently, they were barred by the recovery. The Court below, indeed, assumed that new interests were created, and that the parties in remainder had, besides vested estates in remainder, other interests as possibilities, either by way of executory devise or shifting use. This proposition cannot be supported. If the creation of remainders will satisfy the testator's intention, the Court must hold, that remainders were created; and not treat the estates as executory devises, or shifting uses; and it is not material that a power is given by the law of defeating the remainder—*Purefoy v. Rogers* (4), *Carnardine v. Carnardine* (5), *Doe v. Morgan* (6), *Gilb. Uses*, 171; *Sugd. n.* What the parties claim, in this case, is an acceleration of the remainder; and there is nothing to create a contingency; which is not the construction to be put upon any limitation, when it can be treated as vested—*Driver v. Frank* (7). Vested interests are

(2) 5 B. & Ald. 554.

(3) 1 Ves. & B. 466.

(4) 2 Wm. Saund. 380, n.

(5) 1 Ed. Ch. C. 34.

(6) 3 Term Rep. 763.

(7) 3 Mau. & Sel. 32.

certainly given, in the first instance, not subject to any contingency, but having a determinable quality annexed to them. *Newis v. Lark—Scolastica's case* (8) is strongly in point for the plaintiff in error. There, a clause to prevent the parties, to whom the estate was devised, from alienating or mortgaging the estate, assumed to be a legal clause, was held to be a limitation of the estate, and not a condition; and the judgment of the Court proceeded on the intent of the deviser, which was determined to be, that the estate tail should continue until the acts prohibited were done. That also was the intent of the deviser in the present case; the estate was to continue until the title descended upon the person holding it, and then his estate was to cease as if it had never been created. It is manifest that the repetition of the proviso as to the names and arms was unnecessary. This point, so decided in *Newis v. Lark*, has never been contradicted, and was supported afterwards in *Sharington v. Minors* (9), by *The Lady Ann Fry's case* (10), and by *Page v. Hayward* (11). The argument, on the other side, that new estates are created, is not suggested in any of these cases; and in the devise now in question is quite inconsistent with the usual practice of conveyancers, who, when they intend to create new estates, insert clauses directing the cesser, not only of the prior estates, but of all those created by the original limitation—1 *Saund. Uses*, App. No. II. 382. Then, on the determination of the particular estate, the next immediate remainder-man, if in existence, takes the estate—*Avelyn v. Ward* (12), *Doe v. Lord William Beaucherk* (13), *Gulliver v. Ashby* (14). Fourthly, assuming that new interests were created, yet, as they were collateral limitations, having the effect of determining the estate of the recoveror, they were barred by his recovery. If, indeed, there be charges antecedent to or upon his estate, the recovery

will not affect them; and it is contended, that the proviso is annexed to the life estate, and is interposed before the remainder in tail. But the proviso would not defeat the life estate alone: it puts an end to the remainder in tail; it must, therefore, be barred by the recovery.—*Roper v. Hallifax* (15), which was cited in the Court below, was the case of a power, the exercise of which gives an effect to the estates thereby created, as though they had been inserted in the instrument creating the power; and then they are charges prior to the estates defeated—*Isherwood v. Oldknow* (16). Dower may be defeated by the exercise of a power—*Ray v. Pung* (17); though not by an executory limitation—*Buckworth v. Thirkell* (18), *Moody v. King* (19). Again, the intention there was to prevent, and not to destroy, the power; and the intention of the parties is to be considered in determining the effect of a recovery—*Earl of Jersey v. Deane* (20), *Tyrrell v. Marsh* (21), *Davies v. Bush* (22). Fifthly, the deeds of July 1817 prevent the lessor of the plaintiff from recovering, because he has assigned his right to the defendant. As a possibility coupled with an interest, it was assignable—*Jones v. Roe* (23), *Doe v. Finch* (24); or he has released it. It is true he has actually conveyed to trustees, but that was on a good consideration, and the intent was to release the right. The deed, therefore, may be construed, according to the intent, as a release—*Tomlinson v. Dighton* (25); or, lastly, he is estopped by his covenant for good title, and against incumbrances, which operates as a release—*Goodtitle v. Bailey* (26), *Right v. Bucknell* (27), *Dean v. Newhall* (28).

(8) Plowd. 408.

(9) Moore, 543.

(10) 1 Ventr. 199; s. c. *Williams v. Fry*, 1 Mod. 86; *Fry v. Porter*, *ibid.* 300.

(11) Salk. 570; s. c. cited And. 263.

(12) 1 Ves. sen. 422.

(13) 11 East, 657.

(14) 4 Burr. 1929.

(15) 8 Taunt. 845.

(16) 3 Man. & Selw. 386.

(17) 5 B. & Ald. 561.

(18) 3 Bos. & Pul. 652, n.

(19) 2 Bing. 447.

(20) 3 B. & Ald. 569.

(21) 3 Bing. 31; s. c. 3 Law J. Rep. C.P. 138.

(22) M'Clell. & Y. 58.

(23) 3 Term Rep. 88.

(24) 4 B. & Ad. 52; s. c. 2 Law J. Rep. (n. s.) K.B. 41.

(25) 1 P. Wms. 149.

(26) 2 Cowp. 597.

(27) 2 B. & Ad. 280; s. c. 8 Law J. Rep. K.B. 304.

(28) 8 Term Rep. 168.

The Attorney General, contra.—1. As to the last point, the deeds may warrant an application to a court of equity, but afford no answer in law to this ejectment. They did not transfer any right. The lessor of the plaintiff had merely a possibility of interest, and he conveyed to trustees who had no interest in the estate. Now, a possibility, though assignable in equity—*Doe v. Steward* (29), is not assignable to a stranger at law—*Lampet's case* (30), *Poole v. Haskey* (31), *The Earl of Kent v. Steward* (32), *Doe v. Martyn* (33), *Whitfield v. Fausset* (34), and *Wright v. Wright* (35). They did not operate by way of estoppel, because it appears on the deeds, that the party had only a possibility—*Hermitage v. Tomkins* (36), *Poole v. Haskey*, and *Right v. Bucknell*. Then as to the release, the action has not been released. It is brought by John Doe. In point of fact, he has not executed any covenant, and the covenants actually entered into are only against incumbrances, and for farther assurance; there is no covenant not to bring any ejectment. 2. In answer to the first point, the proviso is not confined to the first descent of the title, but was intended to operate *toties quoties* successively, and though in some possible cases the union may take place, it is sufficient to say that the deviser expressly provided that the union should not take place in the event which has happened. 3. The estate is not carried over, upon the descent of the title on the Earl John to his son, but to the lessor of the plaintiff, for the devise directs that the land shall go to the person or persons next in remainder expectant on the decease and failure of issue male of the person to whom the title shall descend. 4. The recovery did not bar the interest of the lessor of the plaintiff. He claims under the new use created by the proviso, which takes effect whenever the title devolves upon a new tenant for life entitled to the estates.

(29) 1 Ad. & El. 300; a. c. 3 Law J. Rep. (N.S.) K.B. 141.

(30) 10 Co. Rep. 47, b.

(31) Orl. Bridg. 364.

(32) Cro. Car. 358.

(33) 8 B. & C. 516; a. c. 7 Law J. Rep. K.B. 60.

(34) 1 Ves. sen. 391.

(35) Ibid. 411.

(36) 1 Ld. Raym. 729.

NEW SERIES, VI.—EXCHEQ.

All interests which come after, or operate to determine the estate tail, are barred by the recovery, but the present interest overreached that estate. In *Page v. Hayward* (37), and in *Pullen v. Ready* (38), the limitations which were held to be defeated by the recovery, came after the estate tail. The effect of a recovery has been considered as depending upon three different principles. First, that there is a compensation by virtue of the voucher. That principle is inapplicable to the present case, where the tenant for life, and the trustees to preserve contingent remainders, and the party entitled under the proviso, were not vouched. Secondly, that the estate tail, and consequently the remainders supported thereby, is destroyed. This interest arising under the proviso, is supported, not by the estate tail, but, if by any estate, by the life estate, and that for the same reason is not destroyed. Thirdly, the recovery extends the estate tail into a fee, and continues it forwards. Hence, interests subsequent to the estate tail are barred, but not charges paramount or antecedent.—[A vast number of authorities were cited to establish this position.] *Roper v. Hallifax* is a direct authority for the lessor of the plaintiff, and affords a complete analogy. There is no ground for the distinction between a shifting use taking effect upon the occurrence of an event, and upon the exercise of a power. Supposing, first, that no interest were taken, except by the proviso, the recovery would not bar it; supposing, secondly, there were contingent interests under two separate provisos, the destruction of the interest under one would not affect the other; suppose, thirdly, the separate provisos were incorporated into one, the result would be the same, as the proviso would be taken divisibly—*Boyce v. Haning* (39). Here the estate is given over to a branch of a family taking also interests in remainder. But it is immaterial whether the new estate is given to a new party, or to one also taking an interest by force of another clause in the will. Still, new uses are created, and a series of new uses ex-

(37) Salk. 570.

(38) 2 Atk. 587.

(39) 2 Cr. & J. 224; a. c. 1 Law J. Rep. (N.S.) Exch. 123.

actly similar to those created in the early part of the will, arise whenever the title descends upon a tenant for life in possession. That is clearly the intention of the deviser, though there is no clause expressly creating new uses upon the cesser of the estate. The authorities cited on this point do not apply, because, in all of them, upon the cesser of the previous estate, no intermediate estate intervened to be passed over. It is suggested, that the interest under the proviso must be construed as a contingent remainder, but if it were, it must be dependent upon the life estate, and that of the trustees to preserve contingent remainders, and would not be destroyed by the recovery which has been suffered. It is clear, however, that the proviso cannot create a remainder, because the interest does not await the determination of the first estate, by the nature of the original limitation of that estate—*Fearne's Cont. Rem.* 13; and the proviso and the limitations cannot be moulded into the form of remainders, so as to give effect to all the different estates as vested remainders.

Sir W. W. Follett, replied.—First, though John Doe has not covenanted, the Court will consider who is the real party in ejectment—*Doe v. Rosser* (40). Then, if the assignment of this interest be not impossible, the Court will look to the intention, and allow the lease and release to have the effect intended—*Doe v. Cole* (41), and *Doe v. Simpson* (42). Such interests are devisable: why should they not be assignable? Certainly, the prevailing opinion of the profession is, that they are not assignable; but there has not been any conclusive authority upon the point. Secondly, the proper form for a clause, which is to operate more than once, may be found in *Fazakerly v. Ford* (43), but they are always construed strictly—*Stanley v. Stanley* (44). In *Doe v. Heneage* (45), it was never contended that new estates were created by the proviso. Thirdly, as to the effect of the recovery:—The lessor of the plaintiff

uses a complicated method of reading the limitations, which the Court will not adopt, especially as it is not necessary for the purpose of carrying the intention into effect. This will be done whether the limitation be treated as a shifting use or a vested remainder, and the Court will prefer the latter, as already argued; and see *Doe dem. Harris v. Howell* (46). The interest of the lessor of the plaintiff must be construed, having been created by a devise, as a remainder expectant on the determination of the subsisting estate, and the case is not distinguishable from *Newis v. Lark*, and *The Lady Ann Fry's case*. The passage cited from *Fearne's Cont. Rem.* p. 14, is in favour of the lessor of the plaintiff, but the doctrine there laid down cannot be supported. See *Bull. n. on Fearne*, 10; *Bull. Co. L.* 203, b; *Goodtitle v. Billington* (47); *Fearne's C. R.* p. 15, 267, where *Cogan v. Cogan* (48) is cited as an authority, but is not conclusive; *Barton's Practical Points*, p. 195; and *Atkinson's Practical Points in Conveyancing*, p. 82. Then it has been argued, that there is a distinction between a recovery suffered by a tenant in tail in possession and one by a remainder-man in tail, with the concurrence of the tenant for life; but it is unimportant, because all that is requisite is, that there should be a vested estate tail, and a determination of that with the concurrence of the freeholder. Then, there is no ground for treating the interest of the lessor of the plaintiff as divisible. It could only be supported by the suggestion of an event not contained in the devise—namely, that it should happen in the lifetime of the father. It is contended, that the proviso is confined to the life estate, or that the interest arising under it is interposed between the two estates, which it destroys simultaneously. It has not been shewn how that is done; and in answer to the argument, that the remainder in tail is not destroyed, but only its vesting in possession is prevented, it is to be observed, that the remainder in possession was actually vested, and the remainder was defeated by the proviso, at the same time as the estate for

(40) 3 East, 11.

(41) 7 B. & C. 243; s. c. 6 Law J. Rep. K.B. 20.

(42) 2 Wils. 22.

(43) 1 Ad. & El. 900; s. c. 2 Law J. Rep. (n.s.) K.B. 111.

(44) 16 Ves. 491.

(45) 4 Term Rep. 13.

(46) 10 B. & C. 191; s. c. 8 Law J. Rep. K.B. 123.

(47) 2 Doug. 755, n.

(48) Cro. Eliz. 360.

life. *Reper v. Halifax*; if good law, has not been shewa to be applicable.

Cur. adv. vult.

In Easter term, the judgment of the Court was delivered by—

TINDAL, C.J.—This case comes before us upon a writ of error from the Court of King's Bench. It is a case of great importance, not more on account of the large interests at stake between the contending parties, than from the nature of the legal questions which are involved in it; and it has been argued before us with a measure of learning and ability, on each side, corresponding with the importance of the case.

The special verdict finds, amongst other things, the seisin of Sir George Savile: that he duly made and published his will, bearing date the 18th of August 1783, the material parts of which will are set out therein; and that, in January 1784, he died seized without revoking or altering his will: that, after the death of Sir George Savile, Richard Lumley entered into possession of the premises in the declaration mentioned, having, in all respects, complied with the provisions contained in the will: that, in the month of September 1807, the Earl of Scarborough died without issue male, and the title of the earl descended and came to Richard Lumley Savile; and, thereupon, the defendant below entered into possession of the premises in question, and in all respects complied with the provisions of the will; and that he still continued in possession. The special verdict further sets forth indentures of lease and release, dated the 27th and 28th of November 1809, by which the defendant and his eldest son, then being of the age of twenty-one years, convey to George Tennant, for the joint lives of himself and the defendant, for the purpose of making him tenant of the freehold, in order that a common recovery might be suffered; and that such common recovery was accordingly suffered in the Michaelmas term next following, in which the defendant's eldest son, being tenant in tail, was vouched as first vouchee; the uses of which recovery were, by a subsequent deed, declared to be, to the defendant for life, with remainders over. And the special verdict then proceeds to set forth indentures of lease and release of the

1st and 2nd of July 1817, by which Frederick Lumley the elder, the father of the lessor of the plaintiff, and Frederick Lumley the younger, the lessor of the plaintiff, for the considerations therein mentioned, convey the premises therein described to certain trustees upon the same trusts as the uses which had been declared with respect to the common recovery, and enter into the several covenants therein contained. And, lastly, the special verdict finds the death of Frederick Lumley the elder, in September 1831, leaving the lessor of plaintiff his only son; and that, on the 17th of June 1832, Richard Lumley, Earl of Scarborough, died, whereby the title of earl descended and came to the defendant; since whose death possession of the premises has been demanded from the defendant by the lessor of the plaintiff, and refused.

Upon the facts stated in this special verdict, it has been contended, on the part of the plaintiff in error, the defendant below, that the judgment which has been given by the Court of King's Bench is erroneous, upon three distinct grounds.

First, that, by the deeds of lease and release of the 1st and 2nd of July 1817, all the right and interest to the premises in question, which the lessor of the plaintiff could claim under the will of Sir George Savile, was conveyed by him and his father to the trustees named in the deed of release; or, if the interest of the lessor of the plaintiff was of such a nature as to be incapable of passing under a conveyance by way of lease and release, then that the covenants of the lessor of the plaintiff operated by way of estoppel against the plaintiff so as to prevent his maintaining the present action.

Secondly, that, upon the proper construction of the clause in the will of Sir George Savile, by which he provided for the cesser and determination of the estates created by his will, upon the title of Earl of Scarborough descending or coming to any of the devisees mentioned in his will, and for the hereditaments going immediately over to the person or persons next in remainder, such clause of cesser and shifting of the estate applies only to the first devolution of the earldom; and that, having taken effect once upon the descent

of the earldom to Richard, it can have no effect or operation a second time on the descent of the earldom from Richard to the defendant below.

And, thirdly, that, upon the proper construction of the whole will of Sir George Savile, the defendant below took such an estate as enabled him, under the events which have happened, to suffer the common recovery which has been suffered; and that such common recovery has barred and destroyed any estate which the lessor of the plaintiff would otherwise have taken under the said will.

It becomes unnecessary, in consequence of the opinion at which we have arrived on the last point, to state the view we entertain upon that which has been raised as to the effect and operation of the lease and release of the 1st and 2nd of July 1817: nor, indeed, for the same reason, will it be necessary to enter upon a separate and distinct consideration of the second question that has been raised; although, indeed, that question must incidentally come under discussion in considering the third and main ground of objection to the judgment brought under review. It will be sufficient to observe, as to these two questions, that, as at present advised, we see no reason to differ from the opinion which has been expressed upon them by the Court of King's Bench. But if, upon the whole of the will, such estates were taken by the plaintiff in error and his eldest son respectively, as enabled them to suffer a common recovery, and if the effect of such common recovery is to bar the estate and interest under which the lessor of the plaintiff claims, the plaintiff's right of action is of course gone; and the judgment which has been given for him must then be reversed.

It appears to us, therefore, that the whole of the controversy between the parties may be almost reduced to this single inquiry,—what is the legal construction, and what the legal consequences, of the proviso of cesser and determination before adverted to? If no such clause had been inserted in the will, it is obvious no question whatever could have arisen between the parties. Upon that supposition, the defendant below being tenant of the freehold at the time the common recovery was suffered, was able to make a good tenant to the

præcipe; and, John the son being tenant in tail next in remainder, and having been vouched by the tenant of the freehold, such recovery would, upon the ordinary principles, bar the estate tail of John the son, and all other estates in remainder expectant thereon; amongst which, in the case above supposed, was the estate tail of Frederick, the lessor of the plaintiff. For, as to the interposition of the estate to trustees to preserve contingent remainders, it has been properly admitted, in the course of the argument, that such interposition would have had no effect as to the operation of the recovery in barring the subsequent estates tail in remainder. It is, therefore, the insertion of the proviso, and that alone, which creates the difficulty in this case; and it is upon the meaning and construction of that clause, and the legal consequences attending it, that we think the decision of the present case must depend.

Now, the argument on the part of the lessor of the plaintiff has been, that, upon the face of the will, the intention of the testator is manifest, that the earldom, and the estates devised by the will, should *never* be united in the same person; and that the proviso is framed to carry such intention into effect, by declaring that, as often as it shall happen that the title of Earl of Scarborough shall descend or come to any of the persons named as remainder-men, or to any of their sons, (within the period limited by the will), the estates which they respectively took shall cease, determine, and become void; and that new estates for life and in tail shall thereupon immediately be created, and vest in the person next in remainder to him to whom the earldom descended or came: and it is contended, that the proviso attached, in the event which has taken place, to the life-estate of John the father, and, by reason thereof, the conditional limitation created by the proviso is not barred or destroyed by the common recovery. And, again, that the new estate tail so created by the proviso in Frederick the son, was not expectant upon the estate tail of John the son, but altogether independent of it, and substituted instead of the old estate created by the will; and, consequently, not barred or in any way affected by the common recovery. The defendant below, on the other

hand, contends, that there is no intention apparent upon the will that the shifting clause should operate more than once, and that, having once had its operation in the case of the devolution of the title to John, it cannot have a second : that the proviso is one of cesser and determination only, and acceleration of the estates in remainder, and not a proviso which creates any new estates ; and, consequently, that the old remainder in tail in the lessor of the plaintiff, which was created by the will, is barred.

Upon this state of the argument between the parties in error, one point, on which they are directly at variance, is, whether the proviso in question operates only as a simple cesser and avoidance of the old estate and acceleration of the remainder, or as the creation and substitution of new estates in remainder by way of shifting use ; and, as the determination of this question appears to us to go almost the whole length of deciding whether the common recovery did or did not bar the estate tail, under which the lessor of the plaintiff claimed at the trial, we think it entitled to the first consideration : and it is the more entitled to such consideration from the circumstance, that the substitution of a new estate in the place of the old remainder in tail, in the lessor of the plaintiff, appears to be the ground on which the Court below have relied, in giving their judgment in favour of the lessor of the plaintiff.

Now, before we come to the construction of this proviso, we cannot but observe, in the first place, that, whilst the intention of the testator ought to be our only guide to the interpretation of his will, it must be his intention to be collected from the words employed by himself in his will. No surmise or conjecture of any object which the testator may be supposed to have had in view, can be allowed to have any weight in the construction of his will, unless such object can be collected from the plain language of the will itself. With respect to the intention of the testator, to be collected from the will in question, it is observable that the will contains no devise by which the title and the estate are prevented altogether from becoming united in the same person, even within those periods of time during which he had the power by

law of preventing such union : for many cases might be put, and some have been put in the course of argument, depending upon events of no improbable occurrence, in which, notwithstanding the provisions in the will, such union must necessarily take place. To mention one instance only, there is nothing in the will to prevent the union of the title and estate in a grandson of any of the tenants for life, where the estate has descended to the grandson before the devolution of the title upon him. The question, therefore, does not turn upon any such *general* intention, for none such is expressed ; but the question is, whether the testator has, by the proviso in his will, declared an intention, and with sufficient clearness, to reach the case which has actually happened ; and whether he has employed such machinery in his will as is capable of carrying such declared intention into effect.

In the second place, we hold it to be a necessary rule in the investigation of the intention of a testator, not only that we ought to look to the words of the will alone, to determine the operation and effect of the devise, but that we ought to disregard altogether the legal consequences which may follow from the nature and qualities of the estate, when such estate is once collected from the words of the will itself. In determining, therefore, whether the intention of the testator was in any particular case to give the devisee an estate tail or for life only, we cannot think it a sound or legitimate mode of reasoning, to import into the consideration of that question, that, if the estate is held to be an estate tail, the devisee will have the power of defeating the intention of the testator altogether, by suffering a common recovery. For the power of a tenant in tail to bar the estate tail, and all remainders dependent thereon, by a common recovery, is a power which the law annexes to the nature of the estate of tenant in tail : and we have no right to assume that the testator was himself ignorant of such legal consequence and effect, or that he had not taken it into his calculation when he gave such estate tail to the devisee.

The only safe course is to look carefully for the intention of the testator, as it is to be derived from the words employed by

him within the whole of the will, regardless alike of any general surmise or conjecture from without the will, or of any legal consequence annexed to the estate itself, when such estate is discovered within the will.

Now, looking at the proviso, upon the construction and legal operation of which it is agreed that the question before us entirely turns, we think, in the first place, it is open to some little doubt whether the proviso declares the intention of the testator with sufficient clearness, that the shifting of the estates created by the will, shall take place more than once on the devolution of the title to a tenant in possession of the estate under the will; or, in other words, whether the proviso is not so worded as to have performed the full effect for which it is framed, and of which it is capable, when the title descended to Richard Lumley, the first tenant for life, and whether, therefore, it is not incapable of a second operation upon the devolution of the title to John Lumley, the defendant below, the next tenant for life in remainder: and, unless the proviso operates on the descent of the title to John Lumley, it is needless to observe that the remainder, under which the lessor of the plaintiff claims, must be barred by the common recovery which has been suffered.

But, waiving the further consideration of this question, as being one that may be subject to some doubt and uncertainty, and admitting, for the sake of argument, that the clause did operate upon every devolution of title within the limits prescribed in the will, we proceed to state the construction of the proviso, in which we have all, upon the best consideration we can give the question, agreed. For we think this proviso is so framed, as to be a proviso of cesser and determination only of the old estates created by the will to which it applies, so as to accelerate and let in the enjoyment of the remainders over, and not a proviso which creates any new estates in remainder; and, consequently, that, by the common recovery suffered by John the father, the tenant for life, and John the son, the tenant in tail in remainder, the old remainder for life in Frederick the father, and the old remainder in tail in Frederick the son, which were expectant

on the estate tail in John the son, were effectually barred; and that there are no new estates created and substituted in their stead under which Frederick can claim.

First, the proviso is, in its ordinary construction, one of cesser and determination only, thereby accelerating the old estates.

The words contained in the first branch of the proviso itself, point to nothing else:—"The estate which he or they shall then be entitled unto," "shall then cease, determine, and become void." These are the operative words of the proviso,—words of express cesser and determination, in which there is the total absence of the expression of any intention to create a new estate.

The words contained in the second branch of the proviso are equally restrained. It continues thus:—"and the same manors and hereditaments shall immediately thereupon go to the person and persons who, under the limitations aforesaid, shall then be next in remainder" &c., "in the same manner as such person or persons as in remainder as aforesaid would take the same by virtue of this my will, in case he or they to whom the title of the said Earl of Scarborough shall come and fall in possession as aforesaid, was or were actually dead without issue." So that the words in this branch also are strictly confined to the estate of the person to whom the title descends. His estate is to cease, as if he were dead without issue; and all other estates to remain as they stand in the will: so that, if the title descends upon a tenant for life, the estate of such tenant for life, and the estates tail in remainder in all his sons, successively, cease by necessary implication; if it descends upon one of the sons, the tenants in tail, the estate tail in such son of the tenant for life fails only, and the manors go over to his next brother in tail. This latter branch of the proviso, therefore, contains no words indicative of any intention that new estates should be created. The manors, &c., are to go over "to the person and persons who, under the limitations aforesaid, shall then be next in remainder." This is only applicable to the estates in remainder already created by the limitations of the will, not to new estates for the first time created by the proviso. The manors, &c., are to go over "in the same manner as such person or persons as

in remainder as aforesaid would take the same by virtue of this my will, in case he or they to whom the title shall come," "was or were actually dead without issue." They are to take in the same manner as if the prior tenant for life, or remainder-man, were "actually dead without issue;" that is, as if the prior estates had determined by the natural course of their determination, viz. the failure of issue: which provision points to the mere blotting out of the prior estates, and to the accelerating the old estates in remainder already created by the will, and not to the creating of new estates. From the beginning to the end of the proviso, there are no words of new devise over to the remainder-man upon the avoidance of the intermediate estates; but, on the contrary, a distinct reference to the vesting of the same estates in remainder which are already devised by the will.

Again, if the proviso should be construed to create *new estates*, this difficulty arises,—that there are no words in the proviso, which, upon a natural construction, expressly create any new estates beyond those which are to be taken by the person or persons *immediately next* in remainder; so that all new estates in remainder, subsequent to the first, after the devolution of the title takes place, if any such there are, must depend upon implication only. Whereas, upon the construction that the clause is one of cesser and determination, and no more, all the remainders, as they are now declared upon the face of the will, are simply accelerated and let into possession, in succession, one after the other, in the order in which they are so declared in the will.

It has, indeed, been observed in argument, that the condition which follows the proviso, that the persons taking under the clause in question should perform and comply "with the condition or proviso hereinbefore contained for taking and using the surname, and quartering the arms of Savile as aforesaid," shew the intention that the estates in remainder, after the proviso was called into action, should be new estates; otherwise, it is said, what occasion was there to repeat the condition? But these words were probably inserted *pro majori cautela* only; for, in either con-

struction of the proviso, they are equally unnecessary; because the arms and name clause does, by its very terms, apply to every person who, *by virtue of the will*, should be entitled; which words there clearly mean, by virtue of any clause in the will: and those who take by the proviso, even supposing they take new estates, take in that way. This argument, therefore, as it appears to us, proves nothing.

But it is, on the other hand, not an unimportant argument, and appears a strong confirmation of the construction contended for by the plaintiff in error, that, if the proviso had the effect of creating new estates, in the event of every successive devolution of the estate, within the limits assigned, there are no words to be found in the proviso which expressly apply to the cesser or determination of these new estates created by the first devolution, upon a second or any subsequent devolution of title. The proviso refers in express terms to the estates which have been *already* created by the will. It declares the cesser and determination of the estates "which he or they shall *then* be entitled unto, in all and every the manors and hereditaments hereinbefore devised, under or by virtue of this my will." No reference whatever is made to the cesser or determination of a new set of estates, not expressly created by, or taken under, or by virtue of, the will; but which new estates are supposed to be taken under the conditional limitation itself, which conditional limitation can only take effect at a period subsequent to the making of the will, and when the event stated in such proviso takes place.

The lessor of the plaintiff reads the clause as if it had been framed so as, upon the descent of the title to the first tenant for life or tenant in tail, to determine and avoid their respective estates, and to create a new set of estates in remainder, in conformity with the succession marked out in the will. Again, upon a second descent of the title to the next tenant for life or his son, to determine and avoid the new estates which were created by the former descent; and, again, to create a new set of estates in remainder in the same order as before; and so, *toties quoties*. But, if such be the proper construction of the

proviso, how is the first set of new estates to be determined? Not by any words inserted in the proviso itself, for there are none; but by importing into the new limitations a similar proviso, and so determining that new set of estates by the effect of such implied proviso; and so, on every subsequent creation of new limitations, a new proviso must be implied. And, further, if this difficulty be overcome, the effect of this construction would be, to give to each person in remainder, not two interests only, viz. the remainder in tail originally created by the limitations of the will, and one possibility created by the proviso, but the remainder in tail and an indefinite number of possibilities, according to the number of devolutions of title which might take place between the death of the testator and the expiration of twenty-one years after the death of the survivor of the sons of the first-named Earl of Scarborough. This construction appears to us so little warranted by any words of the will, and to lead necessarily to so much complication, that we have no difficulty in saying, that we ought not to adopt it unless absolutely compelled to do so; but that, on the contrary, we are bound to adhere to the more simple and natural construction of the words contained in the clause. And it is not unimportant to observe, that no case has been cited at the bar, nor any authority of any text writer brought forward, in support of the position, that a proviso expressed in the same or similar terms with the present has the effect of creating a succession of new estates.

But it was argued at the bar, that, even supposing the proviso not to have the operation of creating new estates, but that, on the devolution of the title, the old estates were simply accelerated,—still the estate which Frederick actually took, by way of conditional limitation or shifting use, is not a remainder expectant on the estate tail of John the son: for it is contended, that it was not limited to commence where the preceding estates were, by the nature and extent of their original limitation, to expire or determine; but was limited so as to be altogether independent of the measure or extent originally given to those preceding estates; and so as to take effect in pos-

session on an event which might happen before the regular determination to which those estates were liable from the nature of their original limitations; and so as, not to *wait for* the expiration of those estates which is the known essential description of a remainder, but to rescind them, and come in by anticipation. It is argued, therefore, that the estate for life claimed by Frederick the father, and the remainder in tail claimed by Frederick the son, were estates springing up and vesting in enjoyment at the very moment the title devolved on John Lumley the defendant, during his estate for life, and anterior to the commencement of the estate tail of John Lumley the son. The recovery, therefore, cannot, as it is contended, bar *this* estate tail, so springing up, under the operation of the proviso, pending the estate of John the tenant for life.

But, supposing this argument to be correct, and that these limitations cannot be shaped or treated as remainders on the principle of *Scolastica's case*, still it appears to us that the whole force and virtue of this argument depends upon the assumption, that the estate tail so springing up is not the same estate and interest as was originally limited in remainder, after the estate tail of John, but another and different interest. Whereas, for the reasons before given, we think this estate, so coming into possession by the operation of the proviso, is no other than the same identical interest which Frederick the son took under the limitations of the will, but vesting in enjoyment at a different time, and in a different mode, under the event which has happened: such estate, when it vests in possession under the conditional limitation contained in the proviso, being by the express words of the proviso directed to go to the person or persons who under the limitations of the will shall then be next in remainder, “in the same manner as such person or persons so in remainder as aforesaid would take the same, by virtue” of the will, in case the last taker had been actually dead without issue. Even, therefore, admitting the estate to spring from the estate for life in John on the devolution of the title to him, it is no more than the old estate which has been already barred by the common recovery.

As the ground upon which we have come to our conclusion rests upon the construction of the proviso, on which construction we feel ourselves compelled to differ in opinion from the Court below, it becomes unnecessary to discuss the other points which came under the consideration of that Court, or the cases cited by them in their judgment. One of those cases, that of *Roper v. Hallifax*, upon which considerable reliance was placed, may however be admitted to have been rightly decided, without weakening the ground upon which our judgment rests; for it may be well held that the recovery suffered, in that case, by the tenant for life and the remainder-man in tail, should not extinguish a power which was attached to the estate of the trustees for preserving contingent remainders during the estate of the tenant for life, nor bar the *new estates* created by the exercise of that power; and yet, at the same time, the recovery suffered in the present case, by the tenant for life in possession and the next remainder-man in tail, may be sufficient to bar the *old estates* expectant on such estate tail, which continued unaltered by the proviso, except as to the time of enjoyment.

Upon the whole, the contention on the part of the lessor of the plaintiff is briefly this: that the estate tail of Frederick, arising under the proviso, upon the descent of the title to John the father, is precedent in point of limitation to the estate tail in John the son, the vouchee in the recovery, and consequently is not barred by such recovery.

But the defendant below denies that the proviso has any other force than that of blotting out and avoiding the estate of the preceding takers under the will, as if they had been dead without issue, upon the event of the title descending to any one; thereby letting into possession the other remainders and interests; but in all other respects leaving them precisely as they were before. And that, as a common recovery was suffered by the father, then tenant for life, and the son, the tenant in tail in remainder, who by law had at the time the power to suffer it, such common recovery had its ordinary effect in barring and extinguishing all remainders and other interests of every nature subsequent to such estate tail; of which description, at

that time, was the estate tail in Frederick the son: and that, the common recovery being good at the time it was suffered, no defeating of the estate for life or the estate tail by a condition subsequent, the event not happening until after the recovery has been actually suffered, can have the effect of avoiding any of its legal consequences, which have then actually taken place, one of which is, the extinguishing of the old remainders.

And, as we have arrived at the conclusion, that the old remainder in tail, vested in Frederick under the limitations of the will, was destroyed, and that he took no new estate under the proviso, we think the lessor of the plaintiff below had no title upon which he could maintain his ejectment; and that the judgment below must be reversed.

Judgment reversed.

1836. }
Nov. 1, 26. } CAMPBELL V. MAUND.

Churchwardens—Election.

The right to demand a poll is by law incidental to the election of a parish officer by shew of hands, where there is no special custom to exclude it.

A demand of a poll, on the election of a parish officer by shew of hands, is not void, because not made until after the chairman has declared the decision by the shew of hands.

A poll was demanded to be taken in a particular manner, and was granted and taken; it was objected that the poll was not demandable at all, but no objection was made to its being taken in the particular manner:—Held, that the irregularity in the point of form was waived.

The 58 Geo. 3. c. 69. is prevented by the 8th section from affecting the powers of any vestry holden by virtue of any ancient or special usage or custom. It was found by a jury, that in the parish of Paddington the churchwardens are to be chosen by shew of hands, but that no poll had ever been demanded:—Held, that this was no special usage or custom within the meaning of that section.

The 5 Geo. 4. c. cxvi. s. 10, a local act for regulating the parish of Paddington, provided, that the election of churchwardens should be conducted in such a manner as had been usual in the same parish. This passed

six years after the 58 Geo. 3, which had taken effect in that parish, and therefore it was held, that the mode of election of churchwardens therein is now by shew of hands, if no poll be demanded; and if it be, then by poll to be taken by plurality of votes, according to the latter statute.

Held, also, that that provision in the local act applies to the usual and customary mode de facto, independently of its conformity with the general law.

[For the report of the above case, see 6 Law J. Rep. (N.S.) M.C. p. 115.]

1837. }
May 10. } BIRD v. HIGGINSON.

Demise by Deed, when to be pleaded.

Declaration stated an agreement made on the 8th of August, by which the plaintiff agreed to let, and the defendant agreed to take, a messuage, with exclusive licence to sport over a manor, at a certain rent: there was then an averment of mutual promises, and that the plaintiff let unto the defendant the said messuage, &c., so agreed, &c. On demurrer, held, that as the demise was partly of an incorporeal hereditament, the declaration was bad, for not alleging it to have been by deed.

Error from the Court of King's Bench. The pleadings are reported in 2 *Ad. & El.* 696, and 4 *Law J. Rep.* (N.S.) *K.B.* 124.

Kelly, for the plaintiff in error, repeated the arguments urged in the Court below, and further contended, that even assuming the demise to have been of an incorporeal hereditament, so as to require a deed, yet, *non constat* but that there was a letting by deed. The declaration states, first, an agreement by parol, on the 8th of August, to let the messuage, &c., with licence to shoot and sport over the manor; and secondly, a subsequent fact that the plaintiff let unto the defendant the said messuage or tenement, "right, liberties and premises so agreed," &c., from the day, &c. The contract therefore was one thing; the letting afterwards was another, and may have been by deed, for, as observed by Lord Coke, 8 *Cp.* 81, *b*, "all necessary circumstances implied by law need not be expressed, as in the plea of a feoffment of a manor, livery and attornment are implied,"

&c. The contract alleged must be taken to have the attributes requisite to give it validity; and, therefore, if in this case a deed is requisite, it must be inferred.

The Attorney General [as to this point.]—On this declaration no letting need be proved. It is an action on the contract of the 8th of August, and not on anything subsequent. It is admitted, that an action would not lie upon the subsequent agreement, unless under seal, and if it was under seal, then in pursuance of the agreement, being for the same rent and premises, and the party entering under it, the previous parol agreement would be merged in it. If, before the new rules, the parties had gone to trial on this agreement, under the general issue, the plaintiff would not have been called upon to prove any letting at all; it would have been enough for him to shew that he signed the agreement set forth. It is true, that where a letting is alleged, the party alleging it is let in to prove that it was by deed, and the omission in pleading is cured by verdict; but it is bad upon demurrer. Thus it is laid down, that "where a grant of a reversion or any other hereditament, which lies in grant, and can only be conveyed by deed, be pleaded, but it is not alleged to have been by deed, or if a feoffment be pleaded without livery, so that the grantee or feoffee does not shew in himself a perfect title, yet if the grant or feoffment be put in issue, and found by the jury, the verdict cures such imperfection by the common law. But such defect is a fatal objection after a judgment by default, for the objection holds exactly the same as if it had been on demurrer" (1).

Per Curiam.—This is a conclusive authority that the demise should have been alleged to have been by deed. Upon the other points we agree with the Court below, and therefore—

Judgment affirmed.

DOE *dem.* TATHAM v. WRIGHT.

ROUX v. SALVADOR.

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